S. HRG. 106–725

OVERSIGHT OF THE CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

THE RESPONSIBILITIES AND ACTIVITIES OF THE CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE

JULY 27, 1999

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OVERSIGHT OF THE CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE

TUESDAY, JULY 27, 1999

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL JUSTICE OVERSIGHT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:02 p.m., in room SD–628, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the subcommittee) presiding.

Also present: Senators Sessions, Schumer, Leahy, and Feingold [ex officio.]

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

Senator THURMOND. The subcommittee will come to order.

I am pleased to hold this oversight hearing on the Criminal Division of the Department of Justice. The Criminal Division is charged with some of the most critical functions of the Justice Department. It represents the front lines in the Federal Government's fight against crime. It must confront a host of serious crimes, including the war on drugs, money laundering, terrorism, child pornography, and gun crimes. It enforces over 900 Federal laws and oversees the activities of the 94 U.S. attorneys throughout the country.

Mr. Robinson assumed the position of Assistant Attorney General for the Criminal Division over 1 year ago, after it had been vacant since August 1995. We are pleased that this essential Division has an able chief to lead it today.

The Congress has made every effort to support the needs of the Justice Department. The Department's budget has risen dramatically in recent years. It has almost doubled, from close to $11 billion in 1994 to almost $21 billion in 1999. We will continue to support the Department of Justice in an appropriate manner. However, there are issues of concern that we feel should be discussed.

The Judiciary Committee for some time has confronted the Department on the enforcement of the law on voluntary confessions. Section 3501 of title 18 was passed by the Congress soon after the *Miranda* v. *Arizona* decision in an attempt to determine when a voluntary confession is admissible in court. In the recent case of *United States* v. *Dickerson,* the Fourth Circuit held that the statute was constitutional, and criticized the Justice Department for refusing to permit its career prosecutors to use this law against criminals. If the *Dickerson* case is considered by the Supreme Court, the Justice Department should urge the Court to uphold this law.

Earlier this year, this subcommittee held an oversight hearing on this matter and heard from Reagan and Bush administration officials who told us that those administrations did not have a policy against the enforcement of section 3501. Unfortunately, the Justice Department chose not to appear at that hearing, so I hope we can discuss this issue today.

Another important issue is the enforcement of the death penalty on the Federal level. The American public overwhelmingly supports the death penalty. While 38 States now permit the death penalty and many routinely use it, the death penalty has not been carried out on the Federal level since 1963. In 1988, the Congress enacted a death penalty provision for murder involving drug kingpins, and in 1994 greatly expanded the number of death penalty-eligible crimes.

In response to the 1994 law, Attorney General Reno established an elaborate internal review committee to consider whether Federal prosecutors are permitted to seek the death penalty. The Protocol provides for formal input by the defense attorney to the review committee, but apparently not equal input from a representative for the victim. I hope that this review process at Main Justice does not discourage U.S. attorneys from seeking the death penalty in appropriate cases.

Regarding another issue, this subcommittee, in conjunction with Senator Sessions' Subcommittee on Youth Violence, held a hearing earlier this year on the lack of gun prosecutions during much of the Clinton administration. It is much more effective to fight violent crime by separating dangerous criminals from guns than to restrict the rights of law-abiding citizens to bear arms.

This subcommittee has also held hearings this year on issues that the Department and I agree could be quite detrimental to effective Federal law enforcement. Last week, we held a hearing on the use of Federal asset forfeiture and its critical role in taking the profits out of many crimes, including drug offenses. Although reform is needed in this area, we cannot do so in such a way that it gives criminals the upper hand.

Earlier this year, the subcommittee discussed the McDade legislation, which requires that Federal prosecutors follow all State ethics rules in all jurisdictions in which they operate. It is important that we continue to review this issue to make certain that the implementation of McDade does not interfere in areas such as complex undercover investigations or Federal grand jury practices.

As several Senators stated during Mr. Robinson's confirmation hearing early last year, it is important for Mr. Robinson to appear before the Judiciary Committee frequently to discuss the important issues facing the Criminal Division.

Mr. Robinson, we are pleased to have you with us today.

Senator Feingold, do you have a statement?

Senator FEINGOLD. Mr. Chairman, I will wait until the question time to make my statement and ask questions.

Senator THURMOND. Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I am delighted to have Mr. Robinson here. I enjoyed talking with him before he was confirmed, and recognize the importance of the office that you hold. As I noted at the time, you have not had intensive experience as a prosecutor, but 3 years as a U.S. attorney. Traditionally, the Criminal Division chief has been virtually a career prosecutor, but I don't think that is disqualifying and I did vote for you. I do believe that in a few areas you have shown some progress under your leadership, just having a brief opportunity to review some of the numbers in this year's report.

I would like to mention a few things that I think are important before we really get down to questions. I believe it is important for the Department, something that we as taxpayers ought to be concerned with, and I hope that you will focus on it.

I think I have a few charts. Let's look at the Triggerlock chart, maybe, first. We had hearings set for a Monday in my subcommittee on Project Exile and the work that is done, which is sort of like Project Triggerlock in Richmond, that your Department of Justice was doing very well, and we wanted to highlight that.

On the Saturday before that hearing, the President made it his radio address, the subject, had our witnesses there with him, and he directed them to increase prosecutions, work together to increase the prosecution of criminals with guns. Later within the month, the Attorney General appeared, and I frankly did not feel like at all she had instigated any significant change in policy.

Even with this year's numbers—there was a modest increase—you can see that the Federal prosecutions of firearms laws according to your own statistical data are down about 46 percent. That is a dramatic drop since 1992, and I think it gives us pause when we are told repeatedly we have got to pass some new Federal gun law if those laws are not being prosecuted.

The school yard law—don't take a firearm on a school yard—we made that a Federal crime, but there were less than 10 cases nationwide prosecuted under that. So I think the Department needs to look at that, as well as look at the numbers of persons who are prosecuted who attempt to purchase a firearm in violation of the law when they have a prior criminal history and are prohibited, the attempt to purchase if they are discovered by the instant check process at the gun dealer's store. None of those apparently are being prosecuted.

And frankly I am not of the opinion that ATF can claim they are totally capable of investigating that. I think it takes a partnership between the Criminal Division and the ATF to identify the cases that ought to be prosecuted and set about to prosecute them.

I also was looking at the assistant U.S. attorneys. That is your bread and butter, your front-line troops, the people who really do the job. Those numbers have gone up in full-time equivalents since 1993. One year is a drop, but you are now up to 4,600, almost 4,700, a 12-percent increase. And I think you as a manager, the person accountable for the taxpayers to utilize those magnificent prosecutors, need to make sure we are getting good work from them.

I did notice from looking at your statistical report that since 1993, tort-related work hours per attorney have dropped significantly, from 309 hours in 1993 to 218 hours in 1998. That is a 29-percent decrease in the number of tort-related hours worked per attorney, from 309 to 219. So I think you really have to look at that and the leadership has got to come from the top.

And I know you should respect U.S. attorneys, and I do, but within limits they have got to respond to the national leadership of the President. He appoints them and he has a right to expect that they aggressively pursue a criminal agenda.

Finally, I would mention to you, and maybe we can talk about it later, my concern about bankruptcy fraud as part of our bankruptcy bill. There is quite a bit of fraud there. Judges tell me there is blatant fraud sometimes and they have a difficult time getting those investigated. There are no more than one or two prosecutions per district nationwide per year, and I think it is something we can improve.

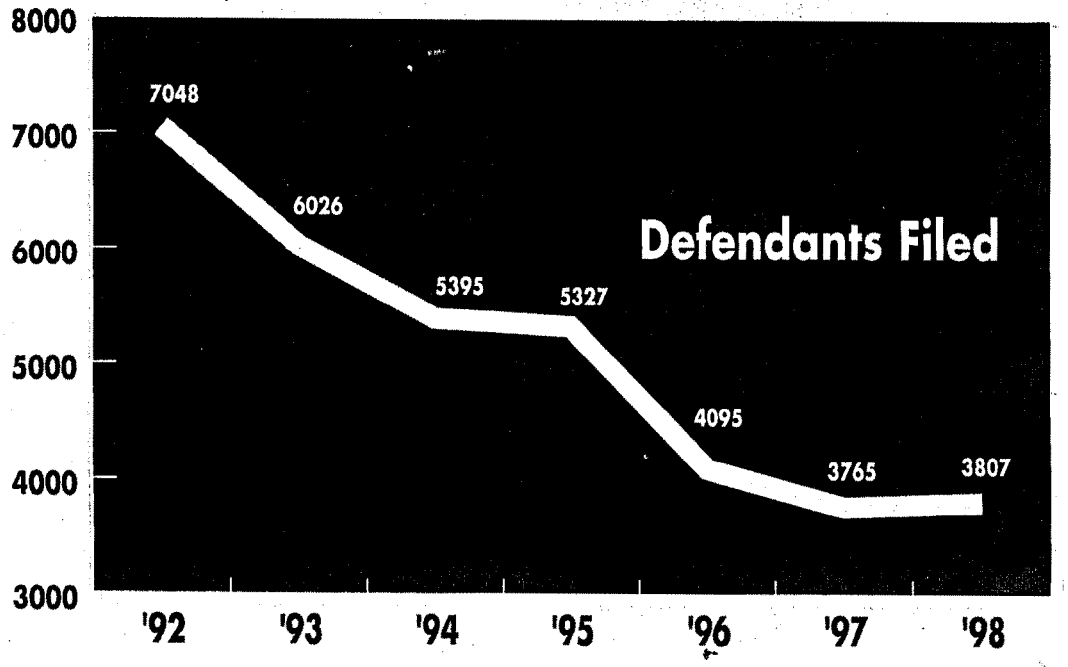
Mr. Chairman, thank you for your leadership. People care about a lot of things, but they are concerned about public safety, they are concerned about fraud and rip-off of the taxpayers. This Criminal Division is the national agency most responsible for dealing with those issues and we need to make sure it is as productive as it possibly can be.

Thank you, sir.

[The charts of Senator Sessions follow:]

Project Triggerlock Prosecutions

FY 1992-1998



Source: United States Attorneys Annual Statistical Report

Federal Firearms Prosecutions Nationwide

	1997	1998
Possession of Firearms on School Grounds [Reported Under 922 (q)]	5	8
Unlawful Transfer of Firearms to Juveniles [Reported Under 922(x)(1)]	5	6
Possession or Transfer of Semiautomatic Weapons (Assault Weapons) [Reported Under 922 (v)(1)]	4	4

Source: Executive Office of United States Attorneys

Senator THURMOND. Thank you very much.

The panel consists of Mr. James Robinson, the Assistant Attorney General for the Criminal Division. Mr. Robinson earned a bachelor's degree at Michigan State University and a law degree from Wayne State University. He has been an associate and partner in the Detroit law firm of Honigman, Miller, Schwartz and Cohn. Mr. Robinson also served as U.S. Attorney for the Eastern District of Michigan. Before assuming his current position, he was dean and professor of law at Wayne State University Law School.

Mr. Robinson, we are happy to have you with us and would be glad to hear from you at this time.

STATEMENT OF JAMES K. ROBINSON, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. ROBINSON. Mr. Chairman, thank you very much. I am delighted to be back here, Senator Sessions, with you as well, and also happy to talk with Senator Feingold at the appropriate time. If it is permissible, I would like to make a brief opening statement. I won't read my whole testimony, which will be submitted for the record.

I am pleased to appear before the subcommittee today on behalf of the Criminal Division of the U.S. Department of Justice, and I thank the Chair and the members of the subcommittee for this opportunity to describe the responsibilities and activities of the Criminal Division, including a number of initiatives we are undertaking to deal with new challenges facing Federal law enforcement.

For the past 13 months, it has been my privilege to serve as the Assistant Attorney General for the Criminal Division, a post frankly I was interested in securing ever since I was the U.S. attorney in Detroit from 1977 to 1980. Because I was a Democrat, there was a little drought in between, so my opportunity for public service in the Justice Department had to wait a while. And although I tried to get the job in 1992, it didn't come until later, but I was delighted for the opportunity to serve.

During the period of my service for the last 13 months, I have come to respect deeply the commitment, integrity and dedication of the career attorneys in the Justice Department, the outstanding assistant U.S. attorneys, as Senator Sessions has mentioned, and the career lawyers in the Justice Department, particularly in the Criminal Division. They are the backbone of the Justice Department. They are here day in and day out doing the people's work.

There are five deputy assistant attorneys general in the Criminal Division with whom I am privileged to work everyday. Among them, they have more than 125 years of combined prosecutorial experience, although, as Senator Sessions knows, I would have to asterisk that by indicating that Deputy Assistant Attorney General Jack Keeney has 48 of those 125 years. He is a real gem and has made a major contribution over a lifetime to the Justice Department.

When I arrived a little more than a year ago, a number of important positions within the Criminal Division were vacant. I made it a high priority to seek out outstanding prosecutors to fill these positions as head of the Fraud Section, the Organized Crime Section,

the Office of International Affairs, Chief of International Training, one of the five deputy assistant attorney general positions, and also the current head of the Capital Crimes Unit in the Division. These are outstanding lawyers who will serve long after I am gone from this position. I am confident that I have made good choices and that they will serve the country well during many years to come.

The mission of the Criminal Division, as alluded to briefly by the chairman, is to develop, enforce and exercise general oversight with regard to the prosecution of Federal criminal law, working, of course, with U.S. attorneys in the 94 judicial districts throughout the United States. We also work with criminal prosecutors in the other divisions of Main Justice that have criminal responsibility in Tax and Antitrust and the Civil Division as well.

We oversee the enforcement of over 900 Federal criminal statutes, establish national law enforcement policy for the Department, and advise the Attorney General on matters concerning Federal criminal law. We give priority in the Department and in the Criminal Division to crime threats that have a Federal or a uniquely national dimension, including, of course, drug trafficking, organized crime, terrorism, white-collar crime, alien smuggling, gang-related violence, and crimes occurring in Indian country, among others.

We also aggressively investigate and prosecute elected and appointed officials at all levels of the government who abuse their office and the public's trust. Many of our most effective law enforcement initiatives involve Federal, State and local enforcement working cooperatively together.

As crime and justice issues increasingly transcend national boundaries, our international presence in the Criminal Division has grown dramatically in recent years. The Division also provides training and technical assistance to foreign law enforcement agencies. We negotiate and implement international treaties for mutual legal assistance and for extradition, and engage in joint law enforcement investigations with other countries.

The Department has taken a proactive approach to developing criminal law policy. An excellent example of this is the Attorney General's Council on White–Collar Crime, of which I serve as the Executive Director. Membership in the Council includes representatives from regulatory, investigative and prosecutive agencies throughout the Federal Government. The Council attempts to identify fraudulent trends, to sponsor training and enforcement initiatives, and to develop programs aimed at the prevention of fraud.

Attorney General Reno believes that we should use our law enforcement experience and perspectives to assist in preventing fraudulent activities, in addition to our important responsibilities to respond to crimes after they occur.

The Department has also been proactive in identifying and developing a response to the growing problem of Internet fraud. On May 4, 1999, the President announced the Department's Internet Fraud Initiative which is aimed at preventing fraud, in addition to prosecuting it when we find it. The growth of the World Wide Web presents a whole new world of opportunity for international and national criminals, and it is something that we feel very strongly that the Department needs to get ahead of the curve on.

Throughout the past year, Criminal Division attorneys have been instrumental in obtaining important convictions across the Nation. Attorneys from the Terrorism and Violent Crime Section were instrumental in the indictment and transfer to United States custody in June 1998 of Mohammed Rashed on charges relating to his alleged bombing in 1982 of a Pan Am flight from Tokyo to Honolulu.

Terrorism and Violent Crime Section attorneys also played a key role in the development and indictment of the case against two Libyan operatives for the bombing of Pan Am Flight 103. They will be heavily involved in assisting Scottish prosecutors during the trial of that case which is scheduled to occur in the Netherlands.

Attorneys from our Organized Crime and Racketeering Section stepped in when the local U.S. attorney's office was recused in a corruption case in Texas and gained the convictions of former members of the Houston City Council. They are also involved in tracking new and deadly Asian and Russian organized crime groups, a growing threat that we are working hard to get in front of.

Another important role fulfilled by the Criminal Division is that of national coordinator in major enforcement initiatives. The Criminal Division focuses its narcotics enforcement efforts and resources to complement the efforts of other participating agencies in regional, national and international narcotics enforcement initiatives.

In close cooperation with the U.S. attorneys, the Drug Enforcement Administration, the FBI and other Federal, State and local investigative agencies, the Criminal Division provides guidance, direction and resources at the national level for drug investigations and prosecutions.

Most of the regional and national level investigations and prosecutions coordinated and supported by the Department of Justice are conducted as part of the Organized Crime Drug Enforcement Task Force program. This past year has been the single most productive year in OCDETF's history. The number of investigations initiated in fiscal year 1998 was 1,356, more than the number which were initiated in fiscal year 1996 and fiscal year 1997 combined.

In fiscal year 1998, there were 3,502 OCDETF indictments and informations returned, compared to 2,401 in 1997, and 10,064 defendants were charged, compared to 7,619 in fiscal 1997. Already, in fiscal year 1999, 1,095 new OCDETF investigations have been initiated, and more than 2,109 indictments or informations have been returned and 5,622 defendants charged.

Because criminal groups so often cross jurisdictional and geographic boundaries, the level of coordination among Federal, State and local law enforcement evidenced by OCDETF is an important part of any effective enforcement effort. When criminals cross international borders, as seems to be so often the case these days, this international cooperation is essential.

As international crime has grown because of the expansion of such technologies as the Internet and the relative ease of international travel, we in the Criminal Division have been working hard to develop effective strategies to deal with international and transnational crime. The effort has led to unprecedented levels of coordination and cooperation with foreign law enforcement. Recently, attorneys from our Child Exploitation and Obscenity Section

participated in an international investigation and prosecution of child pornography passed over the Internet.

In keeping with the idea of no "safe haven" for criminals outlined in the administration's international crime control strategy, we are also involved in encouraging our international neighbors to pass laws criminalizing wrongful behavior so that criminals will have no safe place to hide. Attorneys from our Office of International Affairs negotiate mutual legal assistance treaties with foreign countries, and we handle extraditions and evidence requests for local prosecutors across the Nation. We also are involved in international training with foreign prosecutors and foreign law enforcement, and we increasingly assign attorneys from the Criminal Division throughout the world to assist in these international efforts.

I want again to thank the chairman and the subcommittee for the support for the Criminal Division over many years and this opportunity to provide a brief overview of our activities. I am proud of what we have been able to accomplish during the last 13 months on my watch, and confident that the Criminal Division will continue its proud history of excellence and dedicated service on behalf of the people of this great country.

The issues that have been raised by the Chair and by Senator Sessions are ones that I would have anticipated that we would discuss, and I certainly have made an effort to try to prepare myself to deal with those issues and hopefully others that you may have. To the extent that there are matters, for which I can't provide the immediate answer, I would be happy to try to get that information to you as quickly as possible.

I know we said a year ago that it would be a good thing for the Assistant Attorney General for the Criminal Division to come back, and I appreciate this opportunity. We probably could have done it sooner, but I am delighted for this chance and hopefully we can continue to have this opportunity for this important oversight activity.

If I could ask the Chair that my written remarks be accepted as part of the record?

Senator THURMOND. Without objection, so ordered.

Mr. ROBINSON. Thank you very much, and I would be happy to do the best I can to respond to the questions that you might have. Since I anticipated Senator Sessions' questions, if you would like I would be happy to talk about that issue or any others that you would like to raise with me, Mr. Chairman.

[The prepared statement of James K. Robinson follows:]

PREPARED STATEMENT OF JAMES K. ROBINSON

Mr. Chairman and Members of the Subcommittee: I am pleased to appear before you today on behalf of the Criminal Division of the United States Department of Justice. I would like to thank the Chairman and the members of the Subcommittee for this opportunity to briefly describe the responsibilities and activities of the Criminal Division, including a number of initiatives we are undertaking to deal with new challenges to federal law enforcement.

The mission of the Criminal Division is to develop, enforce, and exercise general oversight for the prosecution of federal criminal laws, in cooperation with the United States Attorneys, except those that are specifically assigned to other Divisions. The Division oversees enforcement of more than 900 federal statutes; develops and facilitates implementation of national law enforcement policy; advises the Attorney General on matters concerning the criminal law; monitors sensitive areas requiring coordination, such as Title III wiretaps, attorney subpoenas, attorney fee

forfeitures, and international law enforcement; provides leadership for cooperative federal-state-local law enforcement efforts; and coordinates law enforcement issues relating to national security.

We give priority attention to crime threats that have a Federal or uniquely national dimension, including drug trafficking, organized crime, terrorism, white collar crime, alien smuggling, gang-related violence, and crimes occurring in Indian country. We also aggressively investigate and prosecute elected and appointed officials at all levels of government who abuse their office and the public's trust. And as crime and justice issues increasingly transcend national boundaries, our international presence has grown. We provide training and technical assistance to foreign law enforcement agencies, negotiate and implement international treaties for mutual legal assistance and extradition, and engage in joint law enforcement investigations with other countries.

VIOLENT CRIME

Our strategies in seeking to reduce violent crime, especially organized crime and drug and gang-related violence, include efforts to fully implement the Violent Crime Control and Law Enforcement Act of 1994, as well as other relevant statutes. We seek to identify, penetrate and dismantle major and emerging organized criminal enterprises, including street gangs engaged in illegal activity. We also support comprehensive attacks on violent crime through the establishment of multi-agency, intergovernmental task forces.

Organized Crime

With critical assistance from our Organized Crime and Racketeering Section (OCRS), John A. Gotti, son of the former boss of the Gambino La Cosa Nostra family in New York City, was recently indicted and convicted along with a number of his associates. In the last two years, RICO and other indictments have been brought against La Cosa Nostra bosses and captains in Miami, Boston, Chicago, Detroit, Youngstown, Las Vegas, Los Angeles and New York. A number of convictions have been already obtained and other trials are pending.

Labor Racketeering

In January 1999, the Department of Justice extended its agreement with Laborers' International Union of North America (LIUNA) to conduct a program of internal reform directed at the removal of La Cosa Nostra (LCN) from within LIUNA. OCRS continues to closely monitor the program. During the three-year period since the original agreement was entered into in January 1995, LIUNA has achieved numerous reforms, including removal of over 100 persons from LIUNA for barred conduct, the adoption of an ethical practice code for union officers, and the creation of a permanent internal union disciplinary structure. Thus far, 13 members and 29 associates of the LCN have been removed from LIUNA. We achieved similar success in connection with a consent order involving the leadership of the Hotel and Restaurant Workers Union.

Russian Organized Crime (ROC)

A defendant named Ludwig Fainberg recently pleaded guilty to RICO charges including allegations that he had attempted to purchase a Soviet submarine to smuggle drugs from Colombia. Oleg Kirillov, a leader of the organized crime group based in Russia's third largest city, Nizhny–Novgorod, was convicted after trial on charges including RICO, visa fraud, narcotics offenses, extortion, and money laundering in the Southern District of Florida. The Nizhny-Novgorad organized crime group is considered by law enforcement to be a very significant ROC group.

In the Eastern District of New York several members of the Gufield/Kutsenko brigade, a group with ties to Vyachaslav Ivankov, the incarcerated leader of Organisatsiya and a close associate of Solntsevskaya leader Sergei Mikhailov, were indicted for RICO extortion, hostage taking, arson, fraud, and trafficking in women.

Asian Organized Crime

On the West Coast, prosecutions continue relating to robberies of numerous computer chip companies. The Los Angeles and San Francisco Organized Crime Strike Force Units have brought 12 indictments charging over 120 defendants with offenses arising from the robberies of over 100 computer chip companies resulting in the loss of over $40 million. Over 70 defendants have been convicted, and charges against other defendants are pending. In a related computer chip robbery indictment brought in Seattle, Washington, six of eight defendants have been convicted.

Two members of a Fukienese gang based in New York pled guilty in the Central District of California to hostage taking relating to the kidnapping of the 17 year old

son of a wealthy Taiwanese businessman. This case involved significant investigative cooperation between police in the People's Republic of China (PRC) and United States law enforcement. This cooperation went well beyond the mere sharing of information. Aspects of the scheme, including the ransom drop, were carried out in the PRC, and defendants were simultaneously arrested in the United States and the PRC. The boy was rescued. The PRC will try the defendants that were arrested in the PRC, and the prosecutors in the PRC and the United States continue to cooperate with each other.

Terrorism

Our Terrorism and Violent Crime Section (TVCS) is involved in the development, implementation, and support of nationwide programs, consistent with the Anti-Violent Crime Initiative, designed to upgrade violent crime enforcement efforts generally and to address evolving violent crime problems. These programs focus priority attention on such violent crime issues as gang and firearms violence. Additionally, Section attorneys participate directly in a limited number of important prosecutions where their expertise can be of particular assistance. For example, TVCS attorneys participated in the development and trial of a major motorcycle case in Tampa and a major street gang case in Los Angeles.

TVCS is an integral part of the government's extensive efforts relating to both international and domestic terrorism, focusing on prevention, crisis response, case development, and prosecution. TVCS serves as the Department's coordinator of crisis response efforts, including managing and handling training for Attorney Critical Incident Response Group prosecutors and a designated Crisis Management Coordinator for each U.S. Attorney's Office. Within hours of the tragic bombing of the Murrah Federal Building in Oklahoma City in 1995, two TVCS attorneys proceeded to the scene to assist in the crisis response and case development efforts, and subsequently in the prosecution of the case. Additionally, TVCS is deeply involved in preparations to address the threat posed by chemical, nuclear, and biological terrorism.

Terrorist attacks on U.S. interests overseas must, in most instances, be prosecuted in the District of Columbia. TVCS attorneys, together with the U.S. Attorney's Office in D.C., have direct responsibility for the development and prosecution of such cases. In fulfilling this role, TVCS attorneys were instrumental in the indictment and transfer to U.S. custody in June 1998 of Mohammed Rashed on charges relating to his alleged bombing in 1982 of a Pan Am flight from Tokyo to Honolulu. Similarly, TVCS attorneys were involved in the 1997 prosecution and conviction of Tsutomu Shirosaki for the 1986 rocket attack on the U.S. Embassy in Jakarta, Indonesia. TVCS attorneys also played a key role in the development and indictment of the case against two Libyan operatives for the bombing of Pan Am Flight 103, and will be heavily involved in assisting Scottish prosecutors during the trial of the case in the Netherlands.

In the domestic terrorism area, a TVCS attorney and a Fraud Section attorney have been directly involved in the prosecution of the notorious Montana Freemen defendants, who engaged in a series of violent and fraudulent acts culminating in a protracted standoff with the FBI. Another TVCS attorney co-tried a RICO case against two white supremacists in Arkansas, which recently resulted in the conviction of both defendants and the imposition of the death penalty against one.

NAZI WAR CRIMES

The Office of Special Investigations, which handles all cases involving suspected participants in Nazi-sponsored acts of persecution committed during the period 1933–45, was undefeated in litigation during the past 12 months, winning court decisions in twelve of these uniquely challenging cases. OSI won 4 denaturalization cases in federal district courts, 4 deportation cases in U.S. immigration courts, 2 appellate cases before the Board of Immigration Appeals, and major subpoena enforcement cases in federal district courts in New York and Florida against two individuals who refused to testify about their wartime activities. The unit also prevailed in an important declaratory judgment action in Pennsylvania. During the past year, OSI succeeded in removing 4 suspected Nazi criminals from the United States.

During the past year, OSI also commenced 4 new prosecutions (one denaturalization case, which had been set aside by a Court of Appeals (Demjanjuk) and three deportation cases). The unit also conducted trials in two denaturalization cases, one of which resulted in judgment for the government and the other of which has not yet been decided. Following the enactment in October of the Nazi War Crimes Disclosure Act, OSI's Director was appointed to represent the Department's inter-agency working group established to coordinate Executive Branch compliance with the Act's requirement that the Government locate, declassify and make public

substantially all records in government possession relating to suspected Nazi criminals and to assets misappropriated from Holocaust victims. OSI has already provided major logistical, historical and financial support to this recently created Working Group.

NARCOTICS ENFORCEMENT

Although most narcotics enforcement efforts in the United States occur at the state and local level, the overwhelming majority of illicit drugs consumed in the United States originate overseas. The vast majority of illicit drugs entering the United States enter across our 2,000 mile southern land border and the adjoining coastal areas. In support of the goals and objectives of the President's National Drug Control Strategy and the Department of Justice Drug Control Strategic Plan, the Criminal Division focuses its narcotics enforcement efforts and resources to complement the efforts of other participating federal departments and agencies, emphasizing regional, national, and international narcotics enforcement initiatives.

Under the leadership of the Attorney General—and in close coordination with the U.S. Attorneys, DEA, FBI and other federal, state, and local investigative agencies—the Criminal Division provides guidance, direction, and resources at the national level for drug investigations and prosecutions. The Attorney General's Southern Frontiers Committee and its associated initiatives including the Southwest Border Initiative and the Caribbean Initiative exemplify the Division's role in assisting in the coordination and direction of our policies in the fight against drug trafficking and abuse. On an operational level, in close cooperation with the U.S. Attorneys' Offices, the Special Operations Division, and other investigative agencies, the Division coordinates the litigation and enforcement activities of the Southwest Border Initiative and oversees the Organized Crime Drug Enforcement Task Force (OCDETF) program.

Southwest Border Initiative

The Southwest Border Initiative (SWBI) was initiated by the Criminal Division, the border U.S. Attorneys, DEA, and FBI in 1994–1995. The original purpose of the SWBI was to develop a regional strategy to disrupt and dismantle the most significant factions of the Mexican Federation that were importing cocaine, methamphetamine and other illicit drugs into the U.S. and that were involved in the corruption of public officials at U.S. border crossings in the Southwest. Shortly after its inception, other federal law enforcement agencies, such as the U.S. Customs Service and the INS/Border Patrol, joined in the implementation of SWBI. The initiative expanded in scope to include an anti-corruption task force effort and to re-focus attention on the strategic use of asset forfeiture as a law enforcement tool against the trafficking organizations. The national investigations and prosecutions undertaken as part of the SWBI are coordinated and supported by the Special Operations Division and the Criminal Division.

As a result of the successes achieved under the rubric of SWBI in the past year or so, we have identified and targeted the emerging trafficking threats who use our Southwest border as their gateway into the U.S. Participating investigators and prosecutors continue to identify and prioritize Colombian and Mexican drug trafficking targets subjects and their United States-based criminal counterparts for investigation and share rather than compete for resources and information. In addition to criminal organizations trafficking in illegal drugs, included among the new targets are major international criminal organizations specializing in money laundering and trafficking in precursor and essential chemicals.

Special Operations Division

The Special Operations Division (SOD) is a joint national coordinating and support entity comprised of agents, analysts, and prosecutors from DEA, the FBI, the United States Customs Service, and the Criminal Division. SOD coordinates and supports regional and national-level criminal investigations and prosecutions targeting the major criminal drug trafficking organizations threatening the United States. Where appropriate, state and local investigative and prosecutive authorities are fully integrated into SOD-coordinated drug enforcement operations. The drug investigative databases of all of the participating agencies are fully available within the SOD. The Criminal Division's Narcotic and Dangerous Drug Section coordinates SOD investigations with Assistant U.S. Attorneys across the country to ensure that each district involved in a nationwide investigation is informed as to the actions taking place in the other districts and the interrelationship of each district's targets in the overall criminal conspiracy. The Criminal Division ensures agreement on a consensus plan of attack, so that large, nationwide trafficking groups are taken down in a single, well-timed enforcement action. SOD will soon expand to include

a Financial Group to focus on the financial activities of the criminal trafficking organizations and their ill-gotten assets.

The Organized Crime Drug Enforcement Task Force Program

Most of the regional and national level investigations and prosecutions coordinated and supported by the SOD are conducted as part of the OCDETF program. In describing the OCDETF program, I must first highlight the dramatic increase in the OCDETF program participation over the past year, the single most productive year in OCDETF's history. The number of investigations initiated in fiscal year 1998 was 1,356, more than the number in the past two years combined. The 1998 investigations targeted those criminal organizations responsible for the greatest volumes of drugs and the greatest incidence of violence in the United States. Also in fiscal year 1998, there were 3,502 OCDETF indictments/informations returned, compared to 2,401 in fiscal year 1997, and 10,064 defendants charged, compared to 7,619 in fiscal year 1997. The OCDETF conviction rate was 88 percent, with 58 percent of OCDETF defendants receiving sentences of more than five years. Already in fiscal year 1999, 1,095 new OCDETF investigations have been initiated, and more than 2,109 indictments/informations returned and 5,622 defendants charged. (OCDETF statistics reported as of July 20, 1999.)

This extraordinary growth in the program reflects the Department's total commitment to what the Deputy Attorney General calls its "premier" counterdrug effort. The program has seen such growth because all the participating federal law enforcement agencies and the 93 United States Attorneys recognize that the most effective weapon against sophisticated drug trafficking organizations is the OCDETF approach—multi-agency, often multi-jurisdictional, comprehensive investigations.

OCDETF cases target organizations responsible for the importation and distribution of all classes and categories of drugs and target the major drug trafficking and money laundering networks in virtually every region of the globe. OCDETF investigations initiated in fiscal year 1998 range from those coordinated by SOD to those focused on street corner gangs, which bring homicides, shootings, and fear to our cities' neighborhoods.

Money Laundering

Enforcement efforts against a criminal trafficking organization will not succeed unless the organization's financial infrastructure is identified and targeted and its proceeds and instrumentalities seized and forfeited both at home and abroad. In attacking the financial component of drug trafficking, U.S. law enforcement and regulators exploit two crucial points of vulnerability for the drug money launderers. First, the sheer volume and bulk of the illicit cash generated by the sale of illicit drugs in the United States, and the need of the traffickers to smuggle this cash out of the United States or place it into the legitimate financial system offer U.S. law enforcement a large and valuable target to pursue.

Second, although the international drug traffickers generally produce, process, and transport their illicit drugs from and through locations with only a limited U.S. law enforcement presence, once the illicit drugs are sold in the U.S., the traffickers and their domestic or international money launderers, immediately face the full effect of the U.S. law enforcement and regulatory anti-money laundering regimes. To exploit these potential trafficker vulnerabilities, the Criminal Division and United States Attorneys' Offices, working with the Department of the Treasury, the U.S. Postal Inspection Service and federal regulators, rely upon an interagency and coordinated national approach that targets specified sectors of the financial system through which drug proceeds are laundered.

ASSET FORFEITURE

Asset forfeiture is a powerful law enforcement weapon that the Justice Department uses in its battle against domestic and international drug trafficking organizations. Using asset forfeiture, the Department can attack the economic infrastructure of these criminal organizations by denying them the profits of their ill-gotten gains. To maximize the use of asset forfeiture, the Department is integrating forfeiture in its law enforcement plan to strike drug traffickers at the source of their economic power.

Our Asset Forfeiture and Money Laundering Section (AFMLS) has participated in the investigation and prosecution of professional money launderers for the Cali and Juarez cartels and numerous Mexican and Venezuelan bankers who assisted in laundering over $80 million in drug proceeds. Three Mexican banks and over forty individuals have been indicted on money laundering charges. In a related civil action, AFMLS filed a civil forfeiture complaint in the District of Columbia seeking forfeiture of approximately $12.3 million in drug proceeds and laundered money

that was deposited into numerous foreign bank accounts. Also after nearly seven years of litigation in the largest global forfeiture case, a total of $691 million has been distributed to the victims of the BCCI bank fraud.

In this era of globalization, the Department's efforts to disrupt and dismantle drug trafficking organizations mandates international cooperation at all levels. While working with other countries to develop international forfeiture cases, the Criminal Division actively promotes international forfeiture cooperation to halt the flow of illegal proceeds across borders and into financial institutions through the negotiation of bilateral forfeiture cooperation and asset sharing agreements.

Asset sharing provides both foreign countries and the United States with the resources to maximize the law enforcement potential of the asset forf6iture laws. The United States has entered into agreements with foreign countries that allow for cooperation in tracing, seizing, forfeiting, and sharing of assets. Since the beginning of our sharing program in 1989 through fiscal year 1998, more than $192.9 million has been forfeited by the United States with the assistance from 23 foreign countries. Of that amount, approximately $66.7 million has been shared with those cooperating countries.

WHITE COLLAR CRIME

White collar crime not only victimizes our citizens but has an insidious and corrupting effect on our commercial and public institutions. We are attempting to deter and combat it by identifying, investigating, and then successfully prosecuting high priority white collar criminal offenses nationwide, as well seeking forfeiture of the illegal proceeds and restitution to victims. We are aided in these efforts by better use of intelligence that helps us identify emerging areas of white collar crime and by enhanced cooperation with foreign governments in investigating and prosecuting international syndicates engaged in white collar crime.

The Attorney General's Council on White Collar Crime

The Attorney General's Council on White-Collar Crime (Council) was established by Order of the Attorney General in July 1995 as an interagency body to coordinate the focus of federal law enforcement efforts to combat white-collar crime. It is chaired by the Attorney General and the Assistant Attorney General of the Criminal Division serves as the Executive Director. The membership of the Council includes representatives from regulatory, investigative and prosecutive agencies. The Council attempts to identify fraudulent trends, sponsor training and enforcement initiatives and develop programs aimed at the prevention of fraud. We have focused at different times on telemarketing scams, pension fraud, securities fraud by brokers, counterfeit aircraft parts, the unlawful sale of CFC for air conditioners, criminal tax enforcement, counterfeit software and cyber crimes. Currently, the Council is examining the nature and extent of problems which are emerging with the growth of the internet. We have also greatly improved the training in advanced white-collar crime areas of all federal law enforcement agents and prosecutors. The Council brought together for the first time the FBI Academy, the Federal Law Enforcement Training Center and the National Advocacy Center to develop joint modular training opportunities.

The Attorney General firmly believes that a greater emphasis on fraud prevention reinforces the traditional mission of law enforcement in combating fraud, since a primary goal of enforcement activity is to *prevent* the occurrence of future crimes. The Council seeks to sponsor and publicize fraud prevention initiatives by all its member agencies.

Health Care Fraud

The prosecution of health care fraud is a major Department of Justice priority. Health care fraud siphons billions of dollars away from federal health care programs that provide essential health care to millions of elderly, low-income, and disabled Americans, as well as to the families of the members of our armed services. In addition, health care fraud and abuse affects private insurers and—most significantly—consumers of health care. Fraudulent billing practices may further disguise inadequate or improper treatment, by billing for services not rendered or rendered by unlicensed and unqualified practitioners. Other schemes, such as kickbacks, may corrupt medical providers' decision making by placing profit above patient welfare, leading to grossly inappropriate medical care, unnecessary hospitalization, surgery, tests and equipment. We are particularly concerned about schemes which affect the quality of medical care. For this reason we are turning our attention to fraud in the managed care and nursing home environments, where incentives to save money may result in the "underprovision" of medical and nursing services, to the detriment of patients' health.

The Criminal Division's Fraud Section plays a leadership role in the Department's health care fraud enforcement effort. In addition to handling a docket of significant health care fraud cases, the Fraud Section chairs a national level, multi-agency working group, develops and provides guidance and advice to other departmental components on a range of health care fraud enforcement policy and legal issues, and serves in a vital liaison function with other federal and state agencies involved in health care fraud enforcement activities.

The Department's health care fraud enforcement strategy has achieved notable success. In the past fiscal year alone, the Department obtained criminal convictions of 326 defendants in 219 criminal cases, and there were awarded $480 million as a result of criminal fines, civil settlements, and judgments. In the past *two* fiscal years, the Department has collected $1.2 *billion* in criminal and civil judgments and settlements in health care fraud cases.

Elder Fraud

Since 1993, when the Department announced the first nationwide undercover operation devoted to telemarketing fraud, Operation Disconnect, the Department has demonstrated a sustained commitment to investigating and prosecuting those who engage in telemarketing fraud, particularly when directed at vulnerable segments of the population. Federal prosecutors and agents have seen numerous telemarketing fraud cases in which older men and women have been targeted as potential victims and suffered devastating financial losses. The Department has therefore taken a variety of measures to prosecute telemarketing fraud more effectively: conviction of nearly 600 individuals in Operation Senior Sentinel (1993–1996); prosecution of nearly 800 individuals in Operation Double Barrel (1996–1998); and establishment of a National Tape Library that now houses more than 13,000 consensual tape recordings of fraudulent telemarketers' "pitches." In addition, the Department has developed a number of telemarketing fraud prevention projects, including the inclusion of telemarketing fraud Web pages on its Web site and the development of a pilot project called Elder Fraud Prevention Teams (EFPT). The EFPT project seeks to develop a coordinated approach—involving the AARP and federal, state, and local law enforcement and regulatory agencies—to outreach and prevention programs that focus on various frauds directed at the older population in various communities.

Internet Fraud

The Department of Justice has also been proactive in identifying and developing a response to the growing problem of Internet fraud. On May 4, 1999, for example, the President announced the Department's Internet Fraud Initiative, which involves a six-part approach to combating Internet fraud:

1. *Coordination of expanded enforcement efforts.* This involves use of interagency working groups—such as the Telemarketing and Internet Fraud Working Group—and other mechanisms to coordinate law enforcement activities against Internet fraud at all levels of government.

2. *Coordinated training on Internet fraud for federal, state, and local prosecutors and agents.* This involves the Department's funding of Internet/telemarketing fraud training for state and local law enforcement, and similar training for experienced federal prosecutors and agents. The Department is now preparing training for federal and local prosecutors through its National Advocacy Center in Columbia, South Carolina.

3. *Improving federal analysis and use of Internet fraud information.* This involves collaboration between the FBI and the National White-Collar Crime center to establish the Internet Fraud Complaint Center, a national center for analysis and strategic use of information on Internet fraud schemes. It also envisions closer ties and formal referral procedures for the FTC, the SEC, and other agencies for possible criminal violations by Internet fraud schemes.

4. *Developing information on the nature and scope of Internet fraud.* This involves possible development of a method for reliably estimating the volume of various forms of Internet fraud, and sharing of information on current Internet schemes with the Department's law enforcement and regulatory agency partners.

5. *Supporting and advising on federal Internet fraud prosecutions.* This involves improving mechanisms for coordination and communication among federal prosecutors, and for supporting federal prosecutions with prosecutive manpower and other resources.

6. *Public outreach and education.* This involves a two-track approach in appropriate collaboration with the private sector: seeking technological means for reducing the incidence of fraud; and keeping the public informed about current schemes and how to handle them. In particular, the latter track involves the Department's

publication of Web pages devoted to Internet fraud, exploring the developing of public-service and other information on Internet fraud, and expanding on current public-private partnerships to combat the problem.

Public Corruption

The Department remains deeply concerned about public corruption. An excellent example of the kind of complex investigation and prosecution of local corruption undertaken by the Criminal Division involved former Houston City Councilman Ben Reyes, former Houston Port Commissioner and lobbyist Elizabeth Maldonado, and other current and former Houston City Council members. Reyes and Maldonado were each convicted of conspiracy and federal program bribery after a three-month jury trial in the Southern District of Texas. Reyes, a member of the City Council for 16 years, and a very influential community leader, was the ringleader of the conspiracy and the initial target of a lengthy undercover investigation conducted by the Federal Bureau of Investigation. This matter was the subject of intense media coverage in Houston throughout the investigation and trials, and was handled by the Division's Public Integrity Section after recusal of the United States Attorney's Office.

The Criminal Division is also actively involved in international efforts to combat corruption, including work with the Organization for Economic Cooperation and Development and the Council of Europe. The Division also participated in the Vice President's Global Forum on Fighting Corruption. The forum included representatives from 90 governments and examined the causes of corruption and practices that are effective to prevent or fight it. The Division has conducted briefings and training sessions in a number of different countries.

The Independent Counsel Act

The Criminal Division's Public Integrity Section was charged with assisting the Attorney General in fulfilling her obligations under the Independent Counsel Act. This includes conducting initial inquiries and preliminary investigations pursuant to the provisions of the Act, and then making appropriate recommendations through my office to the Attorney General. Since July 1, 1998, the Division has participated in more than a dozen independent counsel matters. During the year the Division has also assisted independent counsels with their investigations. Notwithstanding the expiration of the Independent Counsel Act on June 30, 1999, the Division will continue to work with the sitting independent counsels to provide support for their ongoing investigations.

Computer Crime

As we enter the 21st Century, we must confront the increasing sophistication of criminals and new technologies that expand the potential for criminal conduct while at the same time impeding our ability to bring criminals to justice. Since being appointed head of the Criminal Division a little over one year ago, one of my priorities has been to extend the focus and resources of the Division to the new methods and types of crimes that are an increasing threat to the nation.

One of those is computer crime. The incidence and complexity of computer crime continue to increase rapidly as greater numbers of people develop proficiency in manipulating electronic data and navigating computer networks, and as worldwide access to the Internet continues to skyrocket. As a result of emerging computer technology over recent years, significant attention has been focused on the vulnerability of our critical national infrastructure to cybercrime and cyberterrorist attacks, including electronic espionage. The nation has become increasingly reliant on computer networks to support every critical aspect of American life, including telecommunications, power delivery, transportation, delivery of government services, and banking and finance. Cyberterrorists do not have to worry about obtaining a visa or smuggling explosives into the country. From any location on the planet, they can launch a devastating attack of ones and zeros against U.S. networks in a fashion that could shut down telecommunications services, power grids, major transportation hubs, or other vital public services. As the National Research Council, an arm of the Academy of Sciences, recognized several years ago: "Tomorrow's terrorist may be able to do more damage with a keyboard than with a bomb."

Consequently, the Department has undertaken a Computer Crime Initiative under the leadership of the Computer Crime and Intellectual Property Section (CCIPS). This initiative, originally adopted in 1991, directed CCIPS predecessor, the Computer Crime Unit, to ascertain the scope of the problem, coordinate law enforcement cybercrime efforts, provide training to agents and prosecutors, develop an international response, propose and comment on legislation, and formulate policies relevant to the investigation and prosecution of computer crime. Additionally, the Department has designated at least one Assistant United States Attorney in each

district to serve as a Computer and Telecommunications Coordinator, or CTC. These individuals, working closely with CCIPS, prosecute high-tech cases and serve as a technical resource for their entire office. We have devoted such resources to high-tech crime because we recognize the threat of cybercrime and cyberterrorism, and we know that no country has more to lose from criminals attacking computer networks, or using such networks to facilitate traditional offenses.

As I noted, electronic criminals can cross borders with impunity, whereas law enforcement must respect national boundaries. For this reason, it is particularly important that law enforcement address such cases as quickly and efficiently as possible. There are two issues seriously handicapping international law enforcement in the fight against electronic crimes: (1) establishing the identity and location of network criminals; and (2) acquiring evidence stored on data networks that span international borders.

To address these problems, for the last several years, the U.S. has been active in the Subgroup on High-Tech Crime of the G8 countries and in the Cybercrime Committee of the Council of Europe. The G8 subgroup focuses on practical solutions, with an emphasis on tracing communications, outreach to industry, and expanding the network of high-tech law enforcement experts available 24 hours a day to respond to urgent requests in cases involving electronic evidence. The Cybercrime Committee of the Council of Europe, in which the U.S. participates as a deeply-involved observer country, is drafting a convention focusing on cyberspace offenses, international cooperation, the 24/7 emergency network, and related issues. The U.S. will remain actively engaged in these arenas.

Intellectual Property Rights Initiative

We are also undertaking an Intellectual Property Rights Initiative, which will give greater priority to intellectual property crime. In the last several years, the magnitude, severity, and impact of intellectual property crime has grown dramatically. It is now widely reported by law enforcement officials around the world that criminal syndicates are exploiting the high profits and low risks from copyright and trademark piracy to finance other criminal enterprises, including narcotics trafficking. As a world leader in intellectual products, the United States has become the target of choice for thieves of material protected by copyright, trademark or trade secret designation, and the economic loss to American industries is enormous.

Our initiative calls for giving increased priority to prosecution of high-quality intellectual property cases in selected districts, as well as increased training for investigators and prosecutors and support of the Custom Service's border efforts in this area. We also are working for changes in the Sentencing Guidelines to recognize the seriousness of intellectual property crimes and to calculate more accurately the economic loss caused by such crimes.

CHILD EXPLOITATION AND OBSCENITY

The Child Exploitation and Obscenity Section regularly works with the Federal Bureau of Investigation and its Innocent Images national initiative, the U.S. Customs Service and its Cybersmuggling Squad, and the U.S. Postal Inspection Service on child pornography projects. The Section has been actively involved with the Innocent Images Project since its inception and has worked for many years with the Customs Service on its child pornography projects, most recently on Operation Cheshire Cat, an international child pornography ring investigation.

As we approach the new century, it is becoming increasingly apparent that we need to work together with other countries to develop a global approach to combat the victimization of children from child pornography and trafficking for criminal sexual exploitation. Toward that end, the Child Exploitation and Obscenity Section has become more involved in international law enforcement training and policy development in both of these areas, in addition to the work the Section does domestically on these issues. At the end of September, the United States, along with the European Union and Austria, will sponsor a global conference on combating child pornography on the Internet in Vienna, Austria. The Section is working toward developing international protocols for the investigation and prosecution of child pornography cases.

To assist the law enforcement personnel and the prosecutors in the United States Attorney Offices, the Section worked with the Executive Office of the United States Attorneys to implement a toolkit that includes a laptop computer and assorted software to enhance the capabilities of investigators and prosecutors to work these cases successfully. Attorneys from the Section serve as legal advisors to the Internet Crimes Against Children Task Force Program. Ten jurisdictions, involving local and state law enforcement agencies, have established task forces with grants from the Office of Juvenile Justice and Delinquency Prevention in the Office of Justice Pro-

grams to investigate Internet crimes against children in their respective communities. Funds are available this year to establish task forces in additional communities.

Also the Department has become more active in combating trafficking in women and children. Our expanded efforts include working with other agencies to address these problems, including the Departments of the Interior and Labor to investigate trafficking issues in the Commonwealth of the Northern Marianas. As in the area of child pornography, the Division provides training, both domestically and internationally, on the issue of trafficking. For example, training was provided for the Baltic countries in Warsaw last spring. Another training session is scheduled for later in the year for representatives from the Czech Republic and Bulgaria. We are working on training programs to address these issues in other parts of the world, particularly Asia and Latin America.

Our experiences investigating and prosecuting these child exploitation issues domestically enable us to share our knowledge with other countries to help them better address these situations in their countries. The Internet knows no boundaries, nor should our efforts to protect children be limited to our borders.

INTERNATIONAL ISSUES

Modern technological advances and the ease of international travel, communication, and access have also made the problems of transnational crime and international fugitives priorities for the Criminal Division. The Office of International Affairs (OIA), which is responsible for negotiating and handling all incoming and outgoing international extradition and mutual legal assistance requests, involving state and local as well as federal authorities, has seen an extraordinary increase in activity in recent years as criminals have become ever more mobile and creative in their search for safe havens from justice for themselves and their assets and their manipulation of legitimate trade markets and transnational institutions to their own illicit advantage. OIA has responded with a program to modernize our bilateral treaties and international conventions to enhance their flexibility and ability to deal with increasing and increasingly sophisticated patterns of international criminal activity.

In addition to expanding the network of Mutual Legal Assistance Treaties, OIA is working to modernize extradition between nations as the most logical, effective, and equitable mechanism for ensuring that the interests of justice are served in the international arena. This includes acceptance by other nations of the principle of extraditing their own citizens for serious crimes. Consistent successes have been realized in the last year in this regard, including recent notorious cases involving the surrender by Mexico of Jose Luis Del Toro, Jr., alleged hired killer of the mother of quadruplets in Florida, and the arrest in the United Kingdom of three Egyptian nationals charged with involvement in the terrorist bombing of our Embassies in Kenya and Tanzania last summer. Successes in spreading the word on the benefits of extraditing nationals have been achieved with Israel, Colombia, and the Dominican Republic involving changes or clarification of their domestic laws to allow such extraditions; the European Union endorsing and encouraging the proposition; and such countries as Bolivia, Argentina, and Paraguay signing or implementing new bilateral treaties that make no exception to extradition on the basis of the fugitive's citizenship.

As its caseload and responsibilities have expanded, OIA and the Criminal Division have found that merely having treaty relationships are not enough in a number of foreign jurisdictions and that it has become extremely important to our success in dealing with our international counterparts and in assisting our U.S. law enforcement colleagues posted abroad to station Department of Justice attorneys at certain Embassies and Missions overseas. We currently have such judicial attache positions in Rome, Bogota, Mexico City, and Brussels (for the European Union) and detail positions in London and Paris. Due to the perceptible advantages to our extradition and mutual legal assistance relationships from having a "hands-on" Justice Department attorney in-country, we also plan, and hope to obtain authorization for, new positions in Asia, Latin America, the Caribbean, and the Middle East. Using such well-located resources, the Criminal Division will be far better equipped to deal with the enormously increasing problem of international crime and its devastating effects on the citizens and residents of this country.

International Criminal Investigative Training Assistance Program

The International Criminal Investigative Training Assistance Program (ICITAP) was created in 1986 to train criminal investigators in Latin America. Today, ICITAP is a comprehensive law enforcement development program that works in more than 20 countries world-wide. ICITAP currently provides two kinds of assistance programs: technical assistance to develop entire police forces during peace operations

and specialized training to improve existing police forces in emerging democracies. ICITAP utilizes of the skills of state and local police officers as well as federal agents. Assistance programs promote internationally accepted principles of human rights, the rule of law and democratic police practices.

ICITAP is involved in a number of challenging new assignments. At the request of the Department of State, ICITAP will assist the Organization for Security and Cooperation in Europe to train 3,000 new, local police in Kosovo. To fulfill U.S. commitments under the Wye River Accords, ICITAP is assisting the Palestinian police to collect illegal weapons in the West Bank and Gaza. In Albania, ICITAP will train the Rapid Intervention Force that polices Albania's sensitive border with Kosovo. In Indonesia, ICITAP is providing technical assistance in civil disorder management. In El Salvador, an ICITAP "911 emergency response program" has significantly reduced crime in the country's second largest city. ICITAP is also involved in important assistance programs in the former Soviet republics, South Africa and Latin America.

Overseas Prosecutorial Development, Assistance and Training (OPDAT)

The Division provides Overseas Prosecutorial Development, Assistance and Training (OPDAT) rule of law assistance in Africa, Central and Eastern Europe, Latin America and the Caribbean, and in the Newly Independent States, including the Russian Federation through reimbursement from the Department of State. In Africa, OPDAT efforts first assessed the criminal justice systems in Rwanda and Liberia and then placed a resident legal advisor in Rwanda and will shortly place one in Liberia. Our assistance programs focus on the enormous problems of backlogged felony cases and the pretrial detention of 130,000 accused in Rwanda and will improve the competence and efficiency of prosecutors and judges in Liberia. In Central and Eastern Europe, OPDAT activities complemented its on-going, criminal justice technical assistance and training programs in Poland and Latvia, run by resident legal advisors, by placing legal advisors in Romania and Bosnia, and also by initiating assistance activities in Lithuania and Bulgaria. Through OPDAT we began a skills development program for Albanian prosecutors and judges, and assistance with the development of organized crime strike forces for Hungarian prosecutors and investigators. In Latin America and the Caribbean (Haiti), the OPDAT program concentrated on the training and deployment of new prosecutors, magistrates, and judges and provided development assistance to seven model prosecutors offices. A joint US–Mexican training program for prosecutors and investigators involved in counter-narcotics operations was started and thus far two joint training sessions have been held, one in Mexico and the other at the Department's training center in Colombia, South Carolina. The model of justice sector institution building underway in Colombia, run by a resident legal advisor, was replicated through the commencement of OPDAT programs in Argentina, Brazil, Mexico, and Venezuela. In the Newly Independent States, we expanded our criminal justice assistance program, already underway in the Russian Federation where we have a resident legal advisor, by commencing assistance activities in Armenia and Moldova, as well as in Georgia and Ukraine, where resident legal advisors have begun their duties. In addition, we started programs which will address criminal justice sector development needs in Kazahkstan, Kyrgyzstan, and Uzbekistan.

The OPDAT program also provided a forum for comparative law dialogue to promote international legal assistance by hosting more than 600 international visitors from countries throughout the world who came to the United States to gain an appreciation of our legal system. We provided professional programs in the form of specially tailored discussions and workshops, enhanced in numerous cases by presentations in foreign languages by our multi-lingual attorneys.

CONCLUSION

We will face all the challenges that I have described today recognizing that the Department of Justice is a crime-fighting partner with other federal, state and local agencies, and that we must work together strategically to define our roles and coordinate our efforts so that our scarce resources can have the greatest impact toward reducing crime and violence across America.

Mr. Chairman and Members of the Subcommittee, I hope that this overview is helpful to your understanding of the work of the Criminal Division. I would be pleased to answer any questions that you may have.

Senator THURMOND. Mr. Robinson, it is widely known that Attorney General Reno is personally opposed to the death penalty, while at the same time she personally decides whether to seek the death

penalty in any Federal case. I understand that the Attorney General has authorized the death penalty to be sought in less than 30 percent of the over 400 cases that she has reviewed.

The question is: has her personal opposition had any impact on the number of death penalty cases that have been sought?

Mr. ROBINSON. Mr. Chair, I believe it has not, and I think your numbers are right. As I understand it, there have been 417 decisions made after the Death Penalty Protocol was developed in death-eligible cases. The Attorney General agreed with the recommendations in U.S. attorneys in 377 of those 417 cases.

I know that a letter was submitted to the Chair on June 24 that provides additional information as to the breakdown of the ones where there might have been disagreement. My understanding is that the Attorney General decided to seek the death penalty in 19 of the cases in which there was disagreement and decided not to seek the death penalty in 18 cases in which there was disagreement.

So my sense is that the Attorney General has kept her undertaking by making the calls on the basis of the record before her and the very careful process that is followed in these extraordinarily important cases that obviously need great attention.

Senator THURMOND. The Attorney General has established a formal Protocol that requires that a review committee at Main Justice independently evaluate each case that is eligible for the death penalty, and receives formal input from defense counsel. As a former member of the review committee has written, "Federal prosecutors wishing to prosecute a death penalty case must now consult with and suffer intense review by Main Justice at the highest levels."

The question is: do you think this procedure may have the effect of discouraging some Federal prosecutors from seeking the death penalty?

Mr. ROBINSON. It is my sense, Mr. Chair, that it does not. I think everyone involved in this decision, investigators and prosecutors, realizes that the ultimate decision as to whether to seek the death penalty is a very different kind of decision than any other a prosecutor can make. It has serious consequences. The decision, to the extent the penalty is carried out, is final, as final as any could be.

I think the process followed by the Department, which we have tried to continue to improve upon, is to assure a sense of uniformity in the approach and that these decisions receive very careful scrutiny. But, nevertheless, as I indicated when I appeared before the committee in my confirmation hearing, I think in certain cases the death penalty is an appropriate penalty.

The process is designed to see to it that the decision is made fairly, but there should be no deterrence of Federal prosecutors to seek the death penalty in appropriate cases. I certainly haven't seen instances in which prosecutors have indicated to me that they were disinclined because of the process to seek the death penalty in appropriate cases. And I think most people would expect there would be a very careful, deliberative process in making this most important decision.

Senator THURMOND. Under the Protocol, the U.S. attorney consults with the lawyer for the defendant before submitting a case that is eligible for the death penalty to the Justice Department for

review. Then the defense lawyer has the opportunity to make a formal presentation to the review committee at Main Justice to try to convince it not to recommend the death penalty.

The question is: do you think that most State prosecutors provide for such formal involvement by the defense counsel before the prosecutor decides whether to seek the death penalty?

Mr. ROBINSON. I have to say I would be glad to try to get an answer to that. I am not sure I could speak on behalf of all of the States, or express full knowledge of what is done in the various States throughout the United States. But I would expect that every State that makes this kind of a decision would have a process by which they would conduct a very careful review.

And because the Federal death penalty is relatively recent, I think the sense is that we are entering into a process that is new. For example, when I was a U.S. attorney 20 years ago, obviously with a very few exceptions the death penalty was not available. So this is a process the Justice Department wants to approach by making this decision in a very careful way. I think that is the intent and I think it is appropriate that we be careful.

Senator THURMOND. Does the review committee hear from a representative for the victim in the same manner as it hears from the lawyer for the defendant? In other words, does the victim side have the opportunity to make an argument to the review committee just as the defendant does?

Mr. ROBINSON. I think the answer is no. Input is sought from the victims, and appropriately so when Federal prosecutors make this kind of a decision. But I don't believe that there is a formal process where representatives of the victims actually appear before the review committee. But I will double-check to make sure that is the case, but I think the answer is no, certainly not in the same way that this process applies to defense counsel.

Senator THURMOND. Thank you.

Senator Feingold.

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

Senator FEINGOLD. Thank you very much, Mr. Chairman.

Mr. Robinson, thank you for being with us today. Although I come at the issue from quite a different perspective, I am pleased that the chairman has raised the issue of the death penalty, and that is what I would like to ask you about during my time.

I am a strong opponent of the death penalty. I believe it is a form of cruel and unusual punishment, and I believe it is wrong for a civil society to rely on such a harsh punishment no matter what the gravity of the offense committed. I hope someday we can join the majority of nations in the world that have abolished the death penalty in law or in practice. In the interim, however, it is vitally important that those States who use the death penalty, as well as the Federal Government, do so in a fair manner, free of even a hint of capriciousness or arbitrariness.

So, Mr. Robinson, my first question is it is my understanding that the Attorney General established a review committee in 1995 to review and recommend whether she should authorize a Federal prosecutor to seek the death penalty when a death-eligible Federal

crime is committed, and the chairman already talked about that. This review apparently includes some opportunity for defense counsel to argue against authorization of the death penalty.

In an article dated June 14, 1999, entitled "Who Lives, Who Dies: DOJ Seeks Consistency in Capital Cases But Defense Bar Cites Vagaries," the Legal Times discussed this process. The Legal Times noted that since 1995, the number of cases reviewed has skyrocketed from 28 in 1995 to 166 in 1998. With the rise in the number of cases reviewed, Attorney General Reno has also increased incrementally each year the number of cases she has authorized for death penalty prosecution.

In 1998, the Attorney General authorized Justice Department prosecutors to seek the death penalty for 44 of the 166 cases brought before her, or 27 percent of the cases. Since 1998, more than half of the federally authorized prosecutions in which the death penalty has been sought have been against black defendants and 75 percent against minorities.

Since 1995, however, the Justice Department appears to be authorizing the death penalty against white defendants at a higher rate than against minority defendants. From January 1995 to August 1998, the Attorney General authorized the death penalty for 41 percent of the white defendants and only 23 percent of the minority defendants. This disparity may indicate that the death penalty is being applied in an arbitrary and capricious manner.

How do you explain these numbers and the disparity in the race of persons who are subject to death penalty prosecution?

Mr. ROBINSON. Senator, the one thing I want to point out is that the race of a death-eligible defendant in a capital case is not made available to the capital review committee. I am not suggesting they never learn of it, but intentionally that information is withheld from the capital review committee.

There are situations in which that information comes to the attention of members of the committee either because counsel raises it or in situations in which racial animus is a specific element of the case involved. But there is a conscious effort to try to remove the issue of race from the case-specific evaluation of whether or not in a particular case, given the mitigating and aggravating circumstances present, the death penalty is appropriate to seek on behalf of the Department of Justice.

Senator FEINGOLD. Let me ask you as a follow-up, have there been any conversations within the Justice Department to address this disparity in the application of the death penalty? Is this something that is of concern to the Department?

Mr. ROBINSON. Well, there is no doubt that these issues are appropriate to look at and appropriate to try to understand. This has been a subject of concern in the sense of wanting to be absolutely sure that any kinds of arbitrary factors are not creeping their way into the decisionmaking process. It certainly would be inappropriate for race or other arbitrary factors to play any part in the decisionmaking process.

Senator FEINGOLD. So in that spirit I do think it is vital, and I am sure you agree, that we monitor and maintain data on the application of the death penalty. I would like to know more about the Federal death penalty authorization and prosecution process, so I

have a series of questions that I will submit to you that ask for data on the number and race of the defendants that have come before the Attorney General's review committee, as well as the eventual outcome of the cases broken down by U.S. attorney jurisdiction.

I will submit those questions and ask that you respond in writing at your earliest convenience. They will include questions, as I have indicated, having to do with the number and race of the defendants who have come before the committee, the eventual outcome of the cases, the number of death-eligible crimes committed in each U.S. attorney's jurisdiction in which U.S. attorneys have requested authorization to use the death penalty, and so on. So I would submit those to you and ask for a response later.

[The questions of Senator Feingold are located in the appendix:]

Senator FEINGOLD. What portion of the defendants before the review committee—and this is something the chairman was alluding to—are represented by defense counsel? And for those that are not represented by counsel, why are they without counsel?

Mr. ROBINSON. I would have to double-check. I would expect in a death-eligible case it would be a very rare circumstance, and I am not aware offhand of any of those that would be appearing without any counsel at all, but I will double-check.

Senator FEINGOLD. I would appreciate that, and you could hopefully submit it with the other answers, or even perhaps sooner.

On a follow-up on that, what is the Justice Department's actual position on whether a defendant has a right to counsel during the committee review process?

Mr. ROBINSON. When you say a right to counsel, obviously they have a right to have counsel there. You are talking about a right to be represented by counsel during that process. I would be very surprised if they aren't represented by counsel, and if the Senator is aware of situations that I am not thinking of where somebody has gone through this process—this is at the charging stage, this is early in the process. They have a right, obviously, to counsel and would be represented by counsel in any criminal proceeding.

Senator FEINGOLD. Well, I am taking that answer as saying that the Justice Department does believe that a defendant has a right to counsel during the committee review process. If that is not the case, I hope you will let me know right away.

Mr. ROBINSON. I certainly will get back to you.

Senator FEINGOLD. Finally, I am going to shorten this, Mr. Chairman, and ask to put the whole set of written questions in the record. All I want to do is point out that there is a great deal of activity around this country in State legislatures. In some of the States, you would almost be surprised where this is happening, calling for at least a moratorium on the death penalty in a number of States, including the State of Illinois, where a number of clear, almost tragic mistakes have been made where it has become clear that certain individuals who were under the death sentence could not have committed the crime and they are now free, fortunately. I am afraid the same thing has not happened in other cases.

So I will spare you all the verbiage, except to say what effort, if any, has been made by the Justice Department to review death row

inmate cases and ensure that not a single innocent person sits on Federal death row?

Mr. ROBINSON. I think it is a very legitimate concern and we look at this very carefully, but I will get back to you on the details of these matters. One of the things I did is to make sure that the Capital Review Unit was made up of people who are not only experienced in cases involving the death penalty, but also approached the subject in a way that appreciated the seriousness of death as a penalty, and that this is not to be done without extraordinary care.

And it would be, I think, a nightmare for all of us to have a Federal defendant put to death and for us to determine conclusively later that that person did not commit the crime for which he or she was executed. And I think that means that everybody involved in the process has to be extraordinarily careful to do everything we can to see to it that that doesn't happen.

Senator FEINGOLD. Thank you for your answers, and thank you for your time, Mr. Chairman.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Thank you. On that death penalty review committee I would just observe, and I think you would agree, that this is a non-statutory, non-required initiative of the Attorney General to give heightened review to the procedures.

Mr. ROBINSON. That is true.

Senator SESSIONS. Traditionally, the prosecutor and the grand jury who has to hear the indictment—and make no mistake, grand juries take death penalty cases very seriously.

Mr. ROBINSON. No doubt about it.

Senator SESSIONS. That is where it is normally decided, but she has taken an extra step.

With regard to these numbers, like 166 in 1998 and 44 approved, these 166 were those recommendations by the U.S. attorney that the death penalty be sought?

Mr. ROBINSON. I think not. We will double-check, but all of these death-eligible cases come up, and there are situations in which the recommendations are not to seek the death penalty. And in a number of those cases, the Attorney General has decided notwithstanding the recommendation of the U.S. attorney that the death penalty not be sought the Attorney General of the United States has decided it should be sought.

Senator SESSIONS. Well, you know, you can go too far in this matter to some degree. If the definition of who has to undergo the death penalty charge and be taken to a jury for it—and that is all we are talking about here—is totally to the discretion of the Attorney General and her personal theories about the matter, you do implicate the power of Congress.

This Congress has passed a death penalty law. The President of the United States says he supports the death penalty, and in my observation has not criticized the matters which Congress has set forth as appropriate for the death penalty. I think you ought not to forget that it is not all totally up to the Attorney General, and she ought not to arrogate to herself total power to decide which cases go because the Congress has said certain kinds of crimes require the death penalty, or are appropriate.

Mr. ROBINSON. I understand your point, Senator, and I do think that what is happening here is an effort to try to make sure that the death penalty process is conducted in a uniform way so that we don't have a situation where the Federal system is attacked because there are wildly different approaches in 94 U.S. attorneys' offices.

You and I as former U.S. attorneys know how jealously U.S. attorneys guard their prerogatives in this area. But I have not found that U.S. attorneys who frankly are not anxious to have Main Justice review many things—I haven't seen a concern on their part about such review. Now, there has been appropriate dialogue about making sure the process isn't unduly burdensome, and those things we have been working on. And we will continue to do so.

Senator SESSIONS. Enough said, I suppose, about it. I just think that the law ought to be considered in this process to a significant degree.

As I understood Senator Feingold's comments, he was suggesting that from 1995 to 1998 a higher percentage of cases were recommended for the death penalty for whites, 41 percent to 23 for minorities, but that number changed this year. I would just say to you—and I respect the Senator; he is straight up front. He does not believe that the death penalty is an appropriate penalty in America today. The Supreme Court and the American people have not agreed with that for the most part, but that is a legitimate view.

I would just say to you that I hope you are not driven by numbers.

Mr. ROBINSON. I expect we should not be driven by numbers at all. It would be inappropriate to be driven by numbers.

Senator SESSIONS. You may have a situation in one year in which 44 cases come up and are approved and they are all of one race. I hope that if each one met the Attorney General's criteria, which I assume are fairly objective in many ways——

Mr. ROBINSON. Yes.

Senator SESSIONS [continuing]. That you would recommend the death penalty and would stand before the world and say you did it for race-neutral reasons based on justice and the facts of the case.

Mr. ROBINSON. I share that view and I subscribe to it. It ought to be based upon what ought to be done on the individual case, regardless of race.

Senator SESSIONS. And the numbers are never going to satisfy the people who don't believe in the death penalty. They will always find numbers that are not perfectly consistent with demography and we will have a fuss that it is unfairly applied. I would just point out that the death penalty procedure now requires two counsel be appointed for any person charged for a death offense, one of which shall be experienced in capital cases, and puts several other burdens.

Back on the prosecution of gun cases, can you tell me what action you have taken, if any, subsequent to the President's radio address this spring in which he directed the Secretary of the Treasury and the Attorney General to improve the handling of these cases? Increase prosecution of criminals, I believe is what he said.

Mr. ROBINSON. What was the date of the radio address? I didn't catch it.

Senator SESSIONS. March 19.

Mr. ROBINSON. In June, the Secretary of the Treasury and the Attorney General sent a memorandum to all U.S. attorneys and special agents-in-charge at ATF on the development of an integrated firearms violence reduction strategy, and I think it is directly related, Senator, to this.

And I have to say we did speak about this during my confirmation process. I have inquired into this matter carefully because I know the Senator is very concerned about this issue and believes strongly in the subject of Federal enforcement of firearms statutes particularly with regard to violent criminals. And so I have been looking into that issue, as I said I would. I have looked at the numbers.

I think you are right in terms of the fact that there are fewer firearms prosecutions from 1992 to today. And these numbers, I think, come out of the U.S. attorneys' statistics. I think that you could quarrel a little here and there with the numbers, but not the trend, and I wouldn't take issue with that.

I have talked to the career prosecutors in the Criminal Division that were involved in the evolution of the Triggerlock project and the continuation of that, and particularly with regard to the current approach that is being taken by the Department. I know that it is one that you don't agree with entirely, and I would just say the following things about this and these are things you have heard before, I know.

I think a combination of the fact that the 1994 violent crime initiative expanded the Department's work in the area of violent crimes beyond guns to gang-related violence and the continuing evolution—something that I know that you agreed with as U.S. attorney—of trying to work cooperatively with State and local law enforcement, has produced some rather good results. And I understand your position that they could be even better and the notion of continuous improvement is appropriate.

But as I understand it, as of 1996, when you combine Federal, State and local efforts in this area, there are 22 percent more criminals incarcerated on Federal and State weapons offenses than there had been before, which means the States are doing a better job. And we are trying to work cooperatively with them. In addition to efforts like Project Exile, I think you will see that people are being encouraged to use best practices in their individual judicial districts.

Also, the number of Federal offenders serving sentences of 5 years or more in the Federal system is up 25 percent since 1992. There is another important factor—and I am not suggesting that the Justice Department is entitled to take credit for it. It is a combined issue of demographics and a lot of hard work by Federal, State and local law enforcement. But the fact is that we have had a 27-percent decline in violent crimes committed with guns between 1992 and 1997 and that the homicide rate is at a 30-year low, is encouraging, but doesn't mean we can be complacent.

The Senator has made a contribution by keeping the Justice Department and the rest of Federal and State law enforcement fo-

cused on the need to concentrate our efforts. And we can do more. I think the Senator's efforts in this area continue to remind us that we need to be looking at these numbers, looking at ways to do a better job, such as encouraging U.S. attorneys to diagnose these problems and take a look at the laws in their own jurisdictions and work out solutions so that serious cases involving violence, involving guns, do not fall between the cracks.

So my sense is that the current balance is working well, and I haven't sensed in the people that I have talked to in our Terrorism and Violent Crimes section and others who have been involved in Triggerlock all along, are uncomfortable with this mix. But that doesn't mean that it isn't appropriate to ask ourselves whether we can do a better job. I understand the Senator's views and I think they are appropriate to continue to remind us of the need to do better.

Senator SESSIONS. Well, I know the time is out, but I know the U.S. attorney and the chief of police in Richmond who testified believe that enhanced prosecutions of Federal gun violations in Richmond substantially reduced the violent crime rate. The murder rate went down 40 percent, and I believe that could be replicated around the country.

The Federal Government has the ability to detain people prior to trial with criminal records better than most States. They have a prompt trial within 70 days. There is certain punishment if the defendant is found guilty. Police appreciate it and I think it does work. And I think there are people not alive today because we haven't used it aggressively enough. People like Senator Schumer are most eloquent in asking for more and more gun laws, but I am asking what about the ones we have got?

Thank you, Mr. Chairman.

Senator THURMOND. Thank you, Senator.

Mr. ROBINSON. Thank you, Senator.

Senator THURMOND. Senator Leahy.

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

Senator LEAHY. Well, Mr. Chairman, I think the Senator from Alabama will probably not be overly surprised to know that much of what he said I agree with. I feel if we are going to put these gun laws on the books, then let's enforce them. I understand the U.S. attorneys may determine, a lot of them, that they would rather the local prosecutors do it. But if some of these are going to be Federal laws, I think we ought to prosecute them, and we ought to prosecute them effectively and strongly.

I find it very difficult to understand why somebody who has had three or four prior felonies, and each one involving a weapon, why they are still walking on the street, somebody who has had three or four prior felonies and they go in to buy a gun, why they are not nailed for that. Just as I find sometimes local police departments round up people and confiscate their guns; they have all got felonies and nothing happens to them. So the Senator from Alabama and I are not too far apart on this issue.

I would note, though, on another issue, the death penalty, first, I come from a State that does not have the death penalty. We don't

have many gun laws either. We don't have much crime. Maybe they are all related. I am not sure. We do have one gun law. During deer season, if you are using a semi-automatic rifle, you are limited to the number of rounds you can have in the weapon because the deer should be given some kind of a chance. Other than that, just about anybody can carry a loaded concealed weapon. We don't have any permit process, so there are no permits. We do have laws, of course, on the sale of firearms.

But we also found long ago that we did away with the death penalty because in most instances it was not a deterrent. Perhaps in some rare ones, but most murders tend to be family murders or people who know each other. We found it was not a deterrent, but we also had a concern that the wrong person might get picked up.

Since 1976, when capital punishment was reinstated, we have had 558 people executed. During that same time, 80 people who were on death row who had been sentenced to death and who were about to be executed were suddenly found innocent and set free. For every seven executions, they found somewhere somebody who had been convicted through the whole system was a mistake. That is three innocent people sentenced to death each year.

In the first half of 1999, seven innocent capital prisoners have been released from death row after they spent a combined total of 61 years on death row. Randall Dale Adams might have been routinely executed if his case had not attracted the attention of a film maker, Earl Morris. The movie "The Thin Blue Line" shredded the prosecution's case and cast the national spotlight on Adams' innocence.

But probably a better case is Anthony Porter. He spent 16 years on death row, 16 years waiting for execution. In 1998, he came within 2 days of execution. He got cleared, not by the criminal justice system doing its job, but by a class of undergraduate journalism students at Northwestern University who took it on as a class assignment. We are finding now with DNA more and more people saying, I wasn't the guy there. And it turns out, guess what? They weren't the guy there. So I would hope that you would supply for the record just what steps are taken to make sure we don't get the wrong person.

I would also like you to look at what the Supreme Court has said about the extent to which crime-fighting can be conducted at the Federal rather than the State or local level. I know that some of my colleagues have worried about the Supreme Court being activist, and I assume they meant Chief Rehnquist and Justice Scalia and Justice Thomas and some of the others who have given the States carte blanche to violate Federal patent and trademark laws. They have made it impossible for State employees to enforce their federally protected right to get paid for overtime work. I assume that is what my Republican colleagues meant about this activist Supreme Court. So I would hope we are going to work closely together to make sure we have legislation that will survive Supreme Court scrutiny.

I am going to have some questions I will submit to you about CALEA. CALEA has been implemented at an extremely slow pace. The Department of Justice issued its final notice of capacity requirements over 2 years late. The FBI has dragged its feet and de-

layed it even further by challenging before the FCC the sufficiency of an industry-adopted standard for compliance with the law.

As one who helped write that law, I am concerned that implementation of CALEA has been subverted. We tried to maintain a balance among privacy rights, law enforcement interests, and innovation in the telecommunications industry. Now, we find the costs soaring and we find that suddenly the FBI has decided they want a lot more than anybody ever intended them to have. I want to know what the Justice Department is doing on that.

There are a number of pieces of legislation and I want to know whether you will work with me on those. Again, I will put that in the record.

[The prepared statement of Senator Patrick Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

This is the first occasion, since we held a hearing on the nomination of Jim Robinson to head the Criminal Division in April 1998, to hear directly from him. This hearing is long overdue, and I commend the Chairman and Ranking Member of the Subcommittee for focusing our attention on how the Criminal Division is handling a number of issues critical to enforcement of our federal criminal laws.

FEDERALISM

As we consider federal law enforcement issues, we must be cognizant that the Supreme Court has launched a cautionary shot across our bow about the extent to which crime fighting may be conducted at the federal, rather than the state or local, level. This year's crop of state's rights decisions continues what many consider the Court's activist efforts to whittle down the legitimate authority of the federal government. In 1995, for the first time in more than half a century, the Court invalidated a federal law as beyond the Commerce Clause, involving children and guns in our schools. This year, the Court gave the states carte blanche to violate federal patent and trademark laws, and made it impossible for state employees to enforce their federally-protected right to get paid for overtime work.

The maintenance of state sovereignty is a matter of great importance. For this reason, I have been critical of the increasing intrusion of federal regulation into areas traditionally reserved to the states. But it is one thing to say that Congress should forbear from interfering in areas that are adequately regulated by the states; it is quite another thing to say that Congress may not exercise its constitutional authority to enact legislation in the national interest.

We are in danger of becoming the incredible shrinking Congress, and not to preserve legitimate local autonomy, but instead on the altar of a strange abstraction of "state dignity." As we work together to produce effective national legislation to combat crime, we will have to work even harder to ensure the legislation will survive Supreme Court scrutiny as a proper exercise of congressional power.

DIGITAL TELEPHONY LAW IMPLEMENTATION

As the primary Senate sponsor in 1994 of the Communications Assistance for Law Enforcement Act (CALEA), I have been disappointed with the pace at which this important law has been implemented. For example, the Department of Justice issued its final notice of capacity more than two years late. This delay produced additional delays in the ability of telecommunications carriers to achieve compliance with the four capability assistance requirements established in CALEA.

The FBI has also challenged before the Federal Communications Commission the sufficiency of an interim standard adopted in December 1997 by the industry for wireline, cellular and broadband PCS carriers to comply with the capability assistance requirements. The FBI wants additional surveillance functions built into our telecommunications system. For example, the FBI wants access to mobile phone location information, to credit card and banking information transmitted over phone lines under a low standard, the ability to eavesdrop on conference calls when the persons named in the court order are not on the call, and so on. I have been concerned that those additional surveillance functions raise significant privacy interests and are being demanded by law enforcement without any regard to the cost.

Uncertainty over the outcome of the disputed industry-adopted standard has resulted in further delays in developing technical solutions that would bring our car-

riers into compliance. Indeed, the FCC was compelled to extend the compliance date of the law by almost two years, until June 30, 2000. Moreover, concerns over the costs of the FBI demands have prompted the House of Representatives to pass on two occasions legislation that would extend the so-called "grandfather date" under CALEA and make the government responsible for bearing more of the costs of CALEA compliance. The most recent version of this legislation, H.R. 916, passed the House on July 13, 1999, and extends the "grandfather" date from *January 1, 1995, for five years until June 30, 2000.*

In short, implementation of CALEA has been subverted: The balance we tried to maintain in CALEA among privacy rights, law enforcement interests and innovation in the telecommunications industry is being threatened, compliance with the law is being delayed, and the costs continue to soar. I want to hear what Assistant Attorney General Robinson is doing about this situation.

E-RIGHTS ACT, S. 854

I introduced privacy legislation earlier in this session to clarify the standards and procedures governing when law enforcement may use the surveillance capabilities the FBI is seeking from the FCC. For example, my bill would require a probable-cause court order before the FBI is authorized to use a cellular phone as a tracking device. The E-RIGHTS bill would also require the FBI to obtain court approval before eavesdropping on a conference call of persons not named in a wiretap order. This bill contains a number of other reasonable provisions designed to restore and protect our privacy rights in our phone, fax and computer communications. I want to hear whether Assistant Attorney General Robinson is willing to work with me in this important area—which will become even more critical should the FBI be granted by the FCC all the additional surveillance capabilities it has requested.

SENIOR SAFETY ACT, S. 751

Seniors are the most rapidly growing sector of our society. It is an ugly fact that crimes against seniors are a significant problem. To address the unyielding rate of crimes against seniors, in March I introduced S. 751, the Seniors Safety Act, to provide a new safety net of laws to combat these crimes. This is a comprehensive bill that addresses the crimes to which seniors are most vulnerable—from combating health care fraud and abuse and protecting nursing home residents to safeguarding pension and employee benefit plans from fraud, bribery and graft.

I know that the Administration has been working on its own legislative proposals in this area, including provisions to allow the use of administrative subpoenas for access to health records for fraud investigations. My legislation would authorize the use of such subpoenas but under circumstances that would protect against the further disclosure of personally identifiable health records. The Administration's draft proposal does not have any such protections included. As this legislation moves forward, I would hope that the Department, and the Criminal Division in particular, will find common ground on authorizing reasonable standards for access, use and disclosure by law enforcement of personally identifiable medical records in ways that do not hinder fraud investigations, but also in ways that ensure these records are accorded privacy protection.

DEATH PENALTY CASES

People of good conscience can and will disagree on the morality of the death penalty. But I am confident that we can all agree that a system that sentences one innocent person to death for every seven that it executes has no place in a civilized society, much less in 21st Century America.

Yet that is what the American system of capital punishment may have done for the last 23 years. A total of 558 people have been executed since the reinstatement of capital punishment in 1976. During the same time, 80 death row inmates have been found innocent and set free. That is one exoneration for every seven executions. That signifies that more than three innocent people are sentenced to death each year. The phenomenon is not confined to just a few states; the 80 exonerations since 1976 span more than 20 different States. And the rate seems to be increasing: In the first half of 1999, seven innocent capital prisoners have been released from death row, having spent a combined 61 years on death row.

This would be disturbing, if their eventual exoneration was the product of reliable and consistent checks in our legal system. It might be comprehensible, though not acceptable, if we as a society lacked effective and relatively inexpensive means to make capital punishment more reliable. But many of the freed men owe their lives to fortuity and private heroism, having been denied common-sense procedural rights and inexpensive scientific testing opportunities. Consider the case of Randall Dale

Adams, who might have been routinely executed had his case not attracted the attention of a filmmaker, Earl Morris. His movie, *The Thin Blue Line,* shredded the prosecution's case and cast a national spotlight on Adams' innocence. Consider the case of Anthony Porter, who spent 16 years on death row and came within two days of execution in 1998; he was cleared this year by a class of undergraduate journalism students at Northwestern University. Now consider the cases of the unknown and unlucky, whom we may never hear about.

By reexamining capital punishment in light of recent exonerations, we can enact provisions to reduce the danger that people will be executed for crimes they did not commit, while increasing the probability that the guilty will be brought to justice. We can also help to ensure that the death penalty is not imposed arbitrarily or out of ignorance or prejudice. I would hope that the Department of Justice would join me in developing legislation to reduce the risk of mistaken executions.

ANTI-ATROCITY ALIEN DEPORTATION ACT, S. 1375

The recent events in Kosovo have been a graphic reminder that crimes against humanity did not end with the Second World War. Unfortunately, war criminals who wielded machetes and guns against innocent civilians in countries like Haiti, Yugoslavia and Rwanda have been able to gain entry to the United States through the same doors that we have opened to deserving refugees. Once these war criminals slip through the immigration nets, they often remain in the United States, unpunished for their crimes.

We need to lock our door to those war criminals who seek a safe haven in the United States; and to those war criminals who are already here, we should promptly show them the door out.

Senator Kohl and I recently introduced S. 1375, "The Anti-Atrocity Alien Deportation Act," to close loopholes in current law to accomplish this task. The Act would (1) bar admission into the United States and authorize the deportation of aliens who have engaged in acts of torture abroad; (2) provide statutory authorization for and expand the jurisdiction of the Department of Justice's specialized Office of Special Investigations (OSI) to investigate, prosecute and remove any alien who participated in torture and genocide abroad—not just Nazis; and (3) authorize additional funding to ensure that OSI has adequate resources to fulfill its current mission of hunting Nazi war criminals.

Little is being done about the new generation of international war criminals living among us, and these delays are costly. As any prosecutor knows, such delays make documentary and testimonial evidence more difficult to obtain. Stale cases are the hardest to make.

This is one of the mistakes we made with Nazi war criminals: waiting for more than 30 years after the end of World War II before creating OSI within the Criminal Division to hunt for Nazi war criminals. Let us not repeat the mistake we made with Nazi war criminals of waiting decades before tracking down those war criminals who settled in this country. I invite the Department of Justice to work with me as this legislation moves through Committee to make any refinements necessary to address this problem.

COMPUTER CRIME ENFORCEMENT ACT, S. 1314

I recently introduced this legislation to establish a Department of Justice grant program to support state and local law enforcement officers and prosecutors to prevent, investigate and prosecute computer crime. Senator DeWine, with whom I worked closely and successfully last year on the Crime Identification Technology Act, and Senator Robb, who has long been a leader on law enforcement issues, also support the bill as original cosponsors.

Computer crime is quickly emerging as one of today's top challenges for state and local law enforcement officials. A recent survey by the FBI and the Computer Security Institute found that 62 percent of information security professionals reported computer security breaches in the past year. These breaches in computer security resulted in financial losses of more than $120 million from fraud, theft of proprietary information, sabotage, computer viruses and stolen laptops. Computer crime has become a multi-billion dollar problem. I invite the Department of Justice to work with me and my colleagues to provide our crime-fighting partners in the States with the resources necessary to combat computer crime.

CRIME VICTIMS ASSISTANCE ACT, S. 934

Finally, I note that the Senate remains in neutral when it comes to providing greater protection and assistance to victims of crime. For the last several years, I have sponsored comprehensive legislation on this important matter with Senator

Kennedy. Others in the Senate are insistent on consideration of a proposed constitutional amendment first. We can make significant improvements now, without delay. I will be interested to hear from the Assistant Attorney-General about what the Department is doing to protect the rights and dignity of victims of crime.

These are just a few of the important criminal justice issues confronting us today. I look forward to hearing from Mr. Robinson about his views on these and other issues.

[The questions of Senator Leahy are located in the appendix:]

Senator LEAHY. I would ask you this question. I recently introduced S. 1375, a bill that would bar admission into the United States and authorize the deportation of aliens who have engaged in acts of torture abroad. S. 1375 would expand the jurisdiction of OSI, the Office of Special Investigations, to investigate and prosecute and remove any alien who participated in torture and genocide abroad, as we have with those from the Holocaust.

But now we find that genocide and these types of war crimes go on, whether it is in Rwanda, Central America, Bosnia and elsewhere. And then these people who commit the crimes, some of them, come and hope they can hide in a nation of 250 million people and utilize our laws. We owe the Department of Justice support for the expansion of OSI so we can go after these war criminals.

Mr. ROBINSON. I saw the article actually in the Legal Times today—I don't know if you have seen it yet—on your legislation, and we will be happy to look at it. I obviously support the work of the Office of Special Investigations in the Criminal Division.

Senator LEAHY. As do we all.

Mr. ROBINSON. When I was U.S. attorney, that Unit was created by then Attorney General Civiletti and one of the early important cases was in the Eastern District of Michigan. So we will be happy to take a look at that, Senator.

Senator LEAHY. Well, look carefully.

Mr. ROBINSON. We will look carefully.

Senator LEAHY. I think it is long overdo.

Mr. Chairman, I am delighted to have a chance to be here. I am delighted to have a chance to discuss what some of you have said has been an activist Supreme Court, and to talk about Vermont. Of course, Mr. Chairman, you are always welcome to come there. Even Senator Schumer is welcome to come any time he wants.

Senator THURMOND. Thank you very much.

Senator LEAHY. Thank you, and we will get simultaneous translation for either one of you guys if you come.

Senator THURMOND. Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman, and I thank you for holding this hearing which is part of our job of oversight. And I thank Senator Leahy for gracing us with his presence. It is always good to see Senator Leahy whether it is in Washington, DC, New York State, or Vermont. But it is usually in Vermont that I see him and he is always talking about Vermont, which is great.

My questions are these. First, I know Mr. Sessions talked about gun prosecutions, which I want to talk about in a minute, but I would just make two points. The two are not mutually exclusive. Tightening the laws on controls and enforcing the existing laws are

not inconsistent. I know that some people want to say it is an either/or situation.

I remember in the House when I was a leader on gun control I sort of confounded many of the people on the other side because they said, well, you are not tough on crime. And that was not my position. I am a strong advocate for gun control. I also have supported punishment—three strikes and you are out, capital punishment, things like that. And they always get in a tizzy about me because they used to go after the gun control advocates saying, well, you are not for punishing people, just for taking the guns away. I happen to be for both.

One of the things I would say—I am sorry my colleague from Alabama isn't here—you know, they say, well, we have plenty of laws on the books. Well, many of the pro-gun advocates make sure that those laws are so riddled with loopholes that they don't work. The one that is most notorious is the Brady law which required a background check. The NRA worked hard to put in a loophole on gun shows. Now, we are here coming to gun shows.

Every time they try to make sure the law doesn't work and then they say, see, it didn't work. So I will leave that at that and I will continue the conversation with my good friend from Alabama. I don't agree with him on this issue, but I appreciate his considerateness and his steadfastness on the issue.

My question is this on gun prosecutions. As you know, I have been a strong supporter of Project Exile which I think has done a very good job, and a lot of the spade work for it occurred in my State of New York, particularly in the Western District over in Rochester and in Buffalo. One of the issues in Project Exile is whether gun prosecutions should be brought in Federal or State court, and there are a whole bunch of sub-issues that make that decision, where the sentences are longer, where the Federal prosecutors have the resources to play a prominent role, the opportunity costs.

Those are important questions, but there is one point that is sort of left out and that is the fact that some firearms offenders have moved through county and State jails many times before their latest firearms offense. They know the system, they know the jail crowd. Their buddies are there. It is almost as if the county and State criminal justice systems are a second home for these individuals, particularly when they get shorter sentences.

In Rochester, NY, Exile means Federal prosecution and incarceration in a far-away Federal facility or a far-away county facility under Federal contract. The repeat offenders under Exile no longer know the ins and outs of the system. Their relatives can't visit them that easily. The consequences for a gun crime become truly life-changing for the offender.

I would just ask your opinion, Mr. Robinson, about this often ignored aspect of Federal firearms prosecution projects.

Mr. ROBINSON. I think your point is well taken, Senator, and I think every U.S. attorney ought to be sitting down with his or her State attorney general and county prosecutors, and those individuals ought to be identified for the strictest possible treatment, whether it is in the Federal system or the State system. And be-

cause of the debate in this area, we are now seeing that there are States that have tough sentences.

But what we hope will happen, and I think should continue to happen and has been happening is that every judicial district, every U.S. attorney, ought to be sitting down and carefully targeting in his or her own district, often on a community-by-community basis, what it needs to get at the problem of gun violence in America.

So I think those kinds of considerations ought to be brought right down to the communities and to the districts, and U.S. attorneys ought to be encouraged to take those cases and to work with State and local prosecutors to see to it that that kind of syndrome that you describe does not repeat itself.

Senator SCHUMER. And could we get some assurance from Justice that you will pass the word out on this issue to the U.S. attorneys throughout the country, those in jurisdictions with Project Exile that is ongoing? As you know, in this budget, in the Commerce–Justice–State budget, Exile was expanded rather significantly.

Mr. ROBINSON. I do understand that, and we do think that this ought to be a matter of discretion within the U.S. attorneys. But I think the objectives are—I think we all agree on the objective, which is to get the job done in identification, prosecution, and putting people away who are engaged in gun violence activities, all kinds of serious violent activities. But guns are a serious problem and we understand that.

Senator SCHUMER. OK, thanks. Next is on cyber crime and cyber terrorism, something I have become concerned about in recent years because of the vulnerability of our computer networks to attack. We worry a lot about bombs, biochemical weapons of mass destruction. Computer terrorism can be just as deadly because our critical infrastructures are almost entirely computer-dependent.

We are hearing almost daily of hacking incidents into a military or government system. Just yesterday, the newspapers reported on security flaws that have been discovered in the UNIX operating system, and that is the most common operating system used by servers on the Internet. So I believe that this effort to fight cyber crime and cyber terrorism ought to be one of the Justice Department's highest priorities, and so I have a few questions in this regard.

First, I understand that the people in the Computer Crimes Section work very hard. I have tremendous respect for them. But are there enough prosecutors assigned to that Section, and are those prosecutors getting the technical support they need to accomplish their mission?

Mr. ROBINSON. There is no question that you are absolutely right about the concern that we ought to have for the future in the area of cyber terrorism and cyber crime. The Computer Crime and Intellectual Property Section, as you know, was created relatively recently, in 1996, and I can say that the people of the United States, and the Justice Department in particular, are blessed to have some of the brightest, most able Federal prosecutors in this area.

The chief of the Computer Crime Section is an outstanding individual who could walk out the door tomorrow and quadruple his in-

come, I am sure. And we have dedicated people working very hard. Can we use more? Yes. We are trying actually within our own resources to move people into that area. Increasingly, that Section gets called upon by all the other sections in the Criminal Division and in the field.

The Section has designated computer and telecommunications coordinators in every U.S. attorney's office. We are trying to get the word out and provide training for investigators and prosecutors. This is where the wave of the future is in terms of the threat to our national security and the threat to crime activities generally. So you are right on the money. We know that we have got to really put the resources into this field and so we are working hard to try to get that done.

Senator SCHUMER. Next question: do you think sentences for computer crimes need to be enhanced?

Mr. ROBINSON. Yes, and there are a variety of things that we can provide some additional detail on. One that occurs to me offhand is in the intellectual property area, but there are a few others in which it might be appropriate. We certainly don't want things falling between the cracks because laws that were created before the avalanche of this new technology may not have been thinking about some of these issues. We need to stay on top of those as well.

Senator SCHUMER. Finally, because so many of these crimes are being committed by younger and younger people who may not even be aware that they are crimes—they may think, oh, this is fun or something like that, I don't know what—is the Department doing any outreach to inform juveniles of the consequences of computer crime?

Mr. ROBINSON. I think there are some efforts afoot, but probably there should be more. We have some of these problems we see with juveniles who are playing around. But we are trying to get the message out by the swift investigation and prosecution of those cases, some even involving juveniles, that this is not an area you can play around with and get away with it.

Senator SCHUMER. And one final question, Mr. Chairman—I see my time is up.

Senator THURMOND. Go ahead.

Senator SCHUMER. Thank you, Mr. Chairman.

Just on biological terrorism, another real threat particularly in heavily populated areas such as New York City, my question is that since a biological attack would require unprecedented coordination between the medical establishment, local and State law enforcement and Federal authorities, what is Justice doing on this front?

Secretary of Defense Cohen has said the question is not if, but when a biological attack will occur. I want to make sure that your Department and other agencies are doing all they can to prepare for such an incident.

Mr. ROBINSON. We would be glad to provide greater detail, but you are absolutely right that this is something that there needs to be an interagency approach to. I have been involved in serious meetings and planning in this area. We have got plans in the works and protocols to deal with this, but obviously we have got to do everything we can. I will be glad to assimilate the material

we have that can be made available to you and get those to you, Senator.

Senator SCHUMER. Thank you, Mr. Chairman. Thank you, Mr. Robinson.

Senator THURMOND. I would like to turn to 18 U.S.C. 3501, the law that the Congress passed to govern the admissibility of confessions in Federal court after the *Miranda* v. *Arizona* decision.

During an oversight hearing in 1997, Attorney General Reno informed the committee that she would apply section 3501 in an appropriate case. In *United States* v. *Dickerson,* in the Fourth Circuit, the trial court found that the defendant had voluntarily confessed his crime but that the *Miranda* warnings were not read to him beforehand.

Why was *Dickerson* not an appropriate case for the Justice Department to raise section 3501?

Mr. ROBINSON. This is another area I anticipated you might want to get into. Although I didn't testify at your hearing, I did submit a statement before the subcommittee in connection with this issue on the May 13 hearing which explained what the position of the Department is and has been with regard to 3501 and *Dickerson.*

Miranda v. *Arizona* was decided in my first year of law school, 1966, and when I graduated from law school in 1968, 18 U.S.C. 3501 was passed. So I find it not only interesting, but also very momentous to be in a situation in which we have the very serious possibility that the U.S. Supreme Court will, in the context of *Dickerson,* if certiorari is applied for and granted—and our response to the application, I think, is currently pending—that this issue may then be a situation in which we would be before the Supreme Court.

As I said during my confirmation hearing, this is an issue that I think is a very important one for us to look at carefully, particularly in this context that we find ourselves in at the moment. I can explain briefly the reason why the Department has taken the position that it has. It is set out in my statement that was submitted for the hearing, and that simply is that in a situation in which *Miranda* v. *Arizona* has not yet been overruled by the U.S. Supreme Court, there is an apparent conflict between *Miranda* v. *Arizona* and 18 U.S.C. 3501. The issue obviously presented is whether *Miranda* is constitutionally based.

And if it is, is it predicated on the Supreme Court's determination that the *Miranda* warnings are compelled by the reading of the Supreme Court of the U.S. Constitution. To the extent that 18 U.S.C. 3501 conflicts with *Miranda* v. *Arizona,* we find ourselves in a situation in which under Supreme Court law you cannot lightly assume that the U.S. Supreme Court decision which has not been overruled is no longer good law.

So the Department has taken the position, as it did in *Dickerson,* that it has been inappropriate to do that. By a 2 to 1 decision of the court of appeals in *Dickerson,* two judges had a different view, and en banc the court of appeals let that decision stand. So it appears that there will be an opportunity to address that issue, and I think that the way in which this issue is now teed up provides an opportunity for the Justice Department, in the context of the position it takes in response to the petition for certiorari and then,

if granted, in the briefs to be filed in the U.S. Supreme Court, to determine whether there ought to be an effort to deal with *Miranda* in a way different than the way it has been dealt with until now.

The U.S. Supreme Court undoubtedly has the capacity to change *Miranda* v. *Arizona* to agree with the principles that are enunciated in 3501 and could do that.

If the Supreme Court were to say that the *Miranda* warnings are simply prophylactic rules not compelled by the Constitution, then 3501 could, be constitutional and we could, in fact, reinstate ourselves to a pre-*Miranda* situation.

But I think there will be an opportunity to address this. We are looking hard at the whole question in terms of making a recommendation to the Solicitor General, who has the final say, subject to the Attorney General, on what the Department's position is on this. But we are looking at it hard, and frankly we are looking at all the alternatives as to what the Department's position should be and whether *Miranda* v. *Arizona* ought somehow to be modified.

That is an ongoing process. Ever since *Dickerson* was decided, we have been gathering the appropriate information and having those issues carefully examined. The big problem is that as long as the U.S. Supreme Court continues to apply *Miranda* v. *Arizona* to the States, and could only do that if it is constitutionally based, we have ourselves in a situation in which I am not sure a congressional enactment can trump a decision on constitutional law by the U.S. Supreme Court.

That is an issue we discussed when we were here before, but that argument may actually not be the key issue if the Supreme Court grants cert in the *Dickerson* case because the Court then will have an opportunity to say exactly what the current state of the law is and what the majority of the Court currently feels on the subject of whether the exclusionary rule should apply in situations where the warnings were not given.

So we are looking at it and we don't have a predetermined position. Of course, I couldn't speak for the Solicitor General in any event, but we will be making recommendations to the Solicitor General on the Criminal Division's view. We are consulting with U.S. attorneys and trying to get the view of law enforcement because we have two decisions to make, a policy decision and a legal decision, and that process is ongoing as we speak.

Senator THURMOND. The executive branch has a constitutional duty to faithfully execute the laws, and I understand that the traditional policy of the Justice Department is that it will defend laws of the Congress as long as a reasonable argument can be made that they are constitutional.

Regardless of one's views about the constitutionally of 3501, the Fourth Circuit has upheld the statute in *Dickerson* and the Tenth Circuit has upheld it in *United States* v. *Crocker*. No circuit has directly held section 3501 to be unconstitutional. In this situation, why does the Department not have a duty to defend section 3501 before the lower Federal courts?

Mr. ROBINSON. Well, I think the question is the Department, as Congress has an obligation to follow the law of the land as articulated with regard to the Constitution by the U.S. Supreme Court.

And I think the position that has been taken in these cases that have been articulated in the testimony that I submitted previously has been that as long as the U.S. Supreme Court has not seen fit to overrule *Miranda* v. *Arizona* in any case that the Department has to follow the last word of the U.S. Supreme Court.

And as was indicated in the *Felton* case in 1997, the lower Federal courts, and this has been the Department's position have an obligation to follow the teachings of the U.S. Supreme Court.

But the issue is the exact position that the Solicitor General will take on 3501, and the principles that underlie 3501, and that is the question of whether or not there ought to be an exclusionary rule for *Miranda* violations. The Supreme Court can certainly change that rule and they could do it in the context of the *Dickerson* case.

I think we have an obligation to approach this issue from the point of view of what is best for law enforcement, and that is the way I feel about it in terms of the Criminal Division. We are certainly going to be articulating the law enforcement perspective on what the Department's position ought to be on this issue as we review it in this context now that we have a specific case that tees it up.

Senator THURMOND. It is important the Senate learn as soon as possible what the position of the Department will be in *Dickerson.* If the Supreme Court hears the *Dickerson* case, the Senate should defend the law if the administration will not. Will you cooperate with this committee so that Senate Legal Counsel will have the opportunity to defend section 3501 before the Supreme Court if the administration will not?

Mr. ROBINSON. Speaking on my own behalf, and I can only go as high as the second floor, I would say the answer is absolutely yes. We will cooperate with this committee with regard to obviously keeping the committee advised as we can when that determination is made, and I think in plenty of time for there to be an opportunity if the Senate feels it needs to take a different view because it is not satisfied. We would be glad to keep the Senate advised of that, Senator.

Senator THURMOND. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman, for raising that issue. It has always been completely circular, the logic of the Department of Justice on this matter. When you say the lower courts have a duty to follow the Supreme Court and *Miranda* and the Department will never take up 3501 and the voluntariness position, unless the Court, as in this case, really just on its own motion takes it up, it doesn't get up. Isn't that correct?

Mr. ROBINSON. Well, it could come up any minute in the context of a State case, obviously, because——

Senator SESSIONS. Well, there is a case out of Virginia—is that *Dickerson*—that you all refused to argue the issue on?

Mr. ROBINSON. The consistent position of the Department has been that at least in recent years—and my understanding is that there have been over the years some efforts to address this issue in various administrations—has been that we are bound by *Miranda,* that district judges and courts of appeals cannot overrule *Miranda.* We think, frankly, *Dickerson* on the face of it was incor-

rectly decided as a matter of constitutional law. That is the Solicitor General's position.

Senator SESSIONS. This is through the looking glass land, really. I mean, the Supreme Court in *Miranda* said it was prophylactic; it was not constitutionally mandated. The Congress comes along with a voluntariness exception and you won't even defend it, and the Court is going to have to on its own, apparently. I don't think there is any need to argue about it. I don't think it is a matter of law; it is a matter of policy.

The Attorney General's policy is not to take this matter up, not to enforce 3501. And I am glad the chairman raised it and I think this Congress is going to have to intervene, or somebody will, if the Department won't argue the case.

Mr. ROBINSON. Senator, we are going to have an opportunity to address this very issue and there is no getting around it even if somebody wanted to. The *Dickerson* case presents this squarely and the Criminal Division is going to make a recommendation to the Solicitor General. We are looking at it with an open mind with regard to what position—I wasn't here before, but we have got an opportunity to deal with it now and we are doing it.

Senator SESSIONS. It is a big deal. I think it is a much bigger deal than most people realize. Professor Schulhofer has repudiated his 1987 article in which he argued *Miranda* has no impact on crime clearance rates. That is clearly false. I mean, anybody that knows what is going on out there knows that that is true.

You say, well, there are not many reversals based on it. It is because cases are not even brought. Defendants are never even taken to trial because the fundamental evidence was the confession voluntary obtained and perhaps some technical *Miranda* violation.

Mr. ROBINSON. Well, I will undertake this, Senator. We are going to look at this issue, and look at it carefully and look at it from a law enforcement perspective. And I don't think—perhaps I could be wrong about this—I am not sure that the Senator—it wouldn't matter whether the Supreme Court reversed *Miranda* and went a different way or did it in the context of applying 3501.

The issue is the excludability or not of confessions, unwarned confessions, that we are all dealing with here in terms of the law enforcement context. And so I think we are going to have an opportunity to have the U.S. Supreme Court speak definitively on its view of *Miranda.*

Senator SESSIONS. Well, I guess you are right, and I would just say this: *Miranda* was wrong-rendered. The Constitution does not require a police officer to read the Constitution to the person he arrests before he asks him any questions. He has a right not to incriminate himself, but he does not have a right to not answer questions. He can't be forced to incriminate himself. One day, we will see.

Mr. ROBINSON. Perhaps sooner than later.

Senator SESSIONS. Let me ask you on a more substantive subject, the bankruptcy matters. I am on the bankruptcy committee. We have been struggling with how to improve bankruptcy. Just as a matter of personal experience, I have had bankruptcy judges come to me and say, Jeff, there have been no prosecutions. The word is out; if you cheat on your bankruptcy forms, you flat out lie—and,

Mr. Robinson, so much of what is done in bankruptcy is in total reliance on the honesty of the forms and statements submitted. People are pretty regularly lying on those, and what can we do about it?

So I came up with a little idea. We got the bankruptcy administrator, trustee, and the FBI agreed to assign an agent to it and to have an assistant U.S. attorney to develop some expertise, and they have done a good job. Ours is a small district, but I understand there will probably be eight or more convictions this year in the Southern District of Alabama for bankruptcy fraud. I know the lawyer who prosecutes them.

I would just say to you that if you did that, instead of 200 cases nationwide, you would probably have over 1,000 cases nationwide. And in the course of that, it could change the mentality of bankruptcy courts. Lawyers would have to advise their clients, because it is a fairly close bar, that if you lie on these forms or if you testify in blatant disregard of the truth, they will prosecute you. Somebody was prosecuted just last week or just last month, so you better tell the truth. And I think it would raise the level, and this is a Federal court.

Mr. ROBINSON. I agree with you entirely and I think we have got to do more. A year ago, the Attorney General approved the creation of the bankruptcy fraud training and identification program. We need to get the word out. We need to do a more effective job. We have some things in the works that I would like to get back to you on that do exactly the kinds of things you are suggesting we should do.

I think it is a growing problem. I share your concern about it. In the white-collar crime council, we had the U.S. bankruptcy trustee represented, and so I think we need to get at this. The growth in the number of bankruptcies is a national concern and a national problem and I think we want to address it. Our Fraud Section is working on this issue and we would be glad to work further and get further information to you, Senator, about it. I agree.

Senator SESSIONS. We have got 1.4 million bankruptcy cases. If 1 percent of them were fraudulent, what would that be, 10,000 prosecutions, 1,000 prosecutions? I don't know which. That is a lot more than we have got now, and I think what we are basically doing is sending a signal that the Federal Government and the FBI are not interested in fraud. You can go down there and unless you get run over by a truck, nobody is going to prosecute you.

Now, in the bankruptcy bill that is pending now, it requires that the Attorney General designate individuals to have primary responsibility for carrying out law enforcement responsibility in addressing the violations of bankruptcy, and should require that there would be a U.S. attorney and the agent for the FBI be involved in those cases.

Have you been able to take a position on that? I think the Department has been basically supportive of that language. Can you give us an official answer on whether you can support that language, section 158 as now constituted?

Mr. ROBINSON. I am not sure the Department's submission has gone in. The one concern that we would have would be anything that—I mean, I am sure you remember, getting directions as to

how you run your U.S. attorney's office is problematic. But I do think that the problem is there and let me just double-check to see if something has gone in.

I certainly support the notion of upping the ante in this area. The question of what position the Department has taken on that specific language—let me check and get back to you, Senator.

Senator SESSIONS. Well, it is a matter that I have raised early on with Deputy Attorney General Holder and others in the Department, and I think it is a matter that just saying we are going to do something about it may not be enough. Nothing has been done. The numbers are still, I think, far too low. This wouldn't require a single case to be prosecuted, but it would require a mechanism to be established. And they could have other duties. It doesn't say that is the only duty this bankruptcy attorney could have.

Mr. ROBINSON. I understand.

Senator SESSIONS. But they would, after handling just a few cases, become much more comfortable, much more familiar with how to prosecute them. And I think you would see a dramatic increase, with no extra funding required.

How do you feel about the asset forfeiture law that has cleared the House, and do you believe it would undermine in a significant way the ability of police and prosecutors around the country to take the ill-gotten gains from criminals, mainly drug dealers? Are you supporting reform?

Mr. ROBINSON. I expect you and I are in a hundred-percent agreement on this subject of asset forfeiture. We have concerns about H.R. 1658. In fact, we did a little piece that was published in the Criminal Justice Weekly that just came out. It was a point/counterpoint between myself and a criminal defense lawyer, former NACDL co-chair of their—they call it their Forfeiture Abuse Task Force.

We believe that asset forfeiture is one of the most effective ways of removing ill-gotten gains from criminals. And while we think some reform is appropriate and we could live with it, we are not looking to take money unfairly from people. We think there ought to be due process. But you mentioned, Senator, that I had been a Federal prosecutor for 3 and a half years, but I also did a fair amount of white-collar criminal defense work. I can say that I represented people in that area that ended up doing some time, but ended up with money they shouldn't have had at the end of the day.

And I think we have got to make sure that crime does not pay, and one of the most effective ways of deterring criminal activity is to make sure that we go after that money and get it all, and get all that we can, and have a fair process, but a process that doesn't allow somebody to do a cost/benefit analysis and say, well, I might spend a few years in jail, but when I get done I am going to have this huge amount of money to live on the rest of my life.

I think asset forfeiture is a critical tool for law enforcement. We appreciate the support of people who know about this with your background to help us and we would be happy to work with you in this area.

Senator SESSIONS. I think you are right. Chairman Thurmond was responsible for that law actually being passed, and Senator

Biden also was involved in that. And we are willing to be open to reasonable improvement, but as I see the legislation that came over from the House, it is a major reduction of the ability of the Government to do its work.

And I thank you for debating that issue in those kinds of publications. Only one side has been getting out. It is hard for us to do that. I hope that you and your staff will get the word out to our brethren in the criminal bar that we can eliminate some of their worst problems, but we need to preserve the Act.

Mr. ROBINSON. I will leave a copy of this, Senator.

Senator SESSIONS. Thank you.

Mr. ROBINSON. I appreciate your support and the support of the chairman in this important area.

Senator SESSIONS. Thank you.

Senator THURMOND. I just have about two more questions. I am extremely concerned about the possible damage to our national security that may have been caused by the compromise of nuclear weapons design codes at Los Alamos National Laboratory. News reports indicate that in 1997 the Department did not permit the FBI to establish a wiretap on the telephone and computer of Wen Ho Lee, the scientist suspected of compromising these codes. Should the Department have requested that the court grant a wiretap for Mr. Lee in 1997?

Mr. ROBINSON. Senator, because that is a pending matter, and I know there has been a written request that is working its way through as a response and that is being worked on by others at the Department, I would appreciate an opportunity to defer the answer to that to the response to the request that I know has been made.

Senator THURMOND. The Department has been investigating Mr. Lee regarding potential criminal charges since at least April. Recent news reports indicate that the Department is considering charging Mr. Lee with mishandling classified nuclear information rather than espionage. Can you confirm this, and when do you expect the Department to finish its review of Mr. Lee's case?

Mr. ROBINSON. I think it would be inappropriate to comment on a pending criminal matter, and therefore I think it wouldn't be appropriate to comment on the timing of any of this or the status of a pending criminal matter.

Senator THURMOND. Senator Sessions, do you have any more questions?

Senator SESSIONS. No. I thank you for asking that question and I would just like to point out that I am very troubled about those matters. Sooner or later, the truth is going to come out, I suppose. If we entered into plea bargains with a number of these individuals and they get little or no sentence and have provided little or no beneficial information to the Government, the Department of Justice is going to have to answer to that.

The Attorney General steadfastly, over the objection of the FBI Director and Mr. LaBella, did not appoint a special prosecutor. See, the thing is the crux of handling one of those cases is often rooted in negotiating that plea bargain. And you could either insist on the absolute truth, no matter who it leads to, and get it, and sometimes you have to be firm about that, or you can enter into a plea too quickly and never get the truth of what happened.

So I hope that we don't have a situation in which the Department of Justice is embarrassed, I really do. I love the Department. I spent 15 years there and I don't want to see its integrity damaged on this case. The extent to which you are involved in that, and you should be, you ought to review every one of those plea bargains and be absolutely sure that it is legitimate because I frankly am troubled by it from what I have seen so far.

Thank you, Mr. Chairman. Mr. Robinson and I have discussed a number of issues before he took office. The Department has shown some increase in prosecutions in several areas. I pointed out some in which I still believe more improvement clearly needs to be done, but there has been some movement in a number of areas. And I think perhaps you need to figure out what you did in those areas and maybe replicate it in some others.

Mr. ROBINSON. We are working hard at it. I managed to persuade my chief assistant when I was U.S. attorney to come back from private practice to join me as my chief of staff and we love being back at the Justice Department. We are working awful hard, you know, night and day at it, but it is wonderful, important work and we appreciate the support of alums of the Justice Department for the mission. I appreciate the opportunity to be here and am happy to come back and talk further about other issues.

Senator THURMOND. Senator Sessions, thank you again for your fine participation.

Senator SESSIONS. Thank you, sir.

Senator THURMOND. There are many other issues in which I am interested, such as the impact that drastic changes in our civil asset forfeitures could have on law enforcement. However, I will ask those questions in writing to you, if that is agreeable.

[The questions of Senator Thurmond are located in the appendix:]

Senator THURMOND. I appreciate your appearing here today and I thank you, Mr. Robinson.

Mr. ROBINSON. Thank you very much, Mr. Chairman. Thank you, Senator Sessions.

Senator THURMOND. We will leave the hearing record open for one week for additional materials to be placed in the record and for follow-up questions.

Now, if there is nothing further to come before the subcommittee, the subcommittee is now adjourned.

[Whereupon, at 3:43 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

FOLLOW-UP QUESTIONS BY SENATOR LEAHY FOR ASSISTANT ATTORNEY GENERAL ROBINSON

SEXUAL PREDATORS

QUESTION: 1. The Protection of Children from Sexual Predators Act ("PCSPA"), P.L. 105-314, requires Internet Service Providers (ISPs) to report evidence of certain child pornography offenses to Federal law enforcement authorities. The Attorney General's proposed regulations to implement this reporting requirement provide that an ISPs report "could include information concerning ... the identity of persons or screen names of persons" engaged in violations. See 64 Fed. Reg. 28424, § 81.14(a) (May 26, 1999). By contrast, the statute instead requires reporting the "facts or circumstances from which a violation ... is apparent." See PCSPA, § 227(b)(1). Identifying information does not fall within this description, since a child pornography offense will either be apparent or not, without regard to the name of the possible violator.

Under current law, ISPs may have discretion to disclose the identity of individuals who are not their subscribers or who have publicly displayed their identity. However, the Electronic Communications Privacy Act of 1986 ("ECPA" does not permit disclosure of a subscriber's name from the ISP's files. Although proposed regulation § 81.14(c) advises providers to consult ECPA, the language of § 81.14(a) is likely to confuse many ISPs in such a way that they violate the statute.

Will the Department amend § 81.14(a) to specify that information in the report could include the illegal material, information regarding the location where the illegal material was found, and identities or screen names "if they are not obtained from the provider's files" to avoid violations of ECPA?

ANSWER: We have received several comments to our Proposed Regulations that we published on May 26, 1999. One comment was similar to this question, in that it proposed that the Department include in the Final Regulations, the clarification that the ISP is not required to independently search its own records for the real name of the alleged violator. We are carefully considering this suggestion as we formulate the Final Regulations, to be published in the near future.

POSTCONVICTION DNA TESTING

QUESTION: 2. In my written questions in connection with the Committee's oversight hearing of March 12, 1999, I asked Attorney General Reno whether the Department would support conditioning the grant of federal funds for DNA testing upon certification by the state that it will, upon request by a convicted offender, provide reasonable access for the purpose of DNA testing of any genetic crime scene evidence collected in his case. The

Attorney General responded that "Awards are already conditioned in that manner," citing the DNA Identification Act of 1994. That statute conditions federal funding for DNA-related programs on certification that DNA samples shall not be made available except to certain people, including "for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which the defendant is charged."

> **(a) Does this provision (i) apply to convicted offenders as well as to defendants in pending criminal cases; and (ii) obligate States that accept grants under the DNA Identification Act to provide defendants and convicted offenders with access to DNA samples collected in connection with the cases in which they are charged or stand convicted?**

ANSWER: The statutory conditions requiring access to DNA samples for "criminal defense purposes" is not currently being interpreted by the states to include postconviction DNA tests. At the time the legislation was passed, postconviction application of DNA testing was not considered. While the current legislation could be interpreted as including postconviction DNA application, it is not clear that states are obligated to include postconviction appeals in the definition of "criminal defense purposes"

> **(b) If so, what is the Department doing to ensure compliance with this requirement? If not, would the Department support a change in the law to make the requirement more explicit?**

ANSWER: The Department would support clarifying the statutory language to include postconviction testing. Such clarification would be consistent with the recent recommendations approved and published by the Departments's National Commission on the Future of DNA Evidence. However, "access to samples and analyses" is complex matter. Access to analysis is an issue of financial allocation. However, access to the actual crime scene sample is a matter of control over the evidence. In most cases, the actual crime scene sample is retained by the law enforcement agency that investigated the crime, not the crime laboratory receiving the federal funding pursuant to the DNA Identification Act.

<u>DEATH PENALTY</u>

QUESTION: 3. At least 80 death row inmates have been found innocent and set free since the Supreme Court reinstated capital punishment in 1976. That is more than three innocent people sentenced to death each year – one for every seven people who are executed. The phenomenon is not confined to just a few states, and the rate seems to be increasing. To address this problem and reduce the risk of mistaken executions, reliable, detailed, and up-to-date information about how the death penalty is being administered by the states is critical.

(a) What if any information does the Department of Justice currently collect with respect to the administration of capital punishment by the states?

ANSWER: The information currently collected by the Department of Justice regarding the administration of the states' capital sentencing laws is compiled by the Bureau of Justice Statistics and is published annually in a bulletin titled "Capital Punishment." This bulletin is attached and is available on the Internet at http://www.ojp.usdoj.gov/bjs/. See Tab A.

(b) Do you agree that there is a need for more information on this issue, and, if so, would you support legislation directing the Department of Justice to collect such information?

ANSWER: Regarding the compilation of more information, we would be happy discuss with you the concerns you have about such information and possible solutions.

QUESTION: 4. How much time is spent, on average, by court-appointed attorneys in federal death penalty cases, and how does this compare to the average time spent by court-appointed attorneys in other federal cases?

ANSWER: This information is not compiled by the Department of Justice.

QUESTION: 5.

(a) In deciding whether it is appropriate to seek the death penalty where concurrent jurisdiction exists with a state or local government, to what extent does the Department consider the state's policy with respect to the death penalty? In particular, what consideration does the Department give to the policy of a state like Vermont, which does not authorize the penalty of death for any offense, under any circumstance?

ANSWER: Neither the existence nor the absence of a state capital sentencing statute in a particular state is considered in determining whether to seek the death sentence for a federal offense that occurred in that state.

(b) In the past ten years, how many times has the Department prosecuted a death penalty case in a state that did not itself authorize the imposition of the death penalty? Please describe each case and the federal interest in the prosecution.

ANSWER: See Tab B.

QUESTION: 6. The federal government assists state and local law enforcement agencies through various grant programs administered by the Department of Justice. Major DOJ programs providing police-related funding are: (1) Byrne programs; (2) COPS program;

(3) "weed and seed" program; (4) Local Law Enforcement Block Grants (LLEBG) program, and (5) Bulletproof Vest Partnership Grants. Appropriations for these programs totaled more than $2.5 billion in FY 1999. How much, if any, of the federal assistance provided to state and local government through the Department of Justice is currently used for indigent defense?

ANSWER: A description of the Bureau of Justice Assistance Byrne Formula Grant funds that may be used to provide indigent defense is provided in Tab C. In addition, the Office of Juvenile Justice and Delinquency Prevention provides formula and discretionary funding to ensure that defendants within the juvenile justice system have access to high quality legal defense services. States may use Formula Grant Program Funds under Title II, Part B, of the JJDP Act of 1974, as amended, to improve defender services for juveniles in the juvenile justice system. States may also use juvenile Accountability Incentive Block Grant program funds to provide defender services for juveniles involved in the juvenile justice system.

MCDADE PROVISION

QUESTION: 7. It has been over three months since Section 801 of last year's Omnibus Appropriations Act, commonly known as the McDade provision, went into effect.

> **(a) Please describe how that legislation has affected the ability of federal prosecutors and law enforcement officers effectively to enforce the federal criminal laws.**

ANSWER: The Department's assessment of the full impact of Section 530B is ongoing, and there are many issues about the scope and interpretation of Section 530B that are currently in litigation or are likely to be litigated in the near future. To date, however, the impact of the legislation has been for the most part exactly what the Department predicted:

1) The Amendment creates a rift between agents and prosecutors.

The Amendment, in practice, restricts prosecutors from supervising agents. The rules of professional conduct dealing with attorney ratification, supervision and "alter egos" are vague and provide little guidance on the circumstances which create liability on the part of the Department attorney for actions of investigative agents. Because of that uncertainty, Department attorneys often feel obliged to restrict the activities of law enforcement agents, even though those activities are consistent with federal law, simply because they fear that a state disciplinary board might hold them accountable under the rules of professional conduct. As a result, we have seen a rift between government attorneys and investigative agents as investigators develop cases on their own, without seeking input and guidance from Department attorneys, in order to avoid the restrictions prosecutors may be subject to under ethics rules. This is not a helpful development in law enforcement because it is critically important that investigators and prosecutors work together, particularly in complex cases.

Moreover, because Section 530B limits the ability of prosecutors to speak with those who may have evidence of wrongdoing, particularly corporate employees, prosecutors have no choice but to use grand jury subpoenas to obtain the evidence, although a simple conversation might provide all that was needed. The Department believes that Section 530B is causing an increase in the use of grand jury subpoenas, but it does not yet have empirical evidence to support this claim.

2) The Amendment has caused tremendous uncertainty.

Many state bar rules have not been interpreted, leaving their scope and meaning vague, especially as applied to government attorneys. Consequently, government attorneys are finding it extremely difficult to know if their conduct is permissible or not. And even in instances where a state's rules have been interpreted, those interpretations often require attorneys to conduct themselves in a manner which is more stringent than the Constitution or federal law requires. For example, in Missouri, Oklahoma, New York and Florida, federal case law permits contacts with represented persons or with former corporate employees, but state ethics opinions or bar counsel have opined that it would violate their contacts rule if a contact occured. As a result, Department attorneys are discovering that compliance with constitutional standards or federal law is no guarantee that they will not be subject to disciplinary action. The end result is that they must, in some cases, either refrain from pursuing conduct which would be perfectly legitimate under federal law or seek an advisory opinion from the Department's Professional Responsibility Advisory Office with no guarantee that such an opinion will be sufficient to protect their licenses to practice law.

The uncertainty is increased because of the Amendment's lack of a choice-of-laws provision. As a result, Department attorneys must frequently compare and assess several state bar rules to determine whether such rules are in conflict and, if so, which rule should apply. As an example, in one case where a government attorney was contemplating the issuance of a subpoena to a lawyer suspected of criminal activity, the rules of professional conduct relating to attorney subpoenas and choice-of-laws and the law relating to the crime-fraud exception of four states had to be reviewed and analyzed before deciding whether the subpoena should issue. The situation is exacerbated when Department attorneys, who are often licensed in multiple states, work in other states, and supervise investigations that span several states (or, in some cases, foreign countries). Those attorneys must engage in a complex and time-consuming analysis to determine what rules govern particular conduct. Although the Department's regulation implementing McDade provides guidance to attorneys on this issue, the area of choice-of-law remains confusing and difficult, in part because the states' rules on choice-of-laws vary widely.

Moreover, the guidance that the Department provides is in a sense of less value to its attorneys than the guidance it can provide in other areas. In attempting to interpret Section 530B, we can advise Department attorneys as to our best reading of the statute, but we cannot protect them from the personal consequences if a court or disciplinary committee takes a different view. Under Section 530B, unlike any other statute to which the Department might object on policy

grounds, it is the individual government attorney, rather than the government, could be subject to discipline for misconstruing the statute. Accordingly, especially with respect to close questions arising under the statute, attorneys are chilled even from engaging in conduct that is in the best interests of a case and consistent with what we believe to be a correct interpretation of the law.

3) The Amendment has prevented attorneys and agents from taking legitimate, traditionally accepted investigative steps, to the detriment of pending cases.

The most obvious effect on law enforcement has been in decisions by attorneys and investigators not to take particular investigative steps out of concern that such steps, including consulting with law enforcement agents who wish to question a represented person, obtaining evidence by consensual monitoring, or speaking with corporate employees about potential corporate misconduct, may violate some state's bar rules.

There have been several examples of the impact already. In some states, Department attorneys are refraining from authorizing consensual tape recordings by informants or law enforcement agents operating undercover. Federal law states that it is not unlawful for a person acting under color of law to intercept a wire, oral, or electronic communication, where one party has given consent. This is a routine law enforcement activity, referred to as consensual monitoring (18 U.S. C. Section 2511). However, one state (Virginia) has issued an ethics opinion and has verbally advised Department attorneys that, if they participate in or authorize a consensual monitoring, they will violate the state bar rule prohibiting the use of fraud or deceit. This state's interpretation appears to be similar to the highly restrictive (and, we believe, incorrect) view of the Oregon bar, which has interpreted its bar rules to prohibit attorney participation in sting operations. In Vermont there is a requirement that law enforcement obtain a search warrant before allowing a cooperating witness to wear a wire in a house.

In another state (California), Department attorneys have been reluctant to authorize consensual monitoring because of state criminal law or state ethics rules that could be interpreted to prohibit the conduct. Before proceeding, they contacted the local District Attorney and others to be sure they would not be prosecuted for their actions which were perfectly legitimate under federal law.

As noted above, state rules regarding contacts with represented persons continue to be a problem for Department attorneys. In many cases, the state rules are unclear or appear to prohibit tradition constitutionally permissible investigative activities. In several cases, Department attorneys have refrained from -- or been advised against -- be involved in questioning targets and witnesses represented by counsel or defendants, even though law enforcement agents are permitted to engage in the same conduct. The most difficult situation arises in investigations of corporate misconduct because the law concerning which employees a government may speak with is unclear. A good example of this is found in a California case where the Court concluded that the USAO had violated Rule 4.2 when an Assistant United States Attorney honored the request of a corporate employee to be interviewed in the absence of corporate counsel. The request was precipitated by the fact that the employee believed the corporate employers who

were the targets of the investigation wanted her to provide the government with false information. The Court held that the government should not have interviewed the employee but should instead have placed her before the grand jury.

The Amendment has also limited the Department's ability to investigate continuing criminal activities and such offenses as witness tampering and obstruction of justice. For instance, in one case, Department attorneys received information that an indicted defendant was seeking to intimidate or bribe a witness. The attorneys did not feel that they could, under the relevant federal and state interpretations of the state's ethics rules, use an informant to find out more about the defendant's plans.

Although state rules on communications with represented persons remain a significant problems, defendants are also using other bar rules offensively to claim that legitimate cases or evidence should be thrown out of court. In one case, defense counsel unsuccessfully sought dismissal of a drug indictment and other sanctions by claiming that, under the McDade Amendment, Department attorneys violated state ethics rules related to trial publicity because an arresting office – a state trooper – talked to a reporter.

In another instance, on the eve of trial a defendant filed a motion to dismiss the indictment based on the alleged failure of the government to present "material evidence" to the grand jury in violation of Rules 3.3(d) and 3.8(d). We argued that we had complied with existing Supreme Court law relating to the presentation of evidence to a grand jury and the court denied the motion.

4) Defendants are raising Section 530B in cases to interfere with legitimate federal prosecutions.

The Department believes that Section 530B should be interpreted not to conflict with other federal laws and not to elevate state substantive, procedural, and evidentiary rules over established federal law. The Department's regulations make clear that Section 530B mandates compliance with state bar ethics rules, not the host of other rules that govern each state's judicial system. Nonetheless, as the Department predicted, it is being forced to litigate such claims by defendants.

As we have noted in the past, the Department continues to litigate against the application of state bar rules that provide additional protections to attorneys (and not others) who are subpoenaed by federal prosecutors. These rules in our view give procedural or other advantages to attorneys and are not part of established federal law. This litigation is presently ongoing in Massachusetts (1st Cir.) and Colorado (10th Cir.) where the courts have taken a view inconsistent with the Department's view and inconsistent with the view of the Third Circuit (arising out of the Pennsylvania rules). These conflicting interpretations cause great uncertainty for Department attorneys, especially in instances where Department attorneys are licensed to practice in states whose rules have been interpreted differently.

The Department expects litigation concerning the McDade Amendment to be wide-

ranging because defense counsel have every incentive to seek broad interpretations of the legislation. In one case currently being litigated, a defendant is arguing that Section 530B requires compliance with state procedural rules that prohibit or limit the removal of cases from state court to federal court.

Additionally, the United States District Court for the Northern District of West Virginia has already ruled that the McDade Amendment requires federal prosecutors to be licensed in the state in which they are stationed. Such a construction would render the McDade amendment inconsistent with the Attorney General's longstanding, statutory authority to send any attorney she designates to any court in the land. This issue is now being litigated on an expedited basis in the Court of Appeals for the Fourth Circuit. An adverse ruling could have an immediate detrimental effect on U.S. Attorney's Offices throughout the country which have literally hundreds of attorneys in their offices who are licensed in some other state or states.

Local rules permitting attorneys to seek admission to a court for an individual case do not solve this problem. Department attorneys stationed in D.C. travel on a routine basis to investigate and litigate cases throughout the country. Many state and federal court rules limit the ability of Department attorneys to request admission in these circumstances; in addition, since the rules generally require local counsel (i.e. the local United States Attorney's Office), the Department may be required to expend unnecessary additional resources.

(b) What actions has the Department taken to implement the McDade provision?

ANSWER: As part of the Department's implementation of Section 530B, the Department has taken a number of steps to ensure compliance with the new law.

First, on April 19, 1999, the Department established the Professional Responsibility Advisory Office (PRAO) to provide guidance and assistance to Department attorneys on matters of professional responsibility, particularly those issues arising under Section 530B. Every Department component and each United States Attorneys Office has at least one Professional Responsibility Officer (PRO) who assists Department attorneys on ethical issues. The primary function of the new PRAO will be to provide an additional resource to the PROs and to ensure consistent policies and practices Department-wide. In addition, the PRAO will: 1) serve as a repository of information concerning professional responsibility issues; 2) develop training materials for Department attorneys; 3) distribute a newsletter to Department attorneys concerning developments in the law; and 4) coordinate the Department's relationships with state bar associations, state disciplinary authorities, and standards setting organizations.

As of December, 1999, the PRAO has received over 400 inquiries concerning professional responsibility issues. These statistics do not reflect the many issues resolved by individual attorneys, supervisors, or PROs in Department components or the United States Attorneys Offices.

Second, the Department issued an Interim Final Rule containing regulations to implement Section 530B. Those regulations define the scope of Section 530B and seek to provide guidance to Department attorneys about what rules apply to their conduct.

Third, the Department conducted training of all Department attorneys concerning the requirements imposed by Section 530B.

CIVIL ASSET FORFEITURE

QUESTION: 8. When the government has the choice of instituting either a criminal or a civil forfeiture proceeding, what are the relevant considerations, and who is responsible for making the final determination?

ANSWER: There are numerous considerations that go into the decision whether to file a forfeiture action criminally, as part of a criminal indictment, or civilly, as either an administrative forfeiture or a civil judicial forfeiture. The decision is made by the Assistant U.S. Attorney assigned to the case, in consultation with the seizing agency, if property has been seized.

The most important consideration is whether Congress has enacted statutory authority for both civil and criminal forfeiture, or only for one or the other. Most forfeiture statutes authorize only civil forfeiture, and some recently-enacted statutes authorize only criminal forfeiture. In those instances, the government has only one choice as to how to proceed.

If both types of forfeiture are authorized, the first consideration is whether the forfeiture is contested. Uncontested forfeitures are generally handled administratively (i.e. as civil forfeitures handled exclusively by the seizing agency), even if there is a parallel criminal prosecution. A great many forfeitures fall in this category.

If the forfeiture is contested, and the government has the option of proceeding either criminally or civilly, the following factors come into play:

(i). Is there going to be a criminal prosecution? Criminal forfeiture is only available if there is a criminal conviction. If there is no prosecution — because, for example, the defendant is dead or is a fugitive, is abroad and cannot be extradited, or cannot be identified — there can be no criminal forfeiture. Also, if the crime involves a relatively less serious offense, such that civil sanctions would impose an appropriate punishment, and incarceration is not warranted, the government may proceed civilly with the forfeiture action.

(ii). Is the defendant being prosecuted for the same crime as the one leading to the forfeiture? In criminal forfeiture, the court may only order forfeiture of the property involved in the offense for which the defendant is convicted. If a drug dealer, for example, is convicted of conducting a certain drug sale, only the proceeds of, or property

used to facilitate, that particular sale may be criminally forfeited. Proceeds obtained by the defendant from other drug sales would have to be forfeited civilly.

(iii). Are there third party claims to the property? Criminal forfeiture is limited to the property of the defendant. If a defendant uses a family member's property to commit a crime, that property may not be forfeited in the criminal case, *even if the family member had full knowledge of the crime and consented to the use of his or her property to commit it*. That is because the family member is not a party to the criminal case. In such cases, the government may file a parallel civil forfeiture.

(iv). Was the property transferred after the crime to a third party? The criminal forfeiture statutes bar a defendant from transferring property subject to forfeiture to innocent third parties for the purpose of avoiding forfeiture. Only if the third party is a "bona fide purchaser" can the third party successfully challenge a forfeiture action against property he did not acquire until after it was involved in an offense. The civil forfeiture statutes have no bona fide purchaser requirement, thus allowing criminals to defeat civil forfeiture by transferring property to innocent donees. To avoid this result, the government must do the forfeiture criminally.

(v). Should the forfeited property be returned to victims as restitution? The criminal forfeiture statutes allow the Attorney General to restore forfeited property to victims; the civil forfeiture statutes do not, except in cases where the victim is the "owner" of the property and thus could have filed a successful judicial challenge to the forfeiture. For this reason, the government must use criminal forfeiture in cases involving restitution to non-owner victims.

(vi). Is the case ripe for prosecution? In many cases, the government must seize property to prevent its being dissipated, hidden, or transferred abroad, before the grand jury has completed its investigation of the underlying criminal case. In such cases, the property is generally seized under the civil forfeiture laws, and the government then files a civil forfeiture action which may or may not be stayed until a grand jury indictment is returned. It is quite common for cases to start out as civil forfeitures but end up as criminal forfeitures for this reason. *See* United States v. Candelaria-Silva, ___ F.3d ___, 1999 WL 16782 (1st Cir. Jan. 22, 1999) (there is nothing improper in the government's beginning a forfeiture case with a civil seizure, and switching to criminal forfeiture once an indictment is returned; it is commonplace).

(vii). What prosecutorial resources are available? Forfeiture law is complex and requires specific expertise. In many U.S. Attorney's Offices, the forfeiture experts are in the Civil Division of the office, and hence are inclined to bring cases civilly where all other factors are equal. In other U.S. Attorney's Offices, a high percentage of the criminal prosecutors have been trained in criminal forfeiture law, or the forfeiture experts are co-located with those prosecutors. In those offices, the inclination is to file forfeiture

actions criminally, where all other factors are equal.

QUESTION: 9. As the Senate considers civil forfeiture reform, we need to know how much various local law enforcement agencies gain from using federal equitable sharing in asset forfeiture. Please provide the Committee with a list of all shared money from asset forfeiture for all law enforcement agencies nationwide for the past three years, with specific information on the amount of cash and type of asset, and the police agency and location participating in the equitable sharing.

ANSWER: Enclosed, on a computer disk, is information from the Consolidated Asset Tracking System (CATS) for calendar years 1996, 1997, and 1998. We are providing it on disk because the complete printouts of the data contained on the disk is over 1500 pages. For each reported year, there are two saved files. The first is an Equitable Sharing Distribution Summary Report listing the amount, in dollars, of sharing received by each recipient state or local law enforcement agency. The second is a Equitable Sharing Distribution Detail Report, which includes more specific information on the type of assets shared (cash or currency, vehicles, real property, etc.), as well as the monetary value of such shared assets, listed by recipient state or local law enforcement agency NCIC/ORI code number. The NCIC/ORI numbers are utilized in CATS for agency identification and asset tracking purposes.

SENIOR SAFETY

QUESTION: 10. S.751, the Senior Safety Act, which I and other Democratic Members introduced earlier this year, creates a standard for the use of administrative subpoenas in health fraud investigations.

The Administration may soon propose broader administrative subpoena authority in such investigations. Please describe the difference in standards of access and disclosure that would apply to personally-identifiable medical records sought and obtained by law enforcement in response to a grand jury subpoena compared to such records obtained in response to an administrative subpoena?

ANSWER: The administration has proposed strengthening law enforcement's ability to investigate and prosecute health care fraud offenses. First, the administration has proposed an amendment to existing administrative subpoena authority under 18 U.S.C. 3486, which would permit these subpoenas to be used not just in criminal investigations, but also in civil investigations of health care fraud offenses. Second, the administration proposed to amend 18 U.S.C. § 3322 to expand the existing grand jury disclosure authority, to allow similar disclosure of grand jury information concerning health care offenses to other government attorneys for use in any investigation or civil proceeding relating to health care fraud or false claims.

Grand Jury subpoenas are upheld in the face of a motion to quash unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation.

However, the subpoena may not be unreasonable or oppressive. *United States v. R. Enterprises, Inc.,* 498 U.S. 292 (1991). "The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. United States v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S.Ct. 357, 363-364, 94 L.Ed. 401 (1950)." *United States v. R. Enterprises, Inc.,* 498 U.S. at 297.

The standards for access and use of health information pursuant to an administrative subpoena issued under § 3486 are more narrow than under a grand jury subpoena. Health information may only be disclosed for the purpose of an investigation or proceeding involving a health care offense, or the sexual exploitation of children. Further, information disclosed pursuant to this administrative subpoena may not be used against the individual whose records are disclosed in any criminal, civil or administrative proceeding or investigation, unless it relates to the receipt of health care, payment for health care, or a fraudulent claim related to health, or unless a court issues an order otherwise allowing other use of this information. A court may only issue an order if it finds good cause for the other proposed use. The court must consider any injury to the patient, the patient-physician relationship or treatment services in making the determination of good cause. 18 U.S.C. § 3486 (e).

Access to and use of medical records obtained for the purpose of health care fraud investigations, whether by grand jury subpoena, or by a § 3486 administrative subpoena, are further governed by provisions of the 1997 "Health Care Fraud and Abuse Program and Guidelines" promulgated by the Attorney General and the Secretary of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996. Section VI of these guidelines addresses confidentiality procedures governing the provision and use of health information and data provided to the Department in health care investigations. The Department subsequently expanded these confidentiality guidelines to apply to all health information received by the Department for any purpose, not just health care fraud investigations.

In addition, the Department of Health and Human Services proposed a regulation in November 1999 that could affect law enforcement access to covered health information. That Department solicited public comments on the legislation, which were due on February 17, 2000. The comments are currently being evaluated.

ANTI-ATROCITY ALIEN DEPORTATION ACT (S. 1375)

QUESTION: 11. Senator Kohl and I recently introduced S. 1375, a bill that would bar admission into the United States and authorize the deportation of aliens who have engaged in acts of torture abroad. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment entered into force in 1994, and under its implementing legislation, the Torture Victims Protection Act, 18 U.S. C. §§ 2340 *et seq.*, the

United States has an affirmative duty to prosecute torturers within its jurisdiction.

(a) Does the Department agree that legislation would be helpful to bring the Immigration and Naturalization Act in line with existing federal and international obligations regarding participants in torture abroad?

ANSWER: Yes. The Criminal Division believes that section 1, which amends the INA to make those who committed acts of torture outside the U.S. inadmissible and removable, would be helpful in bringing the INA in line with existing federal and international obligations regarding participants in torture abroad. However, the scope of section 1 should be expanded to include aliens who participated in torture, war crimes, crimes against humanity, and persecution, regardless of when or where those offenses were committed. The statute should apply more broadly to aliens who "ordered, incited, assisted, or otherwise participated" in these human rights abuses, rather than those who "engaged in" or "committed" such abuses. Additional changes to the INA may be required to accomplish this end.

(b) S. 1375 would also expand the jurisdiction of the Office of Special Investigations ("OSI") to investigate, prosecute, and remove any alien who participated in torture and genocide abroad. What is the Department's view, if any, on expanding OSI jurisdiction?

ANSWER: The Criminal Division opposes section 2 of the legislation as currently drafted to establish a separate office within the Criminal Division with authority to investigate and take appropriate legal action - including administrative, civil, or criminal action - against aliens alleged to have committed acts of torture or genocide abroad, for the following reasons:

(i) Jurisdiction to pursue criminal prosecution of torture and genocide cases currently resides with the Criminal Division's Terrorism and Violent Crimes Section(TVCS), and TVCS has a strong interest in maintaining this jurisdiction. TVCS has the resources and initiative to pursue appropriate cases in this area: (1) TVCS has authority on the Torture Convention within the section; (2) TVCS has had discussions with Amnesty International to seek their assistance in identifying appropriate cases; (3) TVCS recently hosted a conference of American prosecutors involved in war crimes prosecutions in The Hague and received their input in identifying appropriate torture, genocide, and war crimes cases for prosecution in U.S. courts; (4) TVCS has hired staff who prosecuted war crimes cases in The Hague and elsewhere abroad to augment its resources to pursue these cases. To the extent there is a perceived need to augment resources to advance prosecutive efforts, TVCS resources could be increased.

(ii) It is our understanding that INS has an equally strong interest in maintaining its jurisdiction over denaturalization and deportation cases which involve allegations of torture, genocide and war crimes. Indeed, INS has established a separate office within their General Counsel's office to handle requests that fall into this category. In addition, we also understand that there is now improved coordination between INS, the FBI and the

Joint Terrorism Task Forces field operations dealing with this issue.

(iii) Establishing authority within a single office to pursue both criminal and civil remedies opens the door to charges of grand jury abuse, unauthorized disclosure of grand jury material, and allegations of threatening the use of criminal proceedings if a civil or administrative remedy is not agreed to. While these problems are not insurmountable through appropriate internal operating guidelines, it is not clear that such action is preferable to the present approach which gives INS, the Civil Division and the U.S. Attorneys primary authority to pursue administrative and civil action and gives TVCS and the U.S. Attorneys authority for criminal prosecution.

(c) The Office of Legislative Affairs at the Department has advised that the Department is considering a legislative proposal to enhance the investigation, prosecution and deportation of aliens who have participated in torture abroad. Please provide me with a copy of that proposal or information on when that proposal will be ready for transmittal to Congress.

ANSWER: The Department of Justice's draft legislative proposal to enhance the investigation and deportation of aliens who have participated in torture and other crimes against humanity abroad is currently undergoing Administration review. The Department hopes to have something to share with Congress shortly.

COMPUTER CRIME

QUESTION: 12. Computer crime is quickly emerging as one of today's top challenges for state and local law enforcement officials. A recent survey by the FBI and the Computer Security Institute found that 62% of information security professionals reported computer security breaches in the past year. These breaches in computer security resulted in financial losses of more than $120 million from fraud, theft of proprietary information, sabotage, computer viruses and stolen laptops. Computer crime has become a multi-billion dollar problem. To help state and local law enforcement officers and prosecutors meet this challenge, I have introduced the Computer Crime Enforcement Act, S. 1314, to establish a DOJ grant program to the States to prevent, investigate and prosecute computer crime. I would appreciate the Department of Justice's views on this legislation.

ANSWER: The Department generally supports the intent of S. 1314, the "Computer Crime Enforcement Act." It would complement the National Cybercrime Training Partnership, an existing BJA program that provides assistance to state and local law enforcement agencies to train their staff to identify and investigate computer-related crime more effectively. As you may know, the Department is requesting approximately $27 million in 2001 to help state and local governments combat cybercrime.

The Department has reviewed S. 1314 and has the following comments. We very much

appreciate the legislation's recognition of the need for a 3 percent set aside to administer this grant program. However, we would recommend that there also be a set aside for research, statistics, evaluation and training and technical assistance. In addition, we recommend that Section 2(c)(1) be modified to expand the examples of laws that penalize computer crime by including other crimes committed with a computer such as financial fraud, harassment, stalking, and child exploitation.

We support the inclusion of Section 2(c)(3), which requires states to provide a plan for coordinating this program with their other federally-funded efforts. However, the wording of Section 2(d)(3) may be misleading, so we recommend replacing the phrase "...with other federally funded technical assistance and training programs, including directly funded local programs such as the LLEBG program" with ***"...with other federally funded programs, including technical assistance and training programs and other criminal justice services and equipment grant programs such as LLEBG."*** The former language refers to LLEBG as supporting *only* technical assistance and training programs; and thus might be interpreted as restricting coordination to *only* these types of federally-funded programs. The alternate language would honor the intent of the legislation by allowing for the coordination of the full spectrum of federally-funded, criminal justice functions.

We appreciate the opportunity to comment on this important bill and look forward to working with you further to develop this valuable grant program.

RAILROAD POLICE OFFICER TRAINING

QUESTION: 13. I have introduced bipartisan legislation to allow railroad police officers to attend the Federal Bureau of Investigation National Academy for law enforcement raining, S. 1235. Currently, the FBI is authorized to establish and conduct training programs at the National Academy in Quantico, Virginia for State and local criminal justice personnel employed by the State or units of government as police officers. But police officers employed by rail carriers are not afforded such training. Railroad police officers, unlike any other private police department, are commissioned under State law to enforce the laws of that State and the laws of any other State in which the railroad owns property. Because of this broad law enforcement authority, the FBI works closely with the railroad police on numerous issues and cases. A training program in law enforcement, which includes the railroad police, would benefit the law enforcement efforts of the FBI as well as the security of the American people. Do you agree?

ANSWER: The Code of Federal Regulations (CFR) authorizes a railroad police officer commissioned under the laws of any state to enforce the laws of any other state in which the railroad owns property, provided appropriate notice is given. Title 49, CFR, Part 207. Given this broad law enforcement authority of railroad police, the proposal to amend Title 42, U.S.C., Section 3771(a) to enable members of the railroad police to attend the FBI National Academy has merit and undoubtedly would be of significant benefit to the railroad police. This is especially

so, since unlike other non-governmental police departments, the FBI works closely with railroad police on a number of issues and cases.

CALEA IMPLEMENTATION

QUESTION: 14. To date, CALEA implementation has been seriously delayed, prompting the FCC to extend the law's effective date by almost 2 years. These delays have been exacerbate d by the FBI's demands for additional surveillance capabilities beyond those incorporated into an industry standard in December 1997. These additional surveillance capabilities have caused the estimated cost of CALEA compliance to soar to a conservative estimate conceded by the FBI $2 billion.

(a) If the FBI had not challenged the sufficiency of the standard before the FCC, do you agree that the FCC could have avoided extending the compliance date until June 30, 2000?

ANSWER: No. The decision by the Federal Communications Commission (FCC) to extend the compliance date until June 30, 2000, was unrelated to the decision by the Federal Bureau of Investigation (FBI) to exercise its statutory right under § 107(b) to petition the FCC to correct the deficient J-STD-025 technical standard (J-Standard).

The DOJ/FBI Joint Petition for Expedited Rulemaking requesting the FCC to amend the deficiencies in J-Standard was not relevant to the Commission's decision to extend the compliance date to June 30, 2000. The Commission's decision to grant an extension was based solely on its finding that no CALEA-compliant technology would be available in time for carriers to meet the pre-existing deadline. See In re Petition for the Extension of the Compliance Date Under § 107, Memorandum Opinion and Order, at ¶25, FCC 98-223 (September 10, 1998). Indeed, as the FCC observed, carriers were (and are) under an obligation to comply with § 103 of CALEA notwithstanding the existence of an industry standard. Id. ("We agree with the FBI that the lack of standards does not relieve carriers of their obligation to comply with CALEA's capability requirements."). In the recently issued Third Report and Order, wherein the Commission substantially agreed with the FBI that the industry-adopted J-Standard was deficient, the FCC reiterated the point that carriers must comply with § 103 of CALEA notwithstanding the existence of an industry standard. See In re Communications Assistance for Law Enforcement Act, Third Report and Order, at ¶130, FCC 99-230 (August 31, 1999).

(b) Did the FBI contest the FCC extension of the compliance date until June 30, 2000, and, if not, please explain why?

ANSWER: Yes. The DOJ and the FBI contested the FCC extension of the compliance date until June 30, 2000.

On May 8, 1998, DOJ and the FBI filed comments regarding the FCC's authority to

extend the October 25, 1998, compliance date. A copy of those comments is attached. DOJ and the FBI took the position that CALEA does not grant the FCC the authority to grant an industry-wide extension of the compliance date set by Congress. DOJ and the FBI also asserted that an extension was unnecessary because they would be willing to enter into forbearance agreements with carriers and manufacturers in exchange for an agreement to come into compliance with CALEA in a reasonable time.

(c) Please summarize the specific bases for the FBI challenge to the sufficiency of the industry CALEA-compliance standard, and for each item on this so-called "punchlist" provide estimated costs of compliance each of the wireline, wireless and PCS sectors of the telecommunications industry.

ANSWER: Outlined below are the FCC's findings with respect to the nine "Punch List" items contained in its determination that the J-Standard was deficient.

The FCC's Third Report and Order contains a detailed description of each punch list item and the legal grounds supporting their decision that six of the nine items were mandated by § 103. A summary of their conclusions with respect to each of the "punch list" items follows:

1. Content of subject-initiated calls

The FCC determined that § 103 requires the capability that permits law enforcement to monitor the conversations by all parties connected via a conference call when the facilities under surveillance maintain a circuit connection to the call. Third Report and Order, Appendix A, §22.1102 Definitions.

2. Subject-initiated dialing and signaling

The FCC concluded that law enforcement is entitled under CALEA to be informed when a subject using the facilities under surveillance uses services that provide call identifying information, such as call forwarding, call waiting, call hold, and three-way calling. This capability does not include signals generated by customer premises equipment when no network signal is generated. Third Report and Order, Appendix A, § 22.1102 Definitions.

3. In-band and out-of-band signaling

The FCC determined that law enforcement is entitled under § 103 to be informed when a network message that provides call identifying information (e.g., ringing, busy, call waiting signal, message light) is generated or sent by the Internet Access Point (IAP) switch to a subject using the facilities under surveillance. This capability does not include signals generated by customer premises equipment when no network signal is generated. Third Report and Order, Appendix A, § 22.1102 Definitions.

4. Dialed digit extraction (post cut-through dialed digits)

The FCC concluded that post cut-through digits are call identifying information as defined by CALEA and law enforcement is entitled to receive on the call data channel digits dialed by a subject when a call is connected to another carrier's service for process and routing. Third Report and Order, Appendix A, § *22.1102* Definitions.

5. Party hold, join, and drop messages on conference calls

The FCC determined that law enforcement is entitled to this capability which permits the identification of the parties to a conference call conversation at all times. Third Report and Order, Appendix A, § 22.1102 Definitions.

6. Timing information

The FCC agreed with the law enforcement that timing information is call identifying information as defined by CALEA and carriers are required to ensure its delivery pursuant to § 103. The timing information capability permits law enforcement to associate call-identifying information with the content of a call. Call identifying messages must be sent from the carrier's IAP to the law enforcement agency's collection function within eight seconds of receipt of that message by the IAP at least 95% of the time, and with the call event time-stamped to an accuracy of at least 200 milliseconds. Third Report and Order, Appendix A., § 22.1102 Definitions.

7. Surveillance status message

This capability would indicate to law enforcement that the interception software is working properly and is accessing the subject rather than an innocent subscriber. The FCC determined that this status message was not mandated by § 103 of CALEA. However, the FCC did note that nothing in CALEA prohibits carriers from providing this information to law enforcement, and thus carriers might agree to do so on a voluntary or compensated basis. Third Report and Order, ¶101.

8. Continuity check tone

This capability would verify that the link between the carrier and law enforcement is working properly. The FCC determined that this status message was not mandated by § 103 of CALEA. However, the FCC did note that nothing in CALEA prohibits carriers from providing this information to law enforcement, and thus carriers might agree to do so on a voluntary or compensated basis. Third Report and Order, ¶106.

9. Feature status message

This capability would indicate to law enforcement when a subject's capabilities change, even when the subject modifies capabilities remotely through another phone or an operator unaware of the interception. The FCC determined that this status message was not mandated by

§ 103 of CALEA. However, the FCC did note that nothing in CALEA prohibits carriers from providing this information to law enforcement, and thus carriers might agree to do so on a voluntary or compensated basis. Third Report and Order, ¶111.

The FBI does not possess information sufficient to provide estimated costs of compliance for each of these punch list items. However, the FCC has published data provided by five manufacturers of telecommunications equipment representing the estimated revenue which would be expected to be generated through selling software and hardware necessary to implement each punch list item. See Public Notice by Chief, Office of Engineering and Technology, CC Docket No. 97-213, (Released May 7, 1999). The FCC incorporated these revenue estimates into its recent Third Report and Order, finding such estimates to be a "reasonable guide of the costs to wireline, cellular and broadband PCS carriers for CALEA compliance." See Third Report and Order, ¶30. The FCC did not find that the costs associated with any of the punch list items was so exorbitant as to justify eliminating the capability from the industry standard.

QUESTION: 15. The FBI has petitioned the FCC to rule that all wireless telephone companies must design their systems so that they can locate their customers for the government at the beginning and end of any call. Yet twice in 1994, FBI director Louis Freeh testified that location information was not covered by CALEA. Please explain how the FBI director's testimony, on which Congress relied in passing CALEA, comports with the FBI's position now before the FCC.

ANSWER: The FBI did not "petition the FCC to rule that all wireless telephone companies must design their systems so that they can locate their customers for the government at the beginning and end of any call."

The position taken by the DOJ and the FBI before the FCC is consistent with Director Freeh's testimony, and is clearly supported by the statute and its legislative history. The limiting language contained in § 103(a)(2) of CALEA was intended only to ensure that location information is not provided solely pursuant to a pen register or trap and trace order. Director Freeh's testimony disclaimed the goal of acquiring location information "through the use of a pen register or trap and trace device." He never suggested that location information should be outside the scope of CALEA or of lawful surveillance altogether.

The industry-adopted J-Standard contained parameters for the delivery of location information at the beginning and end of communications to and from mobile terminals pursuant to lawful authorization. Parties other than the FBI and Department of Justice objected to this requirement being included in the J-Standard and requested the FCC to delete the requirement. In response, the FBI and DOJ submitted comments to the FCC stating that, the information was "call identifying information" under § 103 of CALEA and that, where delivery of such information is authorized by an appropriate surveillance order, nothing in CALEA prohibits a carrier from providing the information. The FCC agreed with the position taken by the FBI and DOJ. See

Third Report and Order, ¶44.

QUESTION: 16. An underlying premise of CALEA was that the government would pay retrofitting costs for the embedded base of equipment, services and features deployed by telecommunications carriers by January 1, 1995, to come into CALEA compliance. Due to delays in implementation, including the additional surveillance capabilities demanded by the FBI beyond those embodied in the industry standard, the embedded base is now huge and the cost of compliance has soared. The cost to the carriers would be much lower if the grandfather date, January 1, 1995, were extended, since the embedded base would not have to be retrofitted, except where law enforcement deemed such retrofitting to be necessary and then paid for it. The House of Representatives has extended the grandfather date twice, most recently on July 13, 1999, in H.R. 916, to June 30, 2000.

(a) Would extension of the grandfather date force the FBI to prioritize its surveillance capability needs?

ANSWER: No. The extension of the grandfather date would not change the FBI's obligation under CALEA to prioritize its surveillance capability needs.

Any extension of the January 1, 1995 grandfather date would dramatically undermine CALEA's stated purpose of preserving the government's ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies while protecting the privacy of communications and without impeding the introduction of new technologies, features, and services. Five Hundred million dollars were authorized for appropriation under § 110 of CALEA. This limited funding was never envisioned as being sufficient to pay the retrofitting costs for the entire embedded base of equipment, facilities, and services installed or deployed by telecommunications carriers on or before January 1, 1995. Rather, this limited funding was designed to require the government to prioritize the upgrading of grand-fathered equipment that it needed to meet its law enforcement and national security missions. Any extension of the January 1, 1995, grandfather date would greatly expand the amount of equipment, facilities, and services eligible for reimbursement and adversely effect the government's prioritization efforts. Notwithstanding the grandfather date or any proposed extension thereof, the FBI, as the authorized delegate of the Attorney General, will continue to carry out the requirements of § 109(c) and allocate all available funds in accordance with law enforcement priorities.

(b) If H.R. 916 became law, and the FBI were required to seek funding to pay for the "punchlist" capabilities for which it has petitioned the FCC, what would the FBI's funding request be?

ANSWER: DOJ and the FBI are strongly opposed to H.R. 916 becoming law because of the adverse impact it would have on law enforcement and national security. However, in the event H.R. 916 does become law, the FBI's funding request would be appropriately formed based on law enforcement priorities and the legal requirements of CALEA and other applicable federal

law.

CONTROLLED SUBSTANCES TRAFFICKING PROHIBITION ACT

QUESTION: 17. The Controlled Substances Trafficking Prohibition Act ("CSTPA"), enacted at the end of the last Congress, addressed a gap in our controlled substances laws whereby people entering the United States from Mexico were able to bring up to a 90-day supply of drug products into the country without a prescription under the so-called "personal use" exemption. Many of these drug products were then illegally distributed within the United States. The CSTPA addressed the problem by limiting the personal use exemption in certain circumstances to 50 dosage units. However, the CSTPA was only a stopgap measure, intended to stem the tide of illegal importations of controlled drugs while the Department of Justice studied the problems at our borders. As I noted in my statement upon passage of the legislation by the Senate:

"What constitutes 'personal use' is a complicated issue that will turn on a number of circumstances, including the nature of the controlled substance and the medical needs of the individual. It is the sort of issue that should be addressed not through single-standard legislation but through measured regulation passed by an agency with expertise in the matter."

(a) Do you agree that the CSTPA's 50 dosage rule should be replaced by more finely-tuned regulations developed by the Department of Justice?

ANSWER: It is true that what constitutes "personal use" is a complex and technical issue that might, ab initio, have been best left to the regulatory authority of the agency with expertise in the matter: DOJ and in particular DEA. However, in practice, it is very useful to have a simple "bright line" test for application at the busy U.S.-Mexico border. The 50-unit rule created by the CSTPA has proved to be a simple, workable standard. Customs officials need only check (if uncertain) whether the drug presented by the traveler is a controlled substance; count the number of dosage units; and if the number exceeds 50, ask for proof of a U.S. physician's prescription. We are aware of no negative repercussions on the border from the CSTPA, nor have we had complaints from citizens. At this time, therefore, it does not seem appropriate to reverse or replace the CSTPA with a more fine-tuned but more complex rule.

(b) How long would it take the Department to develop such regulations?

ANSWER: It would take DOJ, through DEA, at least a year, and probably closer to two years, to produce final regulations on this subject.

FOLLOW-UP QUESTIONS BY SENATOR HATCH FOR ASSISTANT ATTORNEY GENERAL ROBINSON

On July 1, the Justice Department issued regulations governing the appointment of special counsels from outside the Department.

QUESTION: 1. In your opinion, do special counsels appointed pursuant to these regulation have less independence from the Justice Department than Independent Counsels appointed under the recently expired Ethics in Government Act?

ANSWER: Yes. The new Special Counsel regulations, which replace the procedures set out in the Independent Counsel Act, seek to strike a balance between independence and accountability in certain sensitive investigations. The balance struck is one of day-to-day independence for the Special Counsel, who may be appointed to investigate and, if appropriate, prosecute matters when the Attorney General concludes that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for the matter from the usual Department of Justice process. The Special Counsel is free to structure the investigation as he or she wishes and to exercise independent prosecutorial discretion to decide whether charges should be brought, within the context of the established procedures of the Department. In contrast with the Independent Counsel Act, the new regulations explicitly acknowledge the possibility of Attorney General review of specific decisions reached by the Special Counsel, placing ultimate responsibility for and handling of the matter with the Attorney General. As explained in the next answer, in the rare circumstance that the Attorney General decides to overrule a Special Counsel decision, she must inform Congress.

QUESTION: 2. The regulations governing the Watergate Special Prosecution Force delegated to the Special Prosecutor "full authority for investigating and prosecuting" matters within his jurisdiction. The regulations also stated: "[t]he Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities." ***See 28 C.F.R. 0.37 (Appendix) (1973).*** **In your opinion, do special counsels appointed pursuant to the July 1 regulations in question have less independence from the Justice Department than the Watergate Special Prosecutor had under the 1973 regulations?**

ANSWER: Yes. Unlike the Watergate Special Prosecution regulations, the new regulations explicitly acknowledge the possibility of review of specific decisions reached by the Special Counsel. Under 28 C.F.R. § 600.7(b), the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may, after review, conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued. The Attorney General will give great weight to the views of the Special Counsel, and if she concludes that an action proposed by the Special Counsel

should not be pursued, she must inform Congress, insofar as permitted by law, of her decision at the conclusion of her investigation. The new regulations also require the Special Counsel to provide the Attorney General with annual reports on the status of the investigation in conjunction with the Counsel's annual budget request; notification of significant events in the course of his or her investigation in conformity with the Department's guidelines regarding Urgent Reports; and a confidential report, upon the conclusion of the investigation, explaining his or her prosecution or declination decisions. 28 C.F.R. § 600.8. The discussion accompanying these regulations emphasizes, however, that the Special Counsel "will not be subject to the day-to-day supervision of the Attorney General or any other Departmental official" and that the reports "will not serve as a vehicle for ongoing supervision." 64 Fed. Reg. 37038, 37040 (1999). The new regulations also have different requirements for removal of the Special Counsel. Under the Watergate Special Prosecution regulations, a special prosecutor was not to be removed from his duties "except for extraordinary improprieties," and unless the President first obtained the accord of a consensus of "the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives." 38 Fed. Reg. 30738, 30739, as amended by 39 Fed. Reg. 32805 (1973). Under the new regulations, the Special Counsel may be removed from office by the Attorney General "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies." 28 C.F.R. § 600.7(d). The Attorney General must inform the Special Counsel in writing of the specific reason for his or her removal. Id. She must also notify Congress when she removes a Special Counsel. Id. § 600.9(a)(2).

QUESTION: 3. In a dispute with the President of the United States, would special counsels appointed pursuant to the July 1 regulations have sufficient autonomy from the Executive Branch to present a justifiable case or *controversy under United States v. Nixon, 418 U.S. 863 (1974)*?

ANSWER: It is difficult, of course, to predict how the Supreme Court would decide this issue if it were ever presented to the Court. However, a number of important factors cited by the Court in determining that the dispute over the production of the tapes and documents in Nixon was justiciable would be present in a similar dispute involving a grand jury or trial subpoena issued at the request of a Special Counsel under the new regulations. As the Nixon Court noted, "[t]he mere assertion of . . . an 'intra-branch' dispute, without more," will not render a case non-justiciable. United States v. Nixon, 418 U.S. 683, 693 (1974). The Court looks, among other things, to the "nature of the proceeding for which the evidence is sought." Id. at 694. In Nixon, the Court specifically found that since the dispute over access to information arose in "a judicial proceeding in a federal court alleging violation of federal laws and [] brought in the name of the United States as sovereign," id., it was "within the traditional scope of Art. III power," id. at 697. The Court further noted that the Special Prosecutor was delegated "unique authority and tenure" in representing the United States in certain matters, and that the Attorney General's removal authority or ability to amend or revoke the Special Prosecutor regulations did not make those regulations any less binding. Id. at 696. Under the new regulations, which are binding unless and until they are rescinded, the Special Counsel also enjoys unique authority and tenure. The

Special Counsel has full power to investigate and, if appropriate, prosecute specific matters, and can be removed from office only for "good cause," a clear legal limit on removal authority that provides substantial protection. Finally, as the Court noted, the conflict between the Special Prosecutor's need for evidence for a criminal prosecution pending in a federal court and the President's assertion of executive privilege ensured the necessary "concrete adverseness" for justiciability. Id. at 697. That same adverseness would likely be present in a similar dispute under the new regulations.

On the other hand, we recognize that the Supreme Court highlighted the independence of the Watergate Special Prosecutor, focusing on the fact that the Special Prosecutor could be removed only for "extraordinary impropriety" and with the consensus of eight members of Congress. Id. at 695 n.8. As explained in the preceding answer, a Special Counsel will have somewhat less independence under the regulations than did the Special Prosecutor, and while a Special Counsel can be removed only for "good cause," that standard is not as high as "extraordinary impropriety" and the regulations do not require congressional concurrence for removal. We also recognize that the Court mentioned that the Special Prosecutor had been granted explicit authority to contest the invocation of executive privilege. No such explicit authorization is contained in the regulations, although we believe that this authority is implicit. Whether any of these differences would be sufficient to lead to a different result before the Supreme Court cannot be predicted with any certainty. We do note, however, that the lower courts have resolved similar disputes between Independent Counsels and the Office of the President under the Independent Counsel Act, which did not contain the additional removal limitations applicable to the Watergate Special Prosecutor or an explicit authorization to contest an executive privilege claim.

QUESTION: 4. Under your interpretation of the July 1 regulations, would a special counsel need the approval of the Solicitor General to pursue an appeal?

ANSWER: Under the new regulations, a Special Counsel must comply with the rules, regulations, procedures, and policies of the Department. This includes consulting with appropriate offices for guidance. 28 C.F.R. § 600.7(a). In the event that the Special Counsel concludes that the extraordinary circumstances of a particular decision would render compliance with Departmental review and approval procedures inappropriate, he must consult with the Attorney General directly. Id. Thus, in accordance with Department requirements, the Special Counsel must gain the approval of the Solicitor General for any appeal. However, if there are extraordinary circumstances that dictate otherwise, he would consult with the Attorney General.

QUESTION: 5. Do you believe that a special counsel appointed pursuant to the July 1 regulations has any more independence from the Justice Department than a regular United States Attorney? If so, please explain.

ANSWER: Yes. A Special Counsel will be selected specifically for his or her independence from and lack of political connection to the Administration, and will have no long-term job at

stake with the Department of Justice or the Administration. He or she will receive no day-to-day supervision, and except to the extent required of all Departmental prosecutors by established policy, will not report to anyone or seek approval for his or her decisions from any supervisor in the Department. The Special Counsel will select staff and develop the budget for the investigation. The Special Counsel is protected from removal from office except by the personal action of the Attorney General, and then only for good cause; in contrast, any United States Attorney can be removed at will by the President.

FISA Application

QUESTION: 6. The Attorney General has publicly stated that she recently reviewed the facts underlying the Department's 1997 FISA denial for a warrant for Mr. Wen Ho Lee, and that it is her after-the-fact belief that there was no probable cause for such an application. Do you concur in her assessment that probable cause was lacking at the time of the Department's denial of the warrant?

ANSWER: Review of FISA applications and practice before the FISA court is a function reserved exclusively to the Office of Intelligence Policy and Review, which has the expertise in the Department on the requirements of the Act. The Criminal Division plays no role in this process. AAG Robinson has made no independent assessment of whether probable cause was lacking at the time of the Department's denial of the warrant.

FOLLOW-UP QUESTIONS BY SENATOR FEINGOLD FOR ASSISTANT ATTORNEY GENERAL ROBINSON

QUESTION: 1. Please provide the number and race of defendants whose cases have come before the Attorney General's capital case review committee, and describe the eventual outcome of those cases, broken down by U.S. Attorney judicial district, including, but not limited to, the following information:

(a) The number of death-eligible crimes committed in each U.S. Attorney judicial district;

ANSWER: The Department does not track all the death-eligible crimes committed in each district but only those death-eligible crimes submitted for Department review. Further, at this time, the "non-decisional" information regarding race has been entered into our computer data base only with respect to those cases in which the Attorney General reached a decision; the data base contains no indication as to race in any pending case. There have been 567 submissions and 449 decisions, the difference encompassing cases pending the Attorney General's decision and cases in which a plea was accepted by the USA after submission for Department review but before decision by the Attorney General.

Below is a table documenting the number of capital-eligible submissions by district and a table documenting the submissions for which the Attorney General made a decision, by race and district.

Post-Protocol Death Penalty Submissions[1] by Federal Judicial District (September 1, 1999)

District	Total Defendants
D. Alaska	1
N. D. Ala.	2
D. Ariz.	10
E.D. Ark.	3
W. D. Ark.	3
C.D. Cal.	13
E.D. Cal.	10
N.D. Cal.	3
D. Colo.	5
D. Conn.	10
D. D.C.	18
M.D. Fla.	2
N.D. Fla.	5
S.D. Fla.	16
M.D. Ga.	3
N.D. Ga.	5
S.D. Ga.	2
D. Haw.	4
N.D. Iowa	4
S.D. Iowa	2
N.D. Ill.	7
S.D. Ill.	2
N.D. Ind.	5
S.D. Ind.	2

District	Total Defendants
D. Kan.	10
E.D. Ky.	1
W.D. Ky.	4
E.D. La.	7
D. Mass.	7
D. Md.	34
E.D. Mich.	15
W.D. Mich.	5
D. Minn.	3
E.D. Mo.	5
W.D. Mo.	7
E.D. N.C.	9
W.D. N.C.	5
D. N.D.	1
D. N.J.	3
D. N.M.	11
D. Nev.	9
E.D. N.Y.	52
N.D. N.Y.	6
S.D. N.Y.	43
N.D. Ohio	4
E.D. Okla.	1**
W.D. Okla.	2
D. Or.	1

District	Total Defendants
E.D. Pa.	3
M.D. Pa.	4
W.D. Pa.	1
D. P.R.	59
D. R.I.	4
D. S.C.	7
D. S.D.	3
M.D. Tenn.	6
W.D. Tenn.	1
E.D. Tex.	5
N.D. Tex.	10
S.D. Tex.	5
W.D. Tex.	3
E.D. Va.	57
W.D. Va.	5
D. V.I.	3
D. Vt.	1
N.D. W. Va.	8
Total	**567**

[1] There have been 567 submissions for Department review and 449 decisions by the Attorney General regarding whether to seek the death penalty; the difference encompasses cases pending the Attorney General's decision and cases in which a plea was accepted by the USA after submission for Department review but before decision by the Attorney General.

Post-Protocol Death Penalty Submissions
(which resulted in a decision Attorney General)
by Federal Judicial District, Reflecting Race of Defendants[2]
(September 1, 1999)

	Race of Defendants				
District	*White*	*Black*	*Hispanic*	*Other*	Total
D. Alaska	1	0	0	0	1
N. D. Ala.	2	0	0	0	2
D. Ariz.	0	1	4	1	6
E.D. Ark.	3	0	0	0	3
W. D. Ark.	3	0	0	0	3
C.D. Cal.	2	4	1	1	8
E.D. Cal.	4	2	0	2	8
N.D. Cal.	2	0	0	1	3
D. Colo.	3	0	0	1	4
D. Conn.	0	1	9	0	10
D.D.C.	0	8	0	1	9
M.D. Fla.	0	0	1	0	1
N.D. Fla.	2	3	0	0	5
S.D. Fla.	0	4	0	0	4
M.D. Ga.	0	3	0	0	3
N.D. Ga.	0	1	0	0	1
S.D. Ga.	0	0	0	0	0
D. Haw.	1	0	2	1	4
N.D. Iowa	1	0	2	0	3
S.D. Iowa	2	0	0	0	2
N.D. Ill.	0	2	5	0	7
S.D. Ill.	1	0	0	0	1
N.D. Ind.	0	0	0	0	0

[2] Racial data are currently only available for cases in which the Attorney General reache a decision whether or not to seek the death penalty.

	Race of Defendants				
District	*White*	*Black*	*Hispanic*	*Other*	**Total**
S.D. Ind.	0	2	0	0	2
D. Kan.	2	6	0	2	10
E.D. Ky.	0	1	0	0	1
W.D. Ky.	2	1	0	1	4
E.D. La.	0	4	0	0	4
D. Mass.	3	1	1	0	5
D. Md.	4	27	0	1	32
E.D. Mich.	0	12	3	0	15
W.D. Mich.	1	0	4	0	5
D. Minn.	0	3	0	0	3
E.D. Mo.	0	3	0	1	4
W.D. Mo.	2	2	0	3	7
E.D. N.C.	2	6	0	0	8
W.D. N.C.	1	2	0	1	4
D. N.D.	0	0	0	0	0
D.N.J.	1	1	1	0	3
D.N.M.	2	0	8	1	11
D. Nev.	7	0	0	2	9
E.D.N.Y.	9	17	6	7	39
N.D.N.Y.	0	5	1	0	6
S.D.N.Y.	1	11	11	2	25
N.D. Ohio	0	3	0	0	3
W.D. Okla.	2	0	0	0	2
D. Or.	1	0	0	0	1
E.D. Pa.	0	3	0	0	3
M.D. Pa.	2	0	2	0	4
W.D. Pa.	0	0	0	0	0
D.P.R.	0	1	43	5	49
D. R.I.	0	4	0	0	4
D. S.C.	0	5	0	1	6
D. S.D.	0	0	0	3	3

	Race of Defendants				
District	*White*	*Black*	*Hispanic*	*Other*	Total
M.D.Tenn.	3	1	0	0	4
W.D. Tenn.	1	0	0	0	1
E.D. Tex.	0	2	0	0	2
N.D. Tex.	4	4	2	0	10
S.D. Tex.	0	0	5	0	5
W.D. Tex.	1	0	0	0	1
E.D. Va.	5	44	0	0	49
W.D. Va.	1	4	0	0	5
D. V.I.	0	2	1	0	3
D. Vt.	1	0	0	0	1
N.D. W. Va.	4	3	1	0	8
Total	89	209	113	38	449

(b) The number of requests in each U.S. Attorney judicial district for authorization to use the death penalty;

ANSWER: As we have responded on other occasions, the U.S. Attorney's recommendation, as well as the underlying analysis in support of that recommendation, is part of internal Department deliberations that we decline to disclose. The Department has substantial concerns that disclosure of such information would chill the pre-decision, deliberative process and adversely impact pending and future analyses and authorizations.

(c) The number of cases in each U.S. Attorney judicial district in which the death penalty was authorized;

ANSWER: The Attorney General authorized seeking the death penalty in 38 of 89 cases in which the defendant was white (43%), 55 of 209 cases in which the defendant was black (26%), in 21 of 113 cases in which the defendant was Hispanic (19%), and in 16 of the 38 cases of defendants whose race was mixed or did not otherwise fall within the first three categories (42%).

Generally speaking, defense attorneys are free to raise with the committee any and every legitimate argument that they can make against seeking the death penalty in their client's case. Committee members are informed of the race of the defendant and/or his victim only if the defendant claims that his or her prosecution is tainted by racial bias or a practice of racial discrimination. Claims of discrimination based on statistical evidence are handled consistently

with the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987). Should a defendant ever present verifiable, case-specific evidence of a racially motivated prosecution, that would of course be investigated.

Below is a table documenting Attorney General Decisions Authorizing the Death Penalty by district and a table documenting Attorney General Decisions Authorizing the Death Penalty by district and race.

Post-Protocol Attorney General Authorizations to Seek the Death Penalty, by Federal Judicial District (September 1, 1999)

District	Death Penalty Authorizations
D. Alaska	1
N. D. Ala.	2
D. Ariz.	0
E.D. Ark.	2
W. D. Ark.	3
C.D. Cal.	4
E.D. Cal.	2
N.D. Cal.	1
D. Colo.	2
D. Conn.	0
D.D.C.	1
M.D. Fla.	1
N.D. Fla.	2
S.D. Fla.	1
M.D. Ga.	0
N.D. Ga.	1
D. Haw.	1
N.D. Iowa	0
S.D. Iowa	2
N.D. Ill.	2
S.D. Ill.	1
S.D. Ind.	0

District	Death Penalty Authorizations
D. Kan.	4
E.D. Ky.	0
W.D. Ky.	1
E.D. La.	3
D. Mass.	1
D. Md.	7
E.D. Mich.	3
W.D. Mich.	0
D. Minn.	0
E.D. Mo.	4
W.D. Mo.	7
E.D. N.C.	4
W.D. N.C.	3
D.N.J.	2
D.N.M.	6
D. Nev.	0
E.D.N.Y.	4
N.D.N.Y.	2
S.D.N.Y.	4
N.D. Ohio	0
W.D. Okla.	2
D. Or.	0

District	Death Penalty Authorizations
E.D. Pa.	1
M.D. Pa.	3
D.P.R.	11
D. R.I.	0
D. S.C.	0
D. S.D.	0
M.D.Tenn.	2
W.D. Tenn.	1
E.D. Tex.	1
N.D. Tex.	6
S.D. Tex.	0
W.D. Tex.	0
E.D. Va.	14
D. V.I.	0
D. Vt.	1
N.D. W. Va.	3
Total	**130**

Post-Protocol Attorney General Authorizations to Seek the Death Penalty by Federal Judicial District, Reflecting Race of Defendants (September 1, 1999)

District	Death Penalty Authorized	Race of Defendants			
		White	Black	Hispanic	Other*
D. Alaska	1	1	0	0	0
N. D. Ala.	2	2	0	0	0
D. Ariz.	0	0	0	0	0
E.D. Ark.	2	2	0	0	0
W. D. Ark.	3	3	0	0	0
C.D. Cal.	4	0	3	1	0
E.D. Cal.	2	1	0	0	1
N.D. Cal.	1	0	0	0	1
D. Colo.	2	2	0	0	0
D. Conn.	0	0	0	0	0
D.D.C.	1	0	1	0	0
M.D. Fla.	1	0	0	1	0
N.D. Fla.	2	2	0	0	0
S.D. Fla.	1	0	1	0	0
M.D. Ga.	0	0	0	0	0
N.D. Ga.	1	0	1	0	0
D. Haw.	1	0	0	0	1
N.D. Iowa	0	0	0	0	0
S.D. Iowa	2	2	0	0	0
N.D. Ill.	2	0	2	0	0
S.D. Ill.	1	1	0	0	0
S.D. Ind.	0	0	0	0	0
D. Kan.	4	1	1	0	2
E.D. Ky.	0	0	0	0	0
W.D. Ky.	1	1	0	0	0
E.D. La.	3	0	3	0	0
D. Mass.	1	1	0	0	0

District	Death Penalty Authorized	Race of Defendants			
		White	Black	Hispanic	Other*
D. Md.	7	0	6	0	1
E.D. Mich.	3	0	2	1	0
W.D. Mich.	0	0	0	0	0
D. Minn.	0	0	0	0	0
E.D. Mo.	4	0	3	0	1
W.D. Mo.	7	2	2	0	3
E.D. N.C.	4	2	2	0	0
W.D. N.C.	3	1	1	0	1
D.N.J.	2	1	1	0	0
D.N.M.	6	2	0	4	0
D. Nev.	0	0	0	0	0
E.D.N.Y.	4	0	0	0	4
N.D.N.Y.	2	0	2	0	0
S.D.N.Y.	4	0	4	0	0
N.D. Ohio	0	0	0	0	0
W.D. Okla.	2	2	0	0	0
D. Or.	0	0	0	0	0
E.D. Pa.	1	0	1	0	0
M.D. Pa.	3	1	0	2	0
D.P.R.	11	0	0	10	1
D. R.I.	0	0	0	0	0
D. S.C.	0	0	0	0	0
D. S.D.	0	0	0	0	0
M.D.Tenn.	2	2	0	0	0
W.D. Tenn.	1	1	0	0	0
E.D. Tex.	1	0	1	0	0
N.D. Tex.	6	1	3	2	0
S.D. Tex.	0	0	0	0	0
W.D. Tex.	0	0	0	0	0
E.D. Va.	14	0	14	0	0
W.D. Va.	1	0	1	0	0
D. V.I.	0	0	0	0	0

District	Death Penalty Authorized	Race of Defendants			
		White	Black	Hispanic	Other*
D. Vt.	1	1	0	0	0
N.D. W. Va.	3	3	0	0	0
Total	130	38	55	21	16

(d) The number of cases in each U.S. Attorney judicial district in which the death penalty case went to trial;

ANSWER: Below are tables documenting capital trials by district and by district and race.

Capital Trials in Post-Protocol Cases, by Federal Judicial District
(September 1, 1999)

District	Number of Defendants
N. D. Ala.	1
E.D. Ark.	2
W. D. Ark.	2
N.D. Ga.	1
N.D. Ill.	2
D. Kan.	2
E.D. La.	2
D. Md.	1
E.D. Mo.	2
W.D. Mo.	2
W.D. N.C.	2
E.D.N.Y.	1
N.D.N.Y.	2
W.D. Okla.	2
M.D. Pa.	1
D.P.R.	3
N.D. Tex.	3
E.D. Va.	10
Total	41

Capital Trials in Post-Protocol Cases,
by Federal Judicial District, Reflecting Race of Defendants
(September 1, 1999)

District	Total	Race of Defendants			
		White	Black	Hispanic	Other
N. D. Ala.	1	1	0	0	0
E.D. Ark.	2	2	0	0	0
W. D. Ark.	2	2	0	0	0
N.D. Ga.	1	0	1	0	0
N.D. Ill.	2	0	2	0	0
D. Kan.	2	0	0	0	2
E.D. La.	2	0	2	0	0
D. Md.	1	0	1	0	0
E.D. Mo.	2	0	2	0	0
W.D. Mo.	2	2	0	0	0
W.D. N.C.	2	1	1	0	0
E.D.N.Y.	1	0	0	0	1
N.D.N.Y.	2	0	2	0	0
W.D. Okla.	2	2	0	0	0
M.D. Pa.	1	1	0	0	0
D.P.R.	3	0	3	0	0
N.D. Tex.	3	0	3	0	0
E.D. Va.	10	0	10	0	0
Total	41	11	27	0	3

(e) The number of cases in each U.S. Attorney judicial district in which the death penalty was authorized, but a plea agreement was entered into for a lesser penalty or the death-eligible crime was dropped; and

ANSWER: Below are tables documenting, by district and by district and race, post-protocol authorizations to seek the death penalty for which the charges were resolved by plea agreements.

Post-Protocol Attorney General Authorizations Resolved by Plea Agreement, by Federal Judicial District (September 1, 1999)

District	Plea
D. Alaska	1
N. D. Ala.	1
W. D. Ark.	1
C.D. Cal.	2
E.D. Cal.	1
D. Colo.	2
D.D.C.	1
N.D. Fla.	2
S.D. Iowa	2
S.D. Ill.	1
D. Kan.	2
E.D. La.	1
E.D. Mo.	1
E.D. N.C.	4
D.N.J.	2
D.N.M.	2
E.D.N.Y.	2
S.D.N.Y.	3
M.D. Pa.	2
D.P.R.	2
M.D.Tenn.	2
E.D. Tex.	1
E.D. Va.	4
W.D. Va.	1
Total	43

Post-Protocol Attorney General Authorizations
Resolved by Plea Agreement,
by Federal Judicial District and Reflecting Race of Defendants
(September 1, 1999)

District	Total	Race of Defendants			
		White	Black	Hispanic	Other
D. Alaska	1	1	0	0	0
N. D. Ala.	1	1	0	0	0
W. D. Ark.	1	1	0	0	0
C.D. Cal.	2	0	2	0	0
E.D. Cal.	1	1	0	0	0
D. Colo.	2	2	0	0	0
D.D.C.	1	0	1	0	0
N.D. Fla.	2	2	0	0	0
S.D. Iowa	2	2	0	0	0
S.D. Ill.	1	1	0	0	0
D. Kan.	2	1	1	0	0
E.D. La.	1	0	1	0	0
E.D. Mo.	1	0	1	0	0
E.D. N.C.	4	2	2	0	0
D.N.J.	2	1	1	0	0
D.N.M.	2	2	0	0	0
E.D.N.Y.	2	0	0	0	2
S.D.N.Y.	3	0	3	0	0
M.D. Pa.	2	0	0	2	0
D.P.R.	2	0	0	1	1
M.D.Tenn.	2	2	0	0	0
E.D. Tex.	1	0	1	0	0
E.D. Va.	4	0	4	0	0
W.D. Va.	1	0	1	0	0
Total	**43**	**19**	**18**	**3**	**3**

(f) The race of each defendant listed in response to each of the above requests.

ANSWER: Please see tables above.

FOLLOW-UP QUESTIONS BY SENATOR THURMOND FOR ASSISTANT ATTORNEY GENERAL ROBINSON

QUESTION: 1. The Federal Death Penalty Act imposes criteria, such as certain aggravating and mitigating factors that a sentencing jury must consider in deciding whether to impose the death penalty. See 18 U.S.C.A. § 3592 (West Supp. 1999). Does the Department's Capital Case Review Committee impose criteria for or limitations on seeking the death penalty in addition to those that the Federal Death Penalty Act prescribes, and if so, is this an appropriate function of the executive branch?

ANSWER: There are no additional limitations imposed by the AGCCRC. However, consistent with the provisions of the United States Attorneys Manual, USAM § 9-10.080 ("the Attorney General's Committee and the Attorney General shall consider any legitimate law enforcement or prosecutorial reason which weighs for or against seeking the death penalty"), the committee will take into account prosecutorial concerns, such as severance, when raised by the United States Attorney.

QUESTION: 2. A former member of the Department's Capital Case Review Committee, Rory Little, has written that the Committee's "recommendations represent a developing body of common law precedent regarding the appropriate interpretations of an standard for applying the death penalty at the federal level." Do you agree that the recommendations represent precedent that guides future considerations of whether to seek the death penalty? If so, are such recommendations of equal precedential value as judicial decisions?

ANSWER: The committee recommendations, to the extent that they are adopted by the Attorney General, have some precedential value in guiding and promoting consistent exercise of the prosecutorial discretion to seek the death penalty. Because the recommendations are based on the aggravating and mitigating factors present in any given case, the decision making process is insulated from rationale that would render it arbitrary. Nonetheless, because each capital case presents a unique set of facts and sentencing factors, previous committee recommendations cannot be literally dispositive in any future case.

The Committee's analysis guides the executive's exercise of prosecutorial discretion. Committee interpretation of aggravating and mitigating factors has no dispositive value in the judicial context. In contrast, judicial decisions in this regard do control the committee's understanding of such factors.

QUESTION: 3. The Department's Death Penalty Protocol suggest that the death penalty should besought only when the "Federal interest in the prosecution is more substantial than the interests of the State or local authorities." I am not aware of any such criteria in the Federal Death Penalty Act. Is the Federal interest in prosecuting

these crimes a criteria that the Review Committee or Attorney General uses to limit the number of times the death penalty is sought?

ANSWER: The referenced language in the protocol, USAM 9-10.070, refers to principles that guide a decision whether to indict for a Federal offense potentially subject to the death penalty, not a decision whether it is appropriate to seek the death penalty. That latter decision is controlled by applicable aggravating and mitigating factors as delineated in 18 U.S.C. 3591 -3598. See also, USAM 9-10.080. The factors enumerated in USAM 9-10.070 substantially parallel those promulgated in 1980 at USAM 9-27.001, *et seq*, applicable to federal prosecutions generally.

QUESTION: 4. Even if the Attorney General authorizes the U.S. Attorney to seek the death penalty, the U.S. Attorney may later allow the defendant to plea to lesser charges, as often occurs. I understand that the Death Penalty Protocol does not require the U.S. Attorney to get approval from the Attorney General to plead the case to a lesser charge. Why does the Protocol not requires the Attorney General to approve a plea to a lesser charge?

ANSWER: The decision not to require Attorney General approval of guilty pleas entered in return for sentences other than death reflects a balancing of the centralization of the decision making process with the traditional discretion of the prosecutor to enter into plea agreements. A June 30, 1999, review of post-protocol defendants with whom United States Attorney had entered into a post-authorization plea bargain disclosed that, in 83% of those cases, the death-eligible defendant received a sentence of life without the possibility of parole.

QUESTION: 5. The Department Death Penalty Protocol requires that the U.S. Attorney notify the Attorney General any time a defendant is charged with an offense that makes him eligible to receive the death penalty, regardless of whether the U.S. Attorney requests permission to seek the death penalty. Many U.S. Attorneys have submitted numerous cases under this procedure. However, I understand that U.S. Attorneys in over 30 of the 94 Federal judicial districts have not submitted even one case to the Justice Department as being eligible for the death penalty. As a former member of the Review Committee has written, "It is difficult to believe that not a single murder in those states since 1994 was a possible candidate for Federal prosecution." Why have over 30 districts not referred even one case where a defendant could be charged with a death-eligible crime?

ANSWER: As of September 1, 1999, there were 27 districts that had never submitted a capital-eligible case for Department review. Whether a possible federal capital case is submitted for department review is determined in the first instance by the United States Attorney's charging decisions, which may be influenced by a variety of appropriate prosecution and law enforcement concerns other than the possibility of proceeding capitally. Further, capital-eligible crimes are not subject to Department review if the United States

Attorney enters into a plea bargain prior to submission. (It should be noted that the protocol analysis, but not the Department review, must be accomplished before a plea can be accepted.) It must be recognized that, with certain obvious exceptions, such as for crimes occurring on federal property, most of the crimes eligible for the death penalty under the federal system can also be prosecuted by the states. A decision regarding the appropriate jurisdiction in which to prosecute may be influenced by a variety of factors including the experience, capability and resources of the local prosecutor, as well as the relationship between state and federal prosecuting authorities. Nonetheless, this is an important issue that the Department is reviewing.

QUESTION: 6. According to the Department's Death Penalty Protocol, "bias for or against an individual based upon . . . race or ethnic origin may play no role in the decision whether to seek the death penalty." However, the Protocol also states that the Review Committee "will consider . . . any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty." Precisely how is race a factor in the Capital Case Review Committee's decision-making process if, as you acknowledge, all race-identifying information is withheld from the Committee?

ANSWER: Generally speaking, defense attorneys are free to raise with the committee any and every legitimate argument that they can make against seeking the death penalty in their client's case. Committee members are informed of the race of the defendant and/or his victim only if the defendant claims that his or her prosecution is tainted by racial bias or a practice of racial discrimination. Claims of discrimination based on statistical evidence are handled consistently with the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987). We would, of course, investigate any verifiable, case-specific evidence of a racially motivated prosecution.

QUESTION: 7. In each case potentially eligible for the Federal death penalty, the Department's Capital Case Review Committee apparently makes a written recommendation to the Attorney General on whether she should authorize the U.S. attorney to seek the death penalty. Once a case is closed and no longer pending, why does the Department continue to refuse to release these written recommendations to the Subcommittee?

ANSWER: As previously indicated, the Department has substantial concerns about providing predecisional, deliberative documents regarding the review process even as to closed matters because of their sensitivity and the risk that such disclosure would adversely impact pending and future analyses and authorizations. Disclosure might also offend privacy or other concerns in the closed case. For example, if a defendant enters a guilty plea in return for a sentence less than death in a case in which the Attorney General authorized seeking the death penalty, a pre-authorization recitation of mental problems or abuse made for the purpose of persuading against authorization should not be subject to public disclosure.

QUESTION: 8. Regarding the death penalty, I am particularly interested in a case involving the leaders of the so-called "Plum Blossom Boys," a Chinese gang that has allegedly kidnaped, violently tortured, and murdered immigrants from China. According to press reports, the Attorney General originally authorized prosecutors to seek the death penalty against three of the gang's leaders. However, later it appeared that she reversed her decision as to one of the defendants, You-Zhong Peng, because his two co-defendants were spared the death penalty after pleading guilty. Attorney General Reno may have based her decision on 18 U.S.C.A. § 3592 (a)(4) (West Supp. 1999), where one mitigating factor in considering whether to impose the death penalty is whether "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death." Do you agree that an equally culpable co-defendants lesser punishment should not be considered a mitigating factor if the reason for the lack of a death sentence is that he simply pled guilty in order to be spared? If so, would you support amending § 3592(a)(4) to exclude as a mitigating factor cases where the co-defendant was spared a death sentence as a result of a plea bargain?

ANSWER: Under current law, 18 U.S.C. 3592(a)(4), the existence of an equally culpable defendant who will not be punished by death must be considered as a mitigating factor. Clearly, the circumstances that resulted in the potential for disparate sentencing of co-defendants may cause the factor to be given less or greater weight by the committee or the jury. For example, one defendant's willingness to accept responsibility for his crimes and enter a guilty plea should not necessarily accrue to the benefit of a defendant who is unwilling to admit his guilt.

QUESTION: 9. In response to my request of the Department concerning its review of cases eligible for the Federal death penalty, the Department reports that in the cases of two defendants against whom the Attorney General authorized the government to seek death, the court dismissed the notice of intent to seek the death penalty as untimely filed. Please explain the circumstances surrounding these two cases and how the Department plans to prevent such dismissals from occurring in the future.

ANSWER: The question seeks information regarding the cases of two defendants who had their notices of intent to seek the death penalty dismissed as untimely. Based upon our records there was one case in the District of Puerto Rico in which the district court judge dismissed the notice of intent to seek the death penalty as untimely for three co-defendants, Andres Colon-Miranda, David Samuel Martinez-Velez, and Edwin Rosario-Rodriguez.

For approximately one year Colon-Miranda directed human hunting expeditions in which he and his co-defendants sought to kill members of a renegade faction of his drug gang. Colon-Miranda and his co-defendants participated in the murders of seven victims, including a fourteen-year-old boy and an informant.

On June 26, 1997, a federal grand jury in the District of Puerto Rico returned a seventeen-count third superseding indictment charging the three co-defendants and sixteen others with numerous homicides and drug-related crimes.

Prior to the June 26, 1999 indictment, government prosecutors had filed a Certificate of Death Penalty Case on June 10, 1997, in compliance with Local Rule 428 which governs the appointment of qualified capital counsel in the District of Puerto Rico. The Certificate was subsequently withdrawn without prejudice to re-file upon the request of Judge Jose Antonio Fuste after the issue of the death penalty was discussed at an informal status conference on June 23, 1999. During the conference, Judge Fuste represented to government prosecutors that if the government did not withdraw the Certificate it would be an enormous expense to the Court because the Court would be compelled to appoint qualified capital counsel for all capital-eligible defendants prior to the Department's review process, regardless of whether there was a realistic chance that the Attorney General would authorize a capital prosecution against a particular capital-eligible defendant. At the request of Judge Fuste, Government prosecutors agreed to withdraw the Certificate without prejudice to re-file when the Department's internal capital review process was complete for all capital-eligible defendants.

On September 18, 1997, government prosecutors sent letters to defense counsel for at least five defendants notifying them of the opportunity to present mitigating evidence on behalf of their clients before the Attorney General's Review Committee on Capital Cases on October 29, 1997.

In October 1997, the government requested a continuance of the trial in order to complete the death penalty review process. Judge Fuste denied the government's request and indicated that if the government filed a notice of intent to seek the death penalty such notice would be dismissed as untimely.

On November 6, 1997, the Attorney General authorized the Department of Justice to seek the death penalty against Colon-Miranda, Martinez-Velez, and Rosario-Rodriguez. Notices of intent to seek the death penalty against these three defendants were filed in federal court the next day.

The case was originally set for trial on November 10, 1997, but was later continued until November 17, 1997, in order to accommodate a scheduling conflict involving one of the defense attorneys.

On November 13, 1997, Judge Fuste dismissed the three notices reasoning that ten days notice violated 21 U.S.C. 848 (h) , which requires the government to file its notice a "reasonable time before trial."

The decision was made not to appeal the Judge's order based upon the low probability of success and the adverse consequences that an appeal would have had upon the litigation.

QUESTION: 10. It appears that the Clinton Administration is filing fewer amicus briefs in support of the States in death penalty cases that are heard by the Supreme Court than was the case in the Bush Administration. Paul Cassell, a law professor at the University of Utah, testified about this before the Judiciary Committee in 1995. In a letter to me dated July 23, 1999, Professor Cassell updated his statistics. They show that while the Justice Department during the Bush Administration filed amicus briefs in support of the States in 37 percent of their death penalty cases, the Clinton Administration has filed supporting briefs in only 17 percent of such cases-less then half the rate of support in the previous administration. Do you believe that the Administration supports the States in a sufficient number of death penalty cases before the Supreme Court?

ANSWER: Professor Cassell's comparative statistics on amicus curiae participation do not demonstrate that the Department of Justice is insufficiently supportive of States in their capital litigation before the Supreme Court. As an initial matter, because State capital cases comprise only a small portion of the Supreme Court's overall docket -- a docket that has sharply decreased in size during the past decade -- the statistical validity of any comparisons between the incidents of amicus participation in State capital cases during the Bush Administration and the present Administration are highly problematic, as non-participation in only a case or two per Term may sharply skew the final numbers. Assuming that the Department of Justice may be participating as an amicus in fewer State capital cases in recent years than it has in the past, this is in no way attributable to an unwillingness to support the States in capital cases. Rather, it may be attributable to the narrowness of the issues that have been considered by the Supreme Court in many of its recent capital cases and the consequent unlikelihood that the Court's resolution of those issues will sufficiently implicate federal interests to warrant our amicus participation.

The existence of a discernible federal interest is the touchstone for amicus participation. Indeed, each and every amicus brief that the United States files in the Supreme Court begins with an introductory paragraph explaining the "interest of the United States" in the outcome of the issue(s) pending before the Court. Consistent with that threshold criterion, all State criminal cases in which certiorari has been granted, including capital cases, are evaluated by career attorneys within the Criminal Division and later in the Solicitor General's Office to determine, among other considerations, whether there is a sufficient federal interest in outcome of the case to warrant amicus participation. Quite often, there is not. As the Supreme Court has made clear, there is no one right way for a legislature to structure a capital sentencing scheme, and it is not uncommon for State capital cases to involve issues that are peculiar to capital sentencing schemes that are markedly different from the federal "weighing" schemes enacted by Congress, under which juries are charged with the exclusive responsibility for determining whether a federal death sentence should be imposed. Accordingly, the federal interest needed to warrant amicus participation has been absent from various state capital cases involving judge-based capital sentencing schemes, see, e.g., Lambrix v. Singletary, 520 U.S. 518 (1997); Harris v.Alabama, 513 U.S. 504 (1995);

non-weighing schemes, see, e.g., Buchanan v. Angelone, 118 S. Ct. 757 (1999), or other procedural features distinctive to a state's capital sentencing scheme, but not the federal capital schemes, see, e.g., O'Dell v. Netherland, 521 U.S. 151 (1997).

It is further likely that Professor Cassell has counted the United States's past amicus participation in various state capital cases that -- while not involving issues unique to capital litigation -- raised important questions concerning habeas corpus jurisprudence, including the problem of successive petitions and the rules applicable to procedural default -- matters that may affect federal collateral litigation under 28 U.S.C. 2255, as well as federal habeas corpus actions brought by state prisoners under 28 U.S.C. 2254. The enactment of the habeas reform provisions contained in the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) has diminished the federal interest in participating as an amicus with regard to habeas issues arising in State cases, including capital cases. Quite simply, the AEDPA's reforms have legislatively settled many of the habeas and Section 2255 issues of broad national import that were formerly left for the courts to decide and that justified the Department's prior amicus participation in various State capital cases. The United States took a leading role in successfully defending the constitutional validity of those broad-based habeas reforms in its amicus brief in Felker v. Turpin, 518 U.S. 651 (1996), which was a state capital case. However, now that this important battle has been won, there is no appreciable federal interest that would justify Department amicus participation in many post-Felker AEDPA cases that raise narrow questions pertaining only to Section 2254 actions, and not to the AEDPA provisions that govern Section 2255 actions.

Nor can Professor Cassell's statistical comparisons be fairly interpreted as indicating a lack of support for the death penalty itself. This Administration supported enactment of the Federal Death Penalty Act of 1994, and the Department vigorously -- and successfully -- defended the death sentence that was imposed in Jones v. United States, 119 S. Ct. 2090 (1999), the first federal death penalty case to be decided by the Supreme Court in many decades. Although the instructional issues in Jones were peculiar to the federal statutory scheme, the Department's arguments with respect to the appropriate harmless error analysis to be applied when an aggravating factor has been invalidated (which were adopted by the majority of the Court) and our substantive defense of two aggravating factors, including a victim impact aggravator, that had been ruled invalid by the lower court (which was adopted by a plurality of the justices) will generally benefit the various States in their future capital litigation.

Where federal interests are potentially implicated, the Department does not hesitate to participate as an amicus supporting the States in capital cases and will continue to do so.

QUESTION: 11. Professor Cassell's review of the Department's filing of amicus briefs in all criminal cases showed a similar declining trend of support for the States. According to Professor Cassell, the Bush Administration supported the States in over half-53 percent-of the criminal cases before the Supreme Court. However, the Clinton

Administration has supported the States in only 29 percent of such cases. Are you concerned about the Clinton Administration's relatively lower level of support for the States in criminal cases compared with the previous administration's level of support?

ANSWER: For many of the same reasons, Professor Cassell's raw-number comparisons do not support the proposition that the Department of Justice has been insufficiently supportive of the States in their non-capital criminal cases in the Supreme Court. Whether the United States should participate as an amicus curiae in any criminal case depends upon a myriad of considerations, including the likely impact that the Supreme Court's decision will have on the government's broad interest in promoting effective law enforcement and the fair administration of justice. Each case must be -- and is -- assessed on its own merits. During the present Administration, the United States has participated as an amicus curiae in dozens of State criminal cases before the Supreme Court involving a wide range of constitutional and non-constitutional issues that were of general importance to the sound development of criminal law and practice. The qualitative contributions made by the United States in its amicus filings in these numerous state criminal cases have immeasurably advanced State and federal interests alike. In light of this record of vigorous advocacy, there can be no doubting the willingness of the Department of Justice to lend a supporting hand to the States in litigating their criminal cases before the Supreme Court.

QUESTION: 12. I understand that the Department's current position regarding 18 U.S.C.A. § 3501 (West 1985), as you articulated it before the Subcommittee, is that it will not raise the statute outside of the Fourth Circuit unless the Supreme Court overrules Miranda v. Arizona, 384 U.S. 436 (1966). As you know, the Supreme Court has a policy of not considering questions not raised in the lower Federal courts. If the Department will not raise the issue of § 3501's constitutionality, how does it ever expect the Supreme Court to consider the issue without the involvement of amici curiae?

ANSWER: The issue is presently before the Supreme Court in the Dickerson case.

QUESTION: 13. You stated in prepared testimony for this Subcommittee's oversight hearing on § 3501 that, in the Fourth Circuit, the Department has "instructed federal prosecutors to bring the decision in United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), and § 3501 to the attention of the district courts whenever a Miranda violation is alleged." Does that mean that Federal prosecutors will argue before the courts in the Fourth Circuit that § 3501 is constitutional and should be applied to admit voluntary confessions?

ANSWER: In a memorandum from the Criminal Division sent to all United States Attorneys in the Fourth Circuit and to all Criminal Division Section Chiefs, the Department stated its view that "when a defendant seeks the suppression of a statement allegedly obtained in violation of Miranda, prosecutors in the Fourth Circuit discharge their professional and ethical obligations if they call the district court's attention to the existence of Section 3501

and the Dickerson decision. The prosecutor should acknowledge that Dickerson is controlling authority insofar as it holds that '§ 3501, rather than Miranda, governs the admissibility of confessions in federal court.' The prosecutor should also advise the court, however, that the Department disagrees with Dickerson's holding, and that the decision remains subject to possible further review in the . . . Supreme Court. Moreover, prosecutors should urge district courts to rule on the defendant's claim under traditional Miranda analysis as well."

QUESTION: 14. I appreciate that the Department will bring the Dickerson decision to the attention of the Federal courts in the Fourth Circuit. However, the Tenth Circuit in United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975) and the District of Utah in United States v. Rivas-Lopez, 988 F. Supp. 1424 (D. Utah 1997), have also held that § 3501 is constitutional and should govern the admissibility of voluntary confessions in Federal court. Do you intend to institute the same policy in the Tenth Circuit as you have announced in the Fourth Circuit?

ANSWER: We do not. We believe the language in Crocker is properly characterized as dictum, which the Tenth Circuit has never relied on in any subsequent case. Rivas-Lopez is a district court decision that cannot bind the circuit.

QUESTION: 15. In your prepared statement for this Subcommittee's oversight hearing on § 3501, you mentioned that "it is an infrequent occurrence that a case is lost on Miranda grounds." Can you provide the Subcommittee data on how often a case is lost because of Miranda's exclusionary rule?

ANSWER: On November 5, 1997, in an addendum to a letter to Senator Fred Thompson, a copy of which is attached, we listed all adverse Miranda rulings reviewed by the Solicitor General between January 1, 1989 and November 1, 1997. We note, however, that the government did not necessarily lose each of these cases simply because statements were suppressed. The government is frequently able to proceed with the prosecution without the suppressed statements.

Upon searching our adverse decision files from November 1, 1997, to November 10, 1999, we have found 19 additional cases in which statements were suppressed on Miranda-related grounds. Five cases (## 1, 4, 11, 17, and 18) are pending on the government's appeal, and thus there has not yet been a final disposition of the charges. Three cases are awaiting retrial or further proceedings in the district court (## 2, 8, and 15). In two cases, the government convicted the defendant at trial without the suppressed statements (## 7 and 12). In one case (# 19), the defendant pleaded guilty to the charge in the indictment. In four cases, the government resolved the charges through a plea agreement (## 5, 6, 9, and 13). And finally, in three cases, the government dismissed the charges (## 3, 10, and 14). The cases are listed below.

1. United States v. Peter Paul Hudson & Tammy Riness, Cr. No. 99-163-LH (D.N.M. May 17, 1999) (district court suppressed statements elicited during a routine inspection at a fixed border checkpoint) (appeal pending).

2. United States v. Anibal Ortiz, 177 F.3d 108 (1st Cir. (D.Mass.) June 2, 1999) (court of appeals found an Edwards violation; officers initiated conversations after defendant asserted his Miranda rights) (defendant convicted on one of two counts of money laundering at February 2000 retrial).

3. United States v. Ronald Gardner, No. 3:97CR244-Mu (W.D.N.C. March 9, 1999) (district court discredited government witnesses and found that defendant had not voluntarily waived his Miranda rights) (government dismissed indictment).

4. United States v. Zhi Man Liu and Tommy Chen, No. CR 98-0162 (N.D. Calif. Dec. 9, 1998) (district court found that defendant was in custody and entitled to Miranda warnings; court of appeals affirmed) (case pending on remand in district court; government weighing whether to seek reconsideration of Miranda ruling based on recent 9th Circuit decision).

5. United States v. Walter Fleming, No. 98-0223 (D.D.C. Dec. 11, 1998) (district court held that request for consent to search after assertion of Miranda rights violated Edwards) (defendant pleaded guilty to charges in the E.D. Va. and agreed to cooperate in return for dismissal of charges in D.C.).

6. United States v. George Chamberlain, 163 F.3d 499 (8th Cir. (D. Minn.) Dec. 24, 1998) (holding that the defendant was in custody and hence entitled to Miranda warnings) (following vacation of his conviction, defendant pleaded guilty to one child pornography count and was sentenced to 51 months' imprisonment).

7. United States v. Clara Castano, No. 98-8065-CR-Ryskamp (S.D. Fla. Oct. 16, 1998) (district court found that defendant was in custody and hence entitled to Miranda warnings) (convicted following a jury trial without suppressed statements; sentenced to 135 months' imprisonment).

8. United States v. Willie Tyler, 164 F.3d 150 (3d Cir. (M.D. Pa.) Dec. 15 1998) (court of appeals found an Edwards violation and remanded for further proceedings) (case set for retrial in April 2000).

9. United States v. Errolyn Cherrymae Romero, No. CR97-1264 (C.D. Calif. July 14, 1998) (district court held that officer should have reissued Miranda warnings after polygraph exam) (tried to a hung jury (11-1 for conviction), followed by a guilty plea to the conspiracy charge; defendant was sentenced to 30 months' imprisonment).

10. United States v. Jose Rosario Garibay, 143 F.3d 534 (9th Cir. (S.D. Calif.) May 5, 1998) (court of appeals held that defendant's waiver of Miranda rights was not knowing and intelligent) (retrial ended with a hung jury, after which the government dismissed the charges).

11. United States v. Robert Dice, No. CR-2-96-136 (S.D. Ohio Nov. 24, 1997) (district court suppressed statements because of Edwards violation; court of appeals ordered suppression of physical evidence based on violation of knock-and-announce requirement) (government dismissed charges based on court of appeals' ruling, though we could have proceeded without the defendant's statements)

12. United States v. Khalid Bey, No. 97-191 (E.D. Pa. Mar. 10, 1998) (the district court found that the defendant was in custody for Miranda purposes), affirmed, 168 F.3d 479 (3d Cir. 1998) (Table) (defendant was convicted at trial despite suppression of statements).

13. United States v. Herman Joseph Byram, Jr., 145 F.3d 405 (1st Cir. (D. Me.) May 20, 1998) (district court suppressed unwarned statement finding that defendant was in custody for Miranda purposes, and suppressed subsequent testimony on ground that it was the fruit of the Miranda violation; government appealed suppression of testimony only; court of appeals affirmed) (on remand, defendant pleaded guilty as charged and was sentenced to 96 months' imprisonment).

14. United States v. Jesse Gary Soliz, No. 96-50685 (9th Cir. (S.D. Calif.) Nov. 12, 1997) (court of appeals held that defendant had not waived his Miranda rights) (the government dismissed the case because we could not proceed without the confession).

15. United States v. Leon Thomas, Jr., No. CR 99-0045 CRB (N.D. Calif. Sept. 3, 1999) (defendant was read his Miranda rights, but district court found that the government failed to establish defendant's oral waiver of rights) (no appeal; defendant pleaded guilty to armed bank robbery).

16. United States v. Anthony Zerbo, NO. 98 Cr. 1163 (RPP) (S.D.N.Y. Oct. 8, 1999) (court found that defendant, who has a low IQ and a history of mental illness, did not voluntarily waive his Miranda rights) (no appeal; defendant entered into deferred prosecution agreement whereby charges will be dismissed on 11/1/00 if defendant complies with all conditions).

17. United States v. Thomas Melendez Sanchez, No. 98-129 (SEC) (D.P.R. July 19, 1999) (defendant was entitled to Miranda warnings prior to testifying pursuant to a subpoena in a bank robbery trial of others) (appeal pending).

18. United States v. Juan Felipe Bermudez, No. 99-20071-M1 (W.D. Tenn. July 21, 1999) (defendant was in custody and hence entitled to Miranda warnings; also suppressing post-Miranda statement as fruit of unwarned statement) (appeal pending).

19. United States v. Jorge Romero, No. CR-99-0174-KKK (E.D. Calif. Sept. 10, 1999) (statement by police was tantamount to interrogation necessitating Miranda warnings) (no appeal; defendant pleaded guilty as charged to violating 18 U.S.C. 922(g) and was sentenced to 46 months' imprisonment).

QUESTION: 16. I am concerned about the reduction in gun prosecutions during much of the Clinton Administration. I understand that during the Bush Administration, Attorney General Thornburgh issued a memorandum ordering U.S. Attorneys to pursue certain Federal firearms charges and not to drop them as part of plea bargains. I also understand that Attorney General Reno modified this policy to give U.S. Attorneys more discretion in whether to prosecute these gun offenses. Do you think that the change in the Thornburgh memo contributed to the decline in firearms prosecutions during the Clinton Administration?

ANSWER: We have pursued a strategy of collaborative partnerships between federal, state and local law enforcement agencies in order to bring all resources to bear on violent crime, including gun crime. These partnerships are effective and make sense. Since 1992, the number of violent crimes committed with firearms – including homicides, robberies and aggravated assaults – has dropped by more than 35%, and the nation's violent crime rate has dropped 20% since 1992.

Collaboration among the different levels of law enforcement allows each community to identify their crime problems and to implement the techniques that are most likely to have a positive impact on these problems, and allows federal enforcement tools to be used strategically where they will have the greatest impact.

Excessive focus on counting the number of federal firearms cases overlooks the fact that both federal and state authorities prosecute gun cases, and that federal authorities generally focus on the worst type of offenders.

Although the number of federal prosecutions for lower-level offenders (persons serving sentences of 3 years or less) is down, the number of higher-level offenders (those sentenced to 5 or more years) is up by more than 40 percent since 1992 (from 1058 to 1497 in 1999), according to statistics from the Administrative Office of U.S. Courts.

At the same time, the total number of federal and state prosecutions is up sharply – 22 percent more criminals were sent to prison for state and federal weapons offenses in 1996, the most recent year for which data is available, than in 1992 (from 20,681 to 25,186).

The increased collaboration among federal, state, and local law enforcement has resulted in: (1) a more efficient distribution of prosecutorial responsibilities, (2) a steady increase in firearms prosecutions on a cumulative basis and, most importantly, (3) a sharp decline in the number of violent crimes committed with guns.

QUESTION: 17. Earlier this year, the Justice Department announced that "an estimated 312,000 felons, fugitives and other prohibited people were prevented from buying handguns during the Brady Act's interim period from 1994 through 1998." It is my understanding that in order to be prevented from buying a handgun under the Brady Act, a person must necessarily have made false statements concerning whether he is in a prohibited category. How many of the 312,000 persons mentioned above were prosecuted under Federal Brady Act penalties, including 18 U.S.C.A. § 922 (a)(6) (West 1976 & Supp. 1999)?

ANSWER: First, it is important to understand that a person may be prevented from obtaining a firearm without making a false statement. While it is true that a gun buyer who makes a false statement and is discovered to be prohibited through a background check will be prevented, a person who tells the truth about his disqualification also will be prevented. In addition, a person may fill out a Brady form falsely but without the intent necessary to form the basis for prosecution, while another person may intentionally lie and get away with it because the records relied upon for the background check are incomplete. It is difficult to ascertain an exact number of prosecutions because the districts may report these prosecutions under 18 U.S.C. §§ 922(a)(6), (s), (t) or under the corresponding penalty provisions found in 18 U.S.C. § 924. Moreover, docketing practices have varied across the districts and full subsections have not always been entered into the system. Before the National Instant Criminal Background Check System became operational on November 30, 1998 — thus increasing the number of denials reported to the federal government — officials from the Departments of Justice and Treasury identified appropriate categories of cases meriting prosecution and developed a referral system of such cases. In addition, as a result of a Presidential directive, our agencies are working on an Integrated Firearms Violence

Reduction Strategy which includes false form cases as a tool to reduce violent crime. We will closely monitor the progress of enforcement efforts in this area in the upcoming year.

QUESTION: 18. Press reports have alleged that Benjamin Nathaniel Smith, who murdered several individuals in Illinois over the July 4 weekend, purchased the weapons used in the crimes from an unlicenced gun dealer. However, this occurred after Mr. Smith had been refused purchase of a gun at a licensed dealer because he failed the required background check. Do you think that incidents like that involving Mr. Smith could be avoided if people who attempt to purchase firearms in violation of the Brady Act, including § 922(a)(6), are not simply refused purchase of a gun but are also prosecuted?

ANSWER: As you note, the Brady Law operated successfully to prevent the licensed gun dealer from transferring a gun to Mr. Smith. Unfortunately, an unlicensed seller, who was not required to run a Brady check, sold a gun to Mr. Smith less than a week later. It appears that Mr. Smith began his rampage immediately thereafter. Federal, state and local law enforcement authorities make every effort to identify, arrest and prosecute dangerous gun offenders -- including those who unlawfully possess firearms, or who knowingly make false statements in an attempt to acquire a firearm -- but given the timeframes in this matter, law enforcement intervention was apparently not possible.

QUESTION: 19. According to a recent press report, 6,100 students were expelled in the 1997-98 school year for possession of a gun. Kenneth Cooper, Youth Violence Down, Study Finds, Wash. Post, Aug. 4, 1999, at Al. Why were there only eight prosecutions under 18 U.S.C.A. § 922 (q) (West Supp. 1999))[possession of a firearm on school grounds) in 1998 when such a comparatively large number of students were expelled for such activity?

ANSWER: The vast majority of any criminal cases arising from the students' possession of weapons are handled by the local authorities. This is appropriate because most violent crime cases are investigated and prosecuted at the state or local level, and our use of federal statutes should not compete with or supplant the traditional local response. Rather, the appropriate federal role in prosecuting violent crime is to assist state and local authorities by providing for complementary federal prosecutions of the most dangerous violent offenders in each community.

Federal law pertaining to juvenile offenders, in fact, presumes that juveniles are best handled by the state, and contains strict requirements that must be met before federal jurisdiction may be asserted over a juvenile. And, although federal law does allow a juvenile to be prosecuted as an adult for unlawfully possessing a handgun, a juvenile cannot be prosecuted as an adult for carrying or discharging a firearm in a school zone. In many cases, therefore, state laws may provide a more appropriate sanction than federal law.

In addition, state and local systems are usually better equipped to handle juveniles. Those systems have detention facilities, probation offices, counseling services, and other programs for juveniles that simply do not exist in the federal system. Handling all of these cases federally would require substantial costs to duplicate these facilities and services in the federal system and would impose an additional burden on federal prosecutors which might well require reducing the number of criminal prosecutions in other areas.

QUESTION: 20. As you know, the Department only requested $5 million for fiscal year 2000 to support its multi-agency task forces that are enforcing Federal gun laws. In view of the unqualified success these programs have had in reducing gun-related crime in Richmond and Boston, do you agree that the Senate's $25 million appropriation for firearms prosecutions is a more appropriate level of funding?

ANSWER: The $5 million we requested last year was not intended to be the sole source of funding for firearms prosecutions for U.S. Attorneys' Offices, but was intended to augment current funding already applied for this purpose. We note that the total final appropriation for FY 2000 funding for the U.S. Attorneys' Offices, who prosecute federal firearms offenses in addition to a myriad of other important offenses, was $112.8 million less than the Administration's budget request. We also note that the Department's budget request for FY 2001 seeks an increased $215.9 million to continue vigorously pursuing those who violate our nation's gun laws and to provide state and local law enforcement with assistance and technology to solve and prosecute gun crimes.

QUESTION: 21. In your March 25 testimony before the House Appropriations Committee, you mentioned several performance measures of effectiveness in support of your goal of substantially reducing drug-related crime and violence. However, absent from that list of performance measures is the number of prosecutions of Federal firearms laws. Do you believe that Federal gun prosecutions should be an integral part of the Department's Drug Control Strategic Plan?

ANSWER: One of the goals of our Drug Control Strategic Plan is to increase the safety of America's citizens by substantially reducing drug-related crime and violence. Objectives within this goal include dismantling gangs and other drug trafficking organizations and apprehending violent fugitives. Federal firearms laws are certainly tools for achieving these objectives and we have been using them vigorously to reduce violent crime and will continue to do so. Our efforts should not be measured merely by the number of gun prosecutions brought. Our success is reflected by the reduction in violent crime and an improved quality of life in communities across our nation.

QUESTION: 22. Gun prosecutions are not the only type of prosecutions that have decreased in recent years. Consider carjacking, for example. Earlier this year, the Justice Department reported that there were approximately 49,000 carjackings per year from 1992 to 1996. However, the number of Federal prosecutions for carjacking under 18 U.S.C. § 2119 (Wes Supp. 1999) has dropped in half since 1994, from 279 that year to

135 last year. Why have Federal carjacking prosecutions declined so sharply when the number of carjackings has, by the Department's own admission, remained steadily high?

ANSWER: Congress amended the carjacking law in 1994. Prior to the amendment, prosecutors were not required to prove that the defendant carjacked the automobile with the intent to cause death or serious bodily injury. This change in the law significantly impaired our ability to bring cases in federal court. We strongly support the provision in Senate bill S.254 – currently in conference – that would delete this intent requirement and remove this obstacle to prosecution of carjacking offenses.

QUESTION: 23. I believe that an important reason that crime rates are on the decline is because we are putting more violent offenders behind bars and keeping them there, so they cannot constantly commit more crimes. Do you agree that building prisons to incarcerate violent and repeat offenders is helping to reduce crime rates.

ANSWER: We believe that the reduction in the violent crime rate is a result of a number of factors. In addition to more prosecutions and tougher sentences, these also include more police officers on the streets, better prevention programs, the effect of the Brady law, a healthy economy, and a new approach to crime fighting that involves a closer working relationship between communities and federal, state, and local law enforcement.

QUESTION: 24. In my view, an important way the Federal government can help reduce crime is to provide the states Truth in Sentencing grants. Unfortunately, the President's budget proposes to end funding for the Truth in Sentencing Incentive Grant Program, which has provided hundreds of millions of dollars per year for States to provide more prison space to keep violent criminals off the street. Why does the Administration not support reauthorizing Truth in Sentencing grants?

ANSWER: In 1999, $720,500,000 was appropriated to fund programs under VOI/TIS. Of this amount, $25,000,000 was available for the Cooperative Agreement Program (CAP), $165,000,000 was available for the State Criminal Alien Assistance Program (SCAAP), and the remainder, $530,500,000, was available for the Violent Offender Incarceration/Truth-in-Sentencing (VOI/TIS) State Prison Construction Grant Program (State Prison Grants).

The Administration's 2000 budget requested a total of $75,000,000 for VOI/TIS programs. Of this amount, $35,000,000 was requested for CAP, $34,000,000 for constructing correctional facilities on Indian tribal lands (State Prison Grants), and $6,000,000 for a new initiative entitled "Prisons at Work" administered by NIJ.

In 2000, $653,533,000 was made available under VOI/TIS. Of this amount, $429,533,000 is available to states to build and expand prisons, and $34,000,000 is available for the

construction of jails on Indian reservations (State Prison Grants). There is also $165,000,000 available to states for SCAAP, and $25,000,000 for CAP.

In the 2001 budget, we are requesting $75,000,000 to fund VOI/TIS programs: $34,000,000 will be for construction of jails on Indian reservations, $35,000,000 will be for CAP, and $6,000,000 will be for the Mental Health of Offenders Program. The Administration's 2001 budget also requests $2,400,000,000 to construct, expand, activate, and repair federal prisons, including the cost of housing D.C. felons, for whom the federal government (the Federal Bureau of Prisons) now has responsibility.

QUESTION: 25. Last week, this Subcommittee held a hearing on Federal asset forfeiture. If the Civil Asset Forfeiture Reform Act (H.R. 1658) were to become law in the form in which it passed the House of Representatives, what impact would this have on the Department's use of Federal asset forfeiture laws as a weapon against drug trafficking and money laundering?

ANSWER: If passed, H.R. 1658 would seriously undercut the ability of law enforcement to forfeit property from drug dealers, money launderers, terrorists, alien smugglers, major white collar criminals and other lawbreakers. H.R. 1658 would seriously weaken existing forfeiture laws, encourage the filing of thousands of frivolous claims, and place unnecessary procedural hurdles in the paths of federal prosecutors, thereby undercutting law enforcement efforts aimed at drug trafficking and money laundering and giving unintended relief to drug traffickers, money launderers and other criminals and criminal organizations a that commit crime for profit.

As discussed more fully in response to Question 27, raising the burden of proof on the government in civil forfeiture cases to "clear and convincing evidence" would have a particularly devastating effect on the government's ability to establish the forfeitability of the property in complex drug and money laundering cases by making it much more difficult for law enforcement to establish that the property sought to be forfeited was derived from, or used to commit, a crime.

Another provision of H.R. 1658 that would be particularly harmful to law enforcement's use of forfeiture as a weapon against drug trafficking and money laundering is the provision that would require the government to return seized property to criminals pending trial in the forfeiture case in order to avoid a "hardship." Cars, boats, aircraft and other conveyances used by drug traffickers and money launderers to transport drugs and cash would have to be returned pending trial if the individual from whom it was seized claimed that the deprivation of the property resulted in a "hardship." Some property, especially cash, would undoubtably disappear before trial if left at the disposal of criminals; vehicles and other conveyances could be put back into criminal use by drug traffickers. This provision would seriously undercut law enforcement efforts against drug trafficking and money laundering and, in particular, cause enormous problems for the Immigration and

Naturalization Service (INS), which seizes approximately 27,000 vehicles annually, mostly along the Southwest Border, as part of border interdiction program. H.R. 1658 could compel INS to return a large number of seized vehicles to smugglers, severely hampering its anti-smuggling program, or to contest a huge number of additional claims (each of which would have to be heard and decided within 30 days) in federal court, potentially overwhelming both the INS and the judiciary.

In his testimony before this Subcommittee, Deputy Attorney General Eric Holder identified other provisions of H.R. 1658 that would have a serious, negative impact on legitimate law enforcement efforts against drug trafficking, money laundering and other criminal activity through the use of civil forfeiture. H.R. 1658 goes well beyond what is necessary or reasonable to ensure fairness and due process for innocent property owners, and would seriously harm law enforcement efforts against drug trafficking and money laundering.

QUESTION: 26. Under the House-passed asset forfeiture legislation, anyone who asserts an interest in seized property can ask the court to provide them free legal counsel, and the cost bond is eliminated. What impact would these changes have on the number of frivolous claims?

ANSWER: H.R. 1658 will encourage the filing of thousands of frivolous claims, not only by criminals, but also by their family members, friends and associates.

Under current law, a person contesting a forfeiture must file a 5% cost bond. While this requirement can be waived in *In forma pauperis* cases, so that it does not discourage challenges by truly indigent persons, it does help discourage people from filing frivolous challenges in the hope that the government will forego the forfeiture to avoid storage and maintenance costs on low-value property. The DEA, FBI and INS conduct 45,000 seizures every year. In 1996, for example, over 80 percent of DEA and FBI seizures involved a related arrest or prosecution and over 85 percent of all DEA and FBI cases were uncontested; the costs of litigation and the low probability of success undoubtedly combined to discourage frivolous claims in those cases.

The House-passed bill, H.R. 1658, not only eliminates the cost bond requirement but, in effect, requires federal agencies to publish ads stating that *anyone* interesting in contesting the forfeiture may do so free of charge. It would also entitle each claimant to request a free lawyer. H.R. 1658 also holds the government to a new and unusually high burden of proof -- clear and convincing evidence -- in forfeiture cases. By making it far easier and less expensive to file claims, and to obtain a taxpayer-paid attorney, H.R. 1658 would remove the disincentive to file frivolous claims.

For example, suppose a car containing three individuals is stopped on a highway, and a large quantity of cash is discovered in a bag in the trunk. The car is borrowed from a friend of the driver. They contend that the bag was given to them by a friend of one of the passengers, for delivery to another person in their destination city. Under H.R. 1658, all three

persons in the vehicle, and the owner of the vehicle, and the person who gave them the bag, and the individual to whom the bag was to have been delivered, a total of six persons, would be entitled to submit a claim for all or part of the money, and to request a free attorney at taxpayer expense. Multiplied by 45,000 cases a year, the potential for abuse, and for jamming both law enforcement agencies and the courts, with frivolous claims is obvious.

QUESTION: 27. The House-passed asset forfeiture bill would also change the government's burden of proof in civil forfeiture cases to clear and convincing evidence. What impact would this have on your efforts to seize the assets of major international drug cartels?

ANSWER: Elevating the government's burden of proof in civil forfeiture cases to "clear and convincing evidence" would have a devastating effect on the government's ability to establish the forfeitability of the property in complex drug and money laundering cases and would deprive law enforcement of one of its most effective weapons in our Nation's war on drugs.

Forfeiture enables law enforcement to take advantage of one of the greatest problems faced by drug cartels -- managing the cash proceeds of their criminal operations. Unlike legitimate businessmen who can simply deposit their cash proceeds in a bank, drug cartels seek to avoid creating a paper trail, by moving their money via couriers through airports, down highways, and in containers. Or they have to run it through otherwise legitimate businesses, off-shore banks and shell corporations, money remitters, and accounts held by nominees, and ultimately sell it on the Colombian Black Market Peso Exchange, all to conceal or disguise the connection between the criminal proceeds and the underlying crime. That is the very definition of money laundering. See 18 U.S.C. § 1956(a)(1)(B)(i). Money launderers employed by the drug cartels work long and hard to hide the connection between the crime and its proceeds. Raising the government's burden of proof in civil cases would have the effect of rewarding drug cartels for their money laundering efforts by making it much more difficult for law enforcement to establish that the property sought to be forfeited was derived from, or used to commit, a crime.

Significantly, in the criminal forfeiture context, Congress has recognized that the nexus between the property and the crime need only be shown by a preponderance of the evidence. In certain drug cases there is even a statutory *presumption* that the money is drug proceeds. *See* 21 U.S.C. § 853(d).

Statutes requiring the government to meet a "clear and convincing" standard are extremely rare. See e.g. 18 U.S.C. § 3524(e)(1) (stripping non-custodial parent of visitation rights with child when custodial parent is relocated as a protected witness). In civil cases, such as those filed under the False Claims Act, 31 U.S.C. § 3729, and the bank fraud statutes, 12 U.S.C. § 1833a, the "preponderance" standard is routinely applied. Even when the case is based on a criminal violation, if the government seeks civil sanctions separately from

criminal penalties, the standard is preponderance of the evidence. (Sanctions for knowingly overbilling government programs are generally sought under the False Claims Act, 31 U.S.C. § 3729). The same is true when banks are accused of money laundering, or bankers are accused of bank fraud. See 18 U.S.C. § 1956(b) (civil money laundering enforcement); 12 U.S.C. § 1833a (bank fraud). We believe the "preponderance of the evidence" standard is the appropriate standard for the government to meet in civil forfeiture cases.

QUESTION: 28. Criticism of Federal forfeiture law has focused on civil forfeiture rather than criminal forfeiture. Yet, the Department's court filings for civil forfeitures have decreased considerably in recent years, from over 5,900 in 1990 to less than 2,400 in 1997. Has the Justice Department attempted to make greater use of criminal forfeiture in recent years as an alternative to civil forfeiture, and if so, why?

ANSWER: While the Department of Justice does not have a formal policy with respect to the use of criminal forfeitures as opposed to civil forfeiture, where both types of forfeiture are authorized by statute for a particular offense, the Department does encourage federal prosecutors to make greater use of criminal forfeiture. Through the Criminal Division's Asset Forfeiture and Money Laundering Section and the Executive Office for U.S. Attorneys' Office of Legal Education, the Department offers criminal forfeiture training to Assistant U.S. Attorneys, legal support staff and federal law enforcement agents, including at the National Advocacy Center in Columbia, South Carolina. Federal prosecutors are encouraged to consider the use of criminal forfeiture in the context of all criminal prosecutions where it is permitted by statute. Case filings for fiscal year 1998 indicate that of the 3, 862 forfeiture cases filed by United States Attorneys' offices, 1809 were brought as criminal forfeiture cases (46.8%), while 2053 were brought as civil forfeiture cases (53.2%).

The principal impediment to more widespread use of criminal, as opposed to civil, forfeiture by federal prosecutors is the lack of statutory authority. Criminal forfeiture statutes are not comprehensive. Forfeiture in gambling, counterfeiting and alien smuggling cases, and almost all forfeitures of firearms, for example, must be done civilly, simply because there is no criminal forfeiture statute. Under current law, 28 U.S.C. § 2461(a), if a statute provides for forfeiture without prescribing whether the forfeiture is civil or criminal, it is assumed that only civil forfeiture is authorized. The majority of federal forfeiture statutes fall into this category. In such cases, the government may not pursue forfeiture as part of the criminal prosecution, but must file a parallel civil forfeiture case in order to prosecute an individual and forfeit the proceeds of the offense. To encourage greater use of criminal forfeiture, we strongly support amending existing forfeiture law to authorize criminal forfeiture whenever any form of forfeiture is otherwise authorized by statute.

QUESTION: 29. As you know, the McDade Amendment, 28 U.S.C.A. § 530B (West Supp. 1999), which requires a Federal prosecutor to comply with "state laws and local federal court rules" in each state where he "engages in that attorney's duties," went into effect on April 19 . How has the Department worked to help Federal prosecutors

comply with this law, and what difficulties have been encountered in the process?

ANSWER: As part of the Department's implementation of Section 530B, the Department has taken a number of steps to ensure compliance with the new law.

First, on April 19, 1999, the Department established the Professional Responsibility Advisory Office (PRAO) to provide guidance and assistance to Department attorneys on matters of professional responsibility, particularly those issues arising under Section 530B. Every Department component and each United States Attorneys Office has at least one Professional Responsibility Officer (PRO) who assists Department attorneys on ethical issues. The primary function of the new PRAO will be to provide an additional resource to the PROs and to ensure consistent policies and practices Department-wide. In addition, the PRAO will: 1) serve as a repository of information concerning professional responsibility issues; 2) develop training materials for Department attorneys; 3) distribute a newsletter to Department attorneys concerning developments in the law; and 4) coordinate the Department's relationships with state bar associations, state disciplinary authorities, and standards setting organizations.

As of December, 1999, the PRAO has received over 400 inquiries concerning professional responsibility issues. These statistics do not reflect the many issues resolved by individual attorneys, supervisors, or PROs in Department components or the United States Attorneys Offices.

Second, the Department issued an Interim Final Rule containing regulations to implement Section 530B. Those regulations define the scope of Section 530B and seek to provide guidance to Department attorneys about what rules apply to their conduct.

Third, the Department conducted training of all Department attorneys concerning the requirements imposed by Section 530B.

Further, the Department has encountered difficulties in complying with Section 530B because most state bar rules have not been interpreted as applying to government attorneys and are vague, so attorneys simply do not know if their conduct is permissible or not; not surprisingly that creates a tremendous chilling effect and interferes with our ability to enforce the law. For instance, many jurisdictions have established by case law an "authorized by law" exception to the rule which prevents contact with a represented person. Generally, the law enforcement exception is recognized in non-custodial, pre-indictment situations. It is, however, unclear where the line is properly drawn under this exception. Courts have not drawn bright lines, while recognizing the conflicted and confusing nature of the judicial precedents. The failure to have clear guidance for Department attorneys makes it difficult, if not impossible, for us to undertake investigations in certain cases in a manner that we are confident comports with the relevant anti-contact rule. Private attorneys are not faced with this problem because the exception applies to legitimate law enforcement efforts.

The uncertainty is increased because we must frequently compare conflicting bar rules. Department attorneys, who are often licensed in multiple states, working in other states, and supervising investigations that span many states, must engage in complex analysis to determine what rules should apply to particular conduct. The Department's regulations implementing the McDade Amendment provide guidance to attorneys, but the area of choice-of-law with respect to state ethics rules remains complex. Department attorneys often must seek guidance in determining what rules apply. The clear impact of this is to delay the investigation.

QUESTION: 30. Do you remain concerned about the possibility that the burden of complying with the McDade Amendment will interfere with complex undercover, multi-jurisdictional investigations? Will you bring to this Subcommittee's attention problems you encounter in attempting to comply with McDade?

ANSWER: The Department's assessment of the full impact of Section 530B is ongoing, and there are many issues about the scope and interpretation of Section 530B that are currently in litigation or are likely to be litigated in the near future. To date, however, the impact of the legislation has been for the most part exactly what the Department predicted:

1) The Amendment creates a rift between agents and prosecutors.

The Amendment, in practice, restricts prosecutors from supervising agents. The rules of professional conduct dealing with attorney ratification, supervision and "alter egos" are vague and provide little guidance on the circumstances which create liability on the part of the Department attorney for actions of investigative agents. Because of that uncertainty, Department attorneys often feel obliged to restrict the activities of law enforcement agents, even though those activities are consistent with federal law, simply because they fear that a state disciplinary board might hold them accountable under the rules of professional conduct. As a result, we have seen a rift between government attorneys and investigative agents as investigators develop cases on their own, without seeking input and guidance from Department attorneys, in order to avoid the restrictions prosecutors may be subject to under ethics rules. This is not a helpful development in law enforcement because it is critically important that investigators and prosecutors work together, particularly in complex cases.

Moreover, because Section 530B limits the ability of prosecutors to speak with those who may have evidence of wrongdoing, particularly corporate employees, prosecutors have no choice but to use grand jury subpoenas to obtain the evidence, although a simple conversation might provide all that was needed. The Department believes that Section 530B is causing an increase in the use of grand jury subpoenas, but it does not yet have empirical evidence to support this claim.

2) The Amendment has caused tremendous uncertainty.

Many state bar rules have not been interpreted, leaving their scope and meaning vague, especially as applied to government attorneys. Consequently, government attorneys are finding it extremely difficult to know if their conduct is permissible or not. And even in instances where a state's rules have been interpreted, those interpretations often require attorneys to conduct themselves in a manner which is more stringent than the Constitution or federal law requires. For example, in Missouri, Oklahoma, New York and Florida, federal case law permits contacts with represented persons or with former corporate employees, but state ethics opinions or bar counsel have opined that it would violate their contacts rule if a contact occured. As a result, Department attorneys are discovering that compliance with constitutional standards or federal law is no guarantee that they will not be subject to disciplinary action. The end result is that they must, in some cases, either refrain from pursuing conduct which would be perfectly legitimate under federal law or seek an advisory opinion from the Department's Professional Responsibility Advisory Office with no guarantee that such an opinion will be sufficient to protect their licenses to practice law.

The uncertainty is increased because of the Amendment's lack of a choice-of-laws provision. As a result, Department attorneys must frequently compare and assess several state bar rules to determine whether such rules are in conflict and, if so, which rule should apply. As an example, in one case where a government attorney was contemplating the issuance of a subpoena to a lawyer suspected of criminal activity, the rules of professional conduct relating to attorney subpoenas and choice-of-laws and the law relating to the crime-fraud exception of four states had to be reviewed and analyzed before deciding whether the subpoena should issue. The situation is exacerbated when Department attorneys, who are often licensed in multiple states, work in other states, and supervise investigations that span several states (or, in some cases, foreign countries). Those attorneys must engage in a complex and time-consuming analysis to determine what rules govern particular conduct. Although the Department's regulation implementing McDade provides guidance to attorneys on this issue, the area of choice-of-law remains confusing and difficult, in part because the states' rules on choice-of-laws vary widely.

Moreover, the guidance that the Department provides is in a sense of less value to its attorneys than the guidance it can provide in other areas. In attempting to interpret Section 530B, we can advise Department attorneys as to our best reading of the statute, but we cannot protect them from the personal consequences if a court or disciplinary committee takes a different view. Under Section 530B, unlike any other statute to which the Department might object on policy grounds, it is the individual government attorney, rather than the government, could be subject to discipline for misconstruing the statute. Accordingly, especially with respect to close questions arising under the statute, attorneys are chilled even from engaging in conduct that is in the best interests of a case and consistent with what we believe to be a correct interpretation of the law.

3) The Amendment has prevented attorneys and agents from taking legitimate, traditionally accepted investigative steps, to the detriment of pending cases.

The most obvious effect on law enforcement has been in decisions by attorneys and investigators not to take particular investigative steps out of concern that such steps, including consulting with law enforcement agents who wish to question a represented person, obtaining evidence by consensual monitoring, or speaking with corporate employees about potential corporate misconduct, may violate some state's bar rules.

There have been several examples of the impact already. In some states, Department attorneys are refraining from authorizing consensual tape recordings by informants or law enforcement agents operating undercover. Federal law states that it is not unlawful for a person acting under color of law to intercept a wire, oral, or electronic communication, where one party has given consent. This is a routine law enforcement activity, referred to as consensual monitoring (18 U.S. C. Section 2511). However, one state (Virginia) has issued an ethics opinion and has verbally advised Department attorneys that, if they participate in or authorize a consensual monitoring, they will violate the state bar rule prohibiting the use of fraud or deceit. This state's interpretation appears to be similar to the highly restrictive (and, we believe, incorrect) view of the Oregon bar, which has interpreted its bar rules to prohibit attorney participation in sting operations. In Vermont there is a requirement that law enforcement obtain a search warrant before allowing a cooperating witness to wear a wire in a house.

In another state (California), Department attorneys have been reluctant to authorize consensual monitoring because of state criminal law or state ethics rules that could be interpreted to prohibit the conduct. Before proceeding, they contacted the local District Attorney and others to be sure they would not be prosecuted for their actions which were perfectly legitimate under federal law.

As noted above, state rules regarding contacts with represented persons continue to be a problem for Department attorneys. In many cases, the state rules are unclear or appear to prohibit tradition constitutionally permissible investigative activities. In several cases, Department attorneys have refrained from -- or been advised against -- be involved in questioning targets and witnesses represented by counsel or defendants, even though law enforcement agents are permitted to engage in the same conduct. The most difficult situation arises in investigations of corporate misconduct because the law concerning which employees a government may speak with is unclear. A good example of this is found in a California case where the Court concluded that the USAO had violated Rule 4.2 when an Assistant United States Attorney honored the request of a corporate employee to be interviewed in the absence of corporate counsel. The request was precipitated by the fact that the employee believed the corporate employers who were the targets of the investigation wanted her to provide the government with false information. The Court held that the government should not have interviewed the employee but should instead have placed her before the grand jury.

The Amendment has also limited the Department's ability to investigate continuing criminal activities and such offenses as witness tampering and obstruction of justice. For

instance, in one case, Department attorneys received information that an indicted defendant was seeking to intimidate or bribe a witness. The attorneys did not feel that they could, under the relevant federal and state interpretations of the state's ethics rules, use an informant to find out more about the defendant's plans.

Although state rules on communications with represented persons remain a significant problems, defendants are also using other bar rules offensively to claim that legitimate cases or evidence should be thrown out of court. In one case, defense counsel unsuccessfully sought dismissal of a drug indictment and other sanctions by claiming that, under the McDade Amendment, Department attorneys violated state ethics rules related to trial publicity because an arresting office – a state trooper – talked to a reporter.

In another instance, on the eve of trial a defendant filed a motion to dismiss the indictment based on the alleged failure of the government to present "material evidence" to the grand jury in violation of Rules 3.3(d) and 3.8(d). We argued that we had complied with existing Supreme Court law relating to the presentation of evidence to a grand jury and the court denied the motion.

4) Defendants are raising Section 530B in cases to interfere with legitimate federal prosecutions.

The Department believes that Section 530B should be interpreted not to conflict with other federal laws and not to elevate state substantive, procedural, and evidentiary rules over established federal law. The Department's regulations make clear that Section 530B mandates compliance with state bar ethics rules, not the host of other rules that govern each state's judicial system. Nonetheless, as the Department predicted, it is being forced to litigate such claims by defendants.

As we have noted in the past, the Department continues to litigate against the application of state bar rules that provide additional protections to attorneys (and not others) who are subpoenaed by federal prosecutors. These rules in our view give procedural or other advantages to attorneys and are not part of established federal law. This litigation is presently ongoing in Massachusetts (1st Cir.) and Colorado (10th Cir.) where the courts have taken a view inconsistent with the Department's view and inconsistent with the view of the Third Circuit (arising out of the Pennsylvania rules). These conflicting interpretations cause great uncertainty for Department attorneys, especially in instances where Department attorneys are licensed to practice in states whose rules have been interpreted differently.

The Department expects litigation concerning the McDade Amendment to be wide-ranging because defense counsel have every incentive to seek broad interpretations of the legislation. In one case currently being litigated, a defendant is arguing that Section 530B requires compliance with state procedural rules that prohibit or limit the removal of cases from state court to federal court.

Additionally, the United States District Court for the Northern District of West Virginia has already ruled that the McDade Amendment requires federal prosecutors to be licensed in the state in which they are stationed. Such a construction would render the McDade amendment inconsistent with the Attorney General's longstanding, statutory authority to send any attorney she designates to any court in the land. This issue is now being litigated on an expedited basis in the Court of Appeals for the Fourth Circuit. An adverse ruling could have an immediate detrimental effect on U.S. Attorney's Offices throughout the country which have literally hundreds of attorneys in their offices who are licensed in some other state or states.

Local rules permitting attorneys to seek admission to a court for an individual case do not solve this problem. Department attorneys stationed in D.C. travel on a routine basis to investigate and litigate cases throughout the country. Many state and federal court rules limit the ability of Department attorneys to request admission in these circumstances; in addition, since the rules generally require local counsel (i.e. the local United States Attorney's Office), the Department may be required to expend unnecessary additional resources.

QUESTION: 31. In the very recent case of Richardson v. United States, 119 S. Ct. 1707 (1999), the Supreme Court held that the Federal Continuing Criminal Enterprise Statute, 21 U.S.C.A. § 848 (West Supp. 1999), requires a jury to agree unanimously about which specific violations make up the "continuing series of violations" necessary for conviction. Do you think this decision will make convictions under this law much more difficult, and if so, why?

ANSWER: In our view, the Supreme Court's recent decision in Richardson will make it more difficult to obtain convictions under the Continuing Criminal Enterprise (CCE) statute. Before the Supreme Court's ruling, prosecutors generally believed that the unanimity requirement applied only to the basic elements of the CCE offense. The commission of a "series" of narcotics violations was meant to focus on the drug enterprise, not on the particular violations in the series of offenses. The pre-Richardson precept permitted the jurors to convict when they unanimously agreed that a defendant had engaged in a series of violations of the narcotics law, even if they were not in unanimous agreement as to each specific offense in the series of violations. This principle was in keeping with the general rule under most criminal statutes, which requires jurors to agree unanimously only on the existence of the elements, but not on all of the underlying evidence that establishes those elements. In contrast, after Richardson, juries will now have to be asked precisely and must agree unanimously on which specific violations make up the continuing series. This puts a heavier burden on the United States.

QUESTION: 32. Senator Hatch, myself, and others recently introduced S. 1428, the Methamphetamine Anti-Proliferation Act, which would, among other things, amend § 848 to make it clear that a conviction under this law only requires three violations of the drug statutes. In your opinion would this proposed change help correct some of the

difficulties that prosecutors might face after the Supreme Court's Richardson decision?

ANSWER: Yes. Section 6 of S. 1428, as introduced on June 22, 1999, proposes to amend the CCE statute by specifying that "a person is engaged in a continuing criminal enterprise if -- . . . (2) such violation is a part of a continuing series of 3 or more acts made punishable by this subchapter or subchapter II of this chapter -- . . . ." Emphasis added. This replaces the broad language currently in effect, which merely states "a continuing series of violations." The bill also proposes to add a new section (f) that specifies that the "section may not be construed to require, in any trial before a jury, unanimity as to the identities of -- (1) the predicate acts specified in subsection (c)(2); or (2) the other persons specified in subsection (c)(2)(A)." The language of Section 6 as written, if enacted into law, would appear to override the Richardson decision.

QUESTION: 33. Several States have passed laws that will allow them to collect DNA samples from subjects at the time of arrest. Do you think that the Federal government should collect DNA samples at the time of arrest? Why or why not?

ANSWER: While the department recognizes an investigative value to arrestee testing, it does not believe it is feasible at this time for several reasons. First, the national backlog of convicted samples that have not been tested and entered into CODIS exceeds 1.5 million samples. To add arrestee samples to the current backlog would put more pressure on an inadequate laboratory infrastructure. Rather than allocating resources to test arrestees, we believe funding should be focused on performing non-suspect case analysis i.e. those cases where a DNA sample is in the possession of law enforcement because it was recovered from a crime scene, but no suspect has yet been identified through normal investigative efforts.

Duplicate testing of offenders is a problem in the current offender database system. DNA testing of arrestees would present significant duplicative testing problems and waste financial resources. Purging from the database of individuals not ultimately convicted also requires significant coordination and resources. That coordination does not currently exist and should be developed through the current system first.

QUESTION: 34. The recently released "Cox Report," Report of the Select Committee on U.S. National Security and Military/Commercial Concerns With The People's Republic of China, H.R. Rep. No. 851, 105th Cong., 2d Sess. (1998) (declassified version released May 25, 1999), paints an alarming picture of a massive, unauthorized transfer of U.S. military-related technology to China in recent years. However, statistics from the Administrative Office of the U.S. Courts show that prosecutions under the Arms Export Control Act have declined from 54 to 1994 to 24 in 1998-a 55-percent drop-and that prosecutions under the Export Administration Act have remained in the single digits during this time. In light of these statistics, is the Department prepared to reevaluate its commitment to enforcement of our nation's export laws?

ANSWER: The Department of Justice is committed to the vigorous enforcement of our

export control laws. The Department's Criminal Division works closely with the United States Attorneys and investigative agencies to insure that investigations involving arms trafficking and exports of strategic technology receive appropriate attention and that actionable violations are aggressively pursued. Our record in recent years in this important area has, we believe, been exemplary. Since 1990, we have successfully prosecuted hundreds of individuals and entities for export offenses, including some of the largest and most well known domestic and international companies.

The Cox Report highlights a number of cases involving exports of U.S. arms and strategic technology to China. Many of the cases identified have already been prosecuted. Others, including alleged violations by Loral Space Systems, Hughes Communications, and McDonnell Douglass are under active investigation. These cases have been assigned a very high priority by the Department and in most instances are being worked jointly by attorneys from the United States Attorneys offices and our Criminal Division. The remainder of the cases involve licensed exports or are otherwise not appropriate for criminal prosecution.

In your letter, you note that the Administrative Office of U.S. Courts reports a 55% decrease in the number of cases prosecuted under the Arms Export Control Act between 1994 and 1998, and that prosecutions under the Export Administration Act during that period remained in the single digits. We cannot be certain, but part of this decrease may be the result of decisions to charge the offenses in small arms trafficking cases as violations of the federal firearms statutes, rather than the Arms Export Control Act. While our own statistics reflect that the number of "significant' export cases has also declined somewhat in recent years, we can assure you that the decrease is not due to a lack of commitment on the part of the Department to prosecute export offenses. Indeed, we suspect that much of the reduction can be attributed to changed licensing policies and the relaxation of controls on exports to certain destinations, as well as to an increased awareness on the part of the export community of the laws' requirements. The Department has and will continue to vigorously pursue violations of our export control laws.

QUESTION: 35. As you know, the Department has a long-standing policy to defend Acts of Congress before the Federal courts whenever reasonable arguments in support of their constitutionality exists. 5 Op. Off. Legal Counsel 25, 25-26 (1981). As you may also be aware, the Sixth, Seventh, and Tenth Circuits have upheld application of the Mandatory Victims Restitution Act of 1996, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1217, 1227-1241 (codified at 18 U.S.C. §§ 3556, 3563, 3611-3615, 3663-3664 (West Supp. 1999)) to pre-enactment conduct. See United States v. Newman, 144 F 3d 531 (7th Cir. 1998); United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999); United States v. Ledford, 127 F.3d 1103 (6th Cir. 1997) (unpublished disposition). In view of the fact that reasonable arguments clearly now exist that support this interpretation of the Act, are you considering rescinding the Department's 1996 directive that prohibits Federal prosecutors from arguing that the Act should apply to pre-enactment conduct?

ANSWER: The effective date provision of the Mandatory Victims Restitution Act of 1996 (MVRA) states that the statute applies in sentencing defendants whose convictions occur after the date of enactment, April 24, 1996, unless applying the statute is constitutionally impermissible. When the MVRA does not apply, its predecessor statute, the Victim & Witness Protection Act of 1982 (VWPA), applies and results in similar restitution awards in most cases. The courts of appeals have reached differing views on whether the Ex Post Facto Clause (U.S. Const., Art. I, § 9, cl. 3) precludes application of the MVRA to offenses committed prior to April 24, 1996. The answer turns on whether restitution under the MVRA is a criminal punishment or a tort remedy. The Seventh and Tenth Circuits view MVRA restitution as a tort remedy and reject Ex Post Facto arguments against application of the statute. See United States v. Newman, 144 F.3d 531, 537-542 (7th Cir. 1998); United States v. Nichols, 169 F.3d 1255, 1279-1280 (10th Cir. 1999). The Second, Third, Eighth, Ninth, Eleventh, and D.C. Circuits view MVRA-restitution as a criminal punishment and have therefore held that the application of MVRA to pre-enactment conduct violates the Ex Post Facto Clause. See United States v. Thompson, 113 F.3d 13, 14 n.1 (2d Cir. 1997); United States v. Edwards, 162 F.3d 87, 89-92 (3d Cir. 1998); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997); United States v. Baggett, 125 F.3d 1319, 1322 (9th Cir. 1997); United States v. Siegel, 153 F.3d 1256, 1259 (11th Cir. 1998); United States v. Bapack, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1998). The Department applies for restitution under the MVRA in the Seventh and Tenth Circuits. In the remaining circuits, including those circuits in which the Ex Post Facto issue has not yet been resolved, the Department follows the majority view and seeks restitution under the VWPA for pre-MVRA conduct. In most instances, application of the VWPA will not affect the victim's ability to collect restitution. We note that the question whether application of the MVRA to pre-enactment (pre-1996) conduct violates the Ex Post Facto Clause is of diminishing importance, and for this reason, Supreme Court review of the Ex Post Facto issue is unlikely.

QUESTION: 36. In your March 25 testimony before the House Appropriations Committee, you stated that the Criminal Division is "making our best efforts to work closely with foreign governments to expedite the [extradition] process and to accommodate their legitimate requests to us. I am aware of two particular cases, one involving a fugitive wanted for murder in Los Angeles and the other involving a fugitive wanted for murder in Florida. Both suspects are American citizens and have escaped to Mexico, whose government refuses to extradite them to the United States unless American prosecutors agree not to seek the death penalty in their prosecutions. In your view, is this a "legitimate request" that the Criminal Division should accommodate? If so, should the Department's fiscal year 2000 Performance Plan Goal of renegotiating outdated extradition treaties?

ANSWER: Like numerous other extradition treaties to which the United States is a party, our bilateral extradition treaty with Mexico contains a provision that allows the Government of Mexico to seek a pre-surrender assurance that the death penalty will not be applied to the extraditee, regardless of his or her citizenship. Moreover, Mexico's extradition law, consistent with its constitutional restriction on capital punishment, prohibits the surrender of

persons in death penalty cases without such an assurance.

In the arena of international law enforcement cooperation, the rules and laws we make for ourselves are not always found acceptable or appropriate by our neighbors and partners. In order to ensure that we have mechanisms in place that promote the interests of justice in the vast majority of cases, we are sometimes forced to make compromises, including the acceptance of death penalty provisions in many of our extradition treaties. Although improving our extradition relationship with Mexico and other countries throughout the world has been and will continue to be a top priority of the Department, we do not expect that Mexico, or any other country for that matter, would agree to amend its extradition treaty with the United States in ways that would directly conflict with provisions of its constitution and domestic law.

With respect to the California and Florida cases you mention, it is true that, in accordance with our bilateral extradition treaty, Mexico sought assurances that the death penalty would not be imposed against the American citizen defendants as conditions to their surrender to the United States. In the California case, Mexico declined to extradite David Alex Alvarez after the Los Angeles County District Attorney refused to waive the death penalty. The Mexican government, however, was able to subsequently prosecute Alvarez in Mexico, where he was convicted and received a 90-year prison sentence. In the Florida case, the State Attorney in Sarasota County provided the requested death penalty assurance, and Mexico surrendered Jose Luis Del Toro in July 1999 to the State of Florida, where he faces a potential sentence of life without the possibility of parole if convicted of the offenses for which he was extradited.

QUESTION: 37. During your confirmation hearing, the January 1998 report by the U.S. Conference of Mayors' Task Force on Drug Control was brought to your attention. In that report, the Conference noted wide regional disparities between the numbers of Federal drug prosecutions compared to the number of State and local drug prosecutions in selected U.S. cities. For example, while the ratio of Federal to State and local drug prosecutions was 8 to 1 in a relatively small city like San Diego, the ratio was 565 to 1 in Chicago, a much larger city. Have such regional disparities been narrowed since you became head of the Criminal Division?

ANSWER: We cannot directly answer the question as posed because we do not have the data from the selected U.S. cities that were highlighted in the U.S. Conference of Mayors' Task force on Drug Control Report (Task Force report) . However, the Executive Office for the United States Attorneys has reviewed the number of drug cases filed in each of the Judicial Districts where the cities from the Task Force report are located and their data shows an increase in the number of Federal drug prosecution in each city.

Additionally, the United States Attorney's Office for the Northern District of Illinois ("USAO") has launched the Chicago Federal Narcotics Initiative. In conjunction with the federal, state and local law enforcement agencies, as well as the local States Attorney's

Offices, the USAO has intensified its efforts toward indicting and prosecuting drug traffickers and money laundering in the Chicago area. On May 1, 1998, the USAO in Chicago reorganized its office to enhance the prosecution of narcotics and narcotics-related money laundering cases. Eighteen of the most experienced lawyers in the office, including all of the office's Organized Crime Drug Enforcement Task Force attorneys, were assigned to prosecuting drug suppliers, money launderers and street gangs.

QUESTION: 38. According to a press report, on May 24, 1999, Federal marshals took one Victor Wang into custody after he was already being held by New York State authorities on a similar charge. Apparently, the Federal move occurred without any warning to or consultation with the Manhattan District Attorney's Office. See Gretchen Morgenson, A Turf Battle Over Handling of Fraud Case, N.Y. Times, May 26, 1999, at C1. Is this in fact the case? Also, if Mr. Wang concludes a plea bargain with the U.S. Attorney in Brooklyn, will that bar his subsequent prosecution under New York securities law, as mandated by N.Y. Crim. Proc. Law § 40.30(1) (McKinney 1992) or other legal authority? Finally, please explain what the Department's general policy is regarding Federal intervention in ongoing State prosecutions and why the U.S. Attorney felt it necessary to intervene in this case.

ANSWER: Contrary to the impression created in the news reports on the prosecution of Victor Wang in the EDNY , the U.S. Attorney's Office and the Manhattan D.A.'s office which had been in contact prior to the arrest of Wang, worked out a joint disposition of the case wherein Wang pleaded guilty to state securities fraud charges and federal fraud and money laundering charges. Wang is also subject to federal forfeiture laws under the plea agreement. Wang is facing a sentence of 20 years. While, as with any joint effort there may have been an occasional procedural question, we are advised that both the USAO and the Manhattan D.A.'s offices feel that it was a very successful joint effort.

QUESTION: 39. As you know, the Supreme Court has held that the Sixth Amendment's guarantee of the right to "assistance of counsel" means effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). Strickland also held that a defendant's Sixth Amendment right to "effective" assistance of counsel has been violated if he shows that (a) his counsel's performance "fell below an objective standard of reasonableness; " and (b) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 688, 694. Do you believe that the Supreme Court should revisit the Strickland test, and if so, is the Department searching for test cases in order to secure the Court's review of the ineffective assistance of counsel issue?

ANSWER: The Department has no intention of asking the Supreme Court to revisit Strickland, and it is not searching for a test case in order to secure Supreme Court review. I note that the Supreme Court has accepted certiorari in a state case presenting an ineffective assistance claim. In Roe v. Otega, No. 981441, the Court will decide whether trial counsel

has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request by the defendant. The Solicitor General has filed an amicus brief in that case arguing that trial counsel's failure to file a notice of appeal in the absence of a request constitutes ineffective assistance only where the defendant shows that counsel's performance was deficient and that it prejudiced him. In other words, the Solicitor General argued that the defendant's ineffective assistance claim should be evaluated under the Strickland standard.

TAB A

U.S. Department of Justice
Office of Justice Programs

Revised 1/14/99 from 12/13/98 release
Consistent with printed version

Bureau of Justice Statistics
Bulletin

December 1998, NCJ 172881

Capital Punishment 1997

By Tracy L. Snell
BJS Statistician

Seventeen States executed 74 prisoners during 1997. The number executed was 29 greater than in 1996 and was the largest annual number since the 76 executed in 1955. The prisoners executed during 1997 had been under sentence of death an average of 11 years and 1 month, 8 months more than that for inmates executed in 1996.

At yearend 1997, 3,335 prisoners were under sentence of death. California held the largest number on death row (486), followed by Texas (438), Florida (370), and Pennsylvania (214). Fifteen prisoners were under a Federal sentence of death.

During 1997, 29 States and the Federal prison system received 256 prisoners under sentence of death. California (36 admissions), Texas (32), North Carolina (22) and Florida (18) accounted for 42% of those sentenced to death.

During 1997, 74 men were executed. Of those executed, 41 were non-Hispanic whites; 26 were non-Hispanic blacks; 4, white Hispanics; 1, black Hispanic; 1, American Indian; and 1, Asian. Sixty-eight of the executions were carried out by lethal injection, and 6 by electrocution.

From January 1, 1977, to December 31, 1997, 432 executions took place in 29 States. Nearly two-thirds of the executions occurred in 5 States: Texas (144), Virginia (46), Florida (39), Missouri (29), and Louisiana (24).

Highlights

Status of the death penalty, December 31, 1997

Executions during 1997*		Number of prisoners under sentence of death		Jurisdictions without a death penalty
Texas	37	California	486	Alaska
Virginia	9	Texas	438	District of Columbia
Missouri	6	Florida	370	Hawaii
Arkansas	4	Pennsylvania	214	Iowa
Alabama	3	Ohio	177	Maine
Arizona	2	North Carolina	176	Massachusetts
Illinois	2	Alabama	159	Michigan
South Carolina	2	Illinois	159	Minnesota
Colorado	1	Oklahoma	137	North Dakota
Florida	1	Arizona	120	Rhode Island
Indiana	1	Georgia	115	Vermont
Kentucky	1	Tennessee	98	West Virginia
Louisiana	1	Missouri	88	Wisconsin
Maryland	1	Nevada	87	
Nebraska	1	Louisiana	70	
Oklahoma	1	South Carolina	68	
Oregon	1	Mississippi	64	
		18 other jurisdictions	309	
Total	74	Total	3,335	

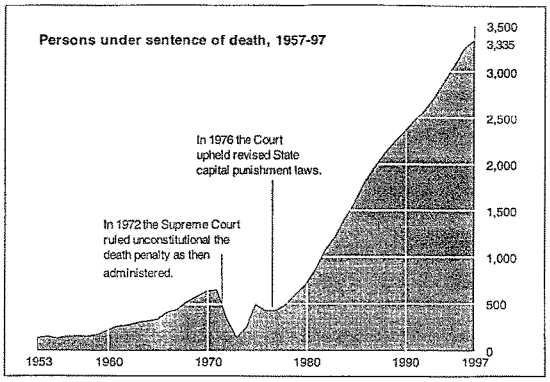
- At yearend 1997, 34 States and the Federal prison system held 3,335 prisoners under sentence of death, 3% more than at yearend 1996.

Persons under sentence of death, by race

	1987	1997
White	1,128	1,876
Black	813	1,406
American Indian	17	28
Asian	9	17
Other	0	8

- The 283 Hispanic inmates under sentence of death accounted for 9.2% of inmates with a known ethnicity.
- Forty-four women were under a sentence of death in 1997.
- Among persons for whom arrest information was available, the average age at time of arrest was 28; 2% of inmates were age 17 or younger.
- At yearend the youngest inmate was 18; the oldest was 82.
- Of the 5,796 people under sentence of death between 1977 and 1997, 7.5% were executed, 2.7% died by causes other than execution, and 32.2% received other dispositions.
- The number of States authorizing lethal injection increased from 18 in 1987 to 32 in 1997. In 1997, 92% of all executions were by lethal injection, compared to 28% in 1987.

*For preliminary 1998 data on executions, see page 12.



During this 21-year period, a total of 5,416 persons entered State and Federal prisons under sentence of death, among whom 50% were white, 41% were black, 7% were Hispanic, and about 2% were of other races.

Also during 1977-97, 2,029 prisoners were removed from a death sentence as a result of dispositions other than execution (resentencing, retrial, commutation, or death while awaiting execution). Of persons removed by other means, 52% were white, 41% were black, 5% were Hispanic, 1% were American Indian, and 0.5% were Asian.

Capital punishment laws

At yearend 1997 the death penalty was authorized by the statutes of 38 States and by Federal statute (tables 1 and 2). During 1997 there were no successful challenges to the constitutionality of State death penalty laws, and no State enacted any new legislation authorizing capital punishment.

Statutory changes

During 1997, six States revised statutory provisions relating to the death penalty. Most of the changes involved additional aggravating or mitigating circumstances, procedural amendments, and revisions to capital offenses.

By State, the changes were as follows:

Montana — Revised its penal code. One revision eliminated hanging as a method of execution (MCA 46-18-103), effective 3/19/97. As a result, lethal injection is now the sole method of execution in Montana.

Another penal code revision added to Montana's capital offenses. Any offender convicted for a second time of rape with serious bodily injury, regardless of the jurisdiction of the first offense, may be punished by death or by life in prison without the possibility of release (MCA 45-5-503(3)(c)), effective 10/1/97.

Montana legislators also amended the code of criminal procedure to specify that, upon determination of guilt in a capital case, a sentence must be rendered within 120 days or within 120 days after the Montana Supreme Court enters a final decision on appeal. The statute allows for not more than one extension of up to 60 days upon a showing of undue hardship to a party (MCA 46-18-301(2)), effective 4/24/97.

Nevada — Added to its penal code as an aggravating factor forced sexual penetration of the victim before, during, or immediately after the commission of the murder (NRS 200.033), effective 7/8/97.

Oregon — Added to the penal code and amended the code of criminal procedure. These changes became effective 10/4/97.

Oregon added to its definition of aggravated murder intentional homicide of a person under 14 years of age (ORS 163.095).

Oregon legislators also amended the code of criminal procedure to establish that court instructions to the jury upon conclusion of the presentation of evidence will include consideration of victim impact evidence, in addition to aggravating and mitigating circumstances, presented during the sentencing phase of capital proceedings (ORS 163.150).

Pennsylvania — Added a section to its penal code and revised its code of criminal procedure. These changes became effective 6/25/97.

Pennsylvania added to its penal code as an aggravating factor murder of a person who had a protective order filed against the defendant (42 Pa.C.S. 9711(d)(18)).

Pennsylvania lawmakers also revised the code of criminal procedure to rescind a requirement that the Pennsylvania Supreme Court consider the proportionality of the death sentence in the course of the automatic review of the conviction and sentence (42 Pa.C.S. 9711(h)(3)(iii)).

Tennessee — Revised an aggravating circumstance from the murder "in a similar fashion" of three or more persons within a 4-year time period "within the State of Tennessee" to any murder of three or more persons during that time period (Tenn. Code Ann. 39-13-204(i)(12)), effective 5/30/97, and added as an aggravating circumstance the murder of a person who had a significant handicap or disability when the defendant knew or reasonably should have known of the disability (Tenn. Code Ann. 39-13-204(i)(14)), effective 7/1/97.

Tennessee legislators also revised the code of criminal procedure to set aside case law which required a specific jury instruction on nonstatutory mitigating factors. Previously, the failure to give such an instruction was considered

reversible error (Tenn. Code Ann. 39-13-204(e)(1)), effective 4/29/97.

Virginia — Amended the definition of capital murder to include among law enforcement murder victims officers from other States or the United States; to add premeditated murder in the course of a continuing criminal enterprise; and to add killing a pregnant woman when the defendant had knowledge of the pregnancy and had intent to terminate the pregnancy to prevent a live birth (Va. Code 18.2-31(6), (10), and (11)), effective 7/1/97.

Automatic review

Of the 38 States with capital punishment statutes at yearend 1997, 36 provided for review of all death sentences regardless of the defendant's wishes. Arkansas had no specific provisions for automatic review. The Federal death penalty procedures did not provide for automatic review after a sentence of death had been imposed. In South Carolina the defendant had the right to waive sentence review if the defendant was deemed competent by the court (State v. Torrence, 473 S.E.2d. 703 (S.C. 1996)). In Mississippi the question of whether a defendant could waive the right to automatic review of the sentence had not been addressed, and in Wyoming neither statute nor case law clearly precluded a waiver of appeal.

While most of the 36 States authorized an automatic review of both the conviction and sentence, Idaho, Indiana, Oklahoma, and Tennessee required review of the sentence only. In Idaho review of the conviction had to be filed through appeal or forfeited. In Indiana and Kentucky a defendant could waive review of the conviction.

The review is usually conducted by the State's highest appellate court regardless of the defendant's wishes. If either the conviction or the sentence was vacated, the case could be remanded to the trial court for additional proceedings or for retrial. As a result of retrial or resentencing, the death sentence could be reimposed.

Table 1. Capital offenses, by State, 1997

Alabama. Intentional murder with 18 aggravating factors (13A-5-40).

Arizona. First-degree murder accompanied by at least 1 of 10 aggravating factors.

Arkansas. Capital murder (Ark. Code Ann. 5-10-101) with a finding of at least 1 of 9 aggravating circumstances; treason.

California. First-degree murder with special circumstances; train wrecking; treason; perjury causing execution.

Colorado. First-degree murder with at least 1 of 13 aggravating factors; treason. Capital sentencing excludes persons determined to be mentally retarded.

Connecticut. Capital felony with 9 categories of aggravated homicide (C.G.S. 53a-54b).

Delaware. First-degree murder with aggravating circumstances.

Florida. First-degree murder; felony murder; capital drug trafficking.

Georgia. Murder; kidnaping with bodily injury or ransom where the victim dies; aircraft hijacking; treason.

Idaho. First-degree murder; aggravated kidnaping.

Illinois. First-degree murder with 1 of 15 aggravating circumstances.

Indiana. Murder with 15 aggravating circumstances. Capital sentencing excludes persons determined to be mentally retarded.

Kansas. Capital murder with 7 aggravating circumstances (KSA 21-3439). Capital sentencing excludes persons determined to be mentally retarded.

Kentucky. Murder with aggravating factors; kidnaping with aggravating factors.

Louisiana. First-degree murder; aggravated rape of victim under age 12; treason (La. R.S. 14:30, 14:42, and 14:113).

Maryland. First-degree murder, either premeditated or during the commission of a felony, provided that certain death eligibility requirements are satisfied.

Mississippi. Capital murder (97-3-19(2) MCA); capital rape (97-3-65(1) MCA); aircraft piracy (97-25-55(1) MCA).

Missouri. First-degree murder (565.020 RSMO).

Montana. Capital murder with 1 of 9 aggravating circumstances (46-18-303 MCA); capital sexual assault (45-5-503 MCA).

Nebraska. First-degree murder with a finding of at least 1 statutorily defined aggravated circumstance.

Nevada. First-degree murder with 13 aggravating circumstances.

New Hampshire. Capital murder (RSA 630:1).

New Jersey. Purposeful or knowing murder by one's own conduct; contract murder; solicitation by command or threat in furtherance of a narcotics conspiracy (NJSA 2C:11-3C).

New Mexico. First-degree murder (Section 30-2-1 A, NMSA).

New York. First-degree murder with 1 of 10 aggravating factors. Capital sentencing excludes persons determined to be mentally retarded.

North Carolina. First-degree murder (N.C.G.S. 14-17).

Ohio. Aggravated murder with at least 1 of 8 aggravating circumstances. (O.R.C. secs. 2903.01, 2929.01, and 2929.04).

Oklahoma. First-degree murder in conjunction with a finding of at least 1 of 8 statutorily defined aggravating circumstances.

Oregon. Aggravated murder (ORS 163.095).

Pennsylvania. First-degree murder with 18 aggravating circumstances.

South Carolina. Murder with 1 of 10 aggravating circumstances (§ 16-3-20(C)(a)). Mental retardation is a mitigating factor.

South Dakota. First-degree murder with 1 of 10 aggravating circumstances; aggravated kidnaping.

Tennessee. First-degree murder.

Texas. Criminal homicide with 1 of 8 aggravating circumstances (TX Penal Code 19.03).

Utah. Aggravated murder; aggravated assault by a prisoner serving a life sentence if serious bodily injury is intentionally caused (76-5-202, Utah Code annotated).

Virginia. First-degree murder with 1 of 11 aggravating circumstances (VA Code § 18.2-31).

Washington. Aggravated first-degree murder.

Wyoming. First-degree murder.

Table 2. Federal laws providing for the death penalty, 1997

8 U.S.C. 1342 — Murder related to the smuggling of aliens.

18 U.S.C. 32-34 — Destruction of aircraft, motor vehicles, or related facilities resulting in death.

18 U.S.C. 36 — Murder committed during a drug-related drive-by shooting.

18 U.S.C. 37 — Murder committed at an airport serving international civil aviation.

18 U.S.C. 115(b)(3) [by cross-reference to 18 U.S.C. 1111] — Retaliatory murder of a member of the immediate family of law enforcement officials.

18 U.S.C. 241, 242, 245, 247 — Civil rights offenses resulting in death.

18 U.S.C. 351 [by cross-reference to 18 U.S.C. 1111] — Murder of a member of Congress, an important executive official, or a Supreme Court Justice.

18 U.S.C. 794 — Espionage.

18 U.S.C. 844(d), (f), (i) — Death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce.

18 U.S.C. 924(i) — Murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime.

18 U.S.C. 930 — Murder committed in a Federal Government facility.

18 U.S.C. 1091 — Genocide.

18 U.S.C. 1111 — First-degree murder.

18 U.S.C. 1114 — Murder of a Federal judge or law enforcement official.

18 U.S.C. 1116 — Murder of a foreign official.

18 U.S.C. 1118 — Murder by a Federal prisoner.

18 U.S.C. 1119 — Murder of a U.S. national in a foreign country.

18 U.S.C. 1120 — Murder by an escaped Federal prisoner already sentenced to life imprisonment.

18 U.S.C. 1121 — Murder of a State or local law enforcement official or other person aiding in a Federal investigation; murder of a State correctional officer.

18 U.S.C. 1201 — Murder during a kidnaping.

18 U.S.C. 1203 — Murder during a hostage taking.

18 U.S.C. 1503 — Murder of a court officer or juror.

18 U.S.C. 1512 — Murder with the intent of preventing testimony by a witness, victim, or informant.

18 U.S.C. 1513 — Retaliatory murder of a witness, victim, or informant.

18 U.S.C. 1716 — Mailing of injurious articles with intent to kill or resulting in death.

18 U.S.C. 1751 [by cross-reference to 18 U.S.C. 1111] — Assassination or kidnaping resulting in the death of the President or Vice President.

18 U.S.C. 1958 — Murder for hire.

18 U.S.C. 1959 — Murder involved in a racketeering offense.

18 U.S.C. 1992 — Willful wrecking of a train resulting in death.

18 U.S.C. 2113 — Bank-robbery-related murder or kidnaping.

18 U.S.C. 2119 — Murder related to a carjacking.

18 U.S.C. 2245 — Murder related to rape or child molestation.

18 U.S.C. 2251 — Murder related to sexual exploitation of children.

18 U.S.C. 2280 — Murder committed during an offense against maritime navigation.

18 U.S.C. 2281 — Murder committed during an offense against a maritime fixed platform.

18 U.S.C. 2332 — Terrorist murder of a U.S. national in another country.

18 U.S.C. 2332a — Murder by the use of a weapon of mass destruction.

18 U.S.C. 2340 — Murder involving torture.

18 U.S.C. 2381 — Treason.

21 U.S.C. 848(e) — Murder related to a continuing criminal enterprise or related murder of a Federal, State, or local law enforcement officer.

49 U.S.C. 1472-1473 — Death resulting from aircraft hijacking.

Method of execution

As of December 31, 1997, lethal injection was the predominant method of execution (32 States) (table 3).

Eleven States authorized electrocution; 6 States, lethal gas; 3 States, hanging; and 3 States, a firing squad.

Sixteen States authorized more than 1 method — lethal injection and an alternative method — generally at the election of the condemned prisoner; however, 4 of these 16 stipulated which method must be used, depending on the date of sentencing; 1 authorized hanging only if lethal injection could not be given; and if lethal injection is ever ruled unconstitutional, 1 authorized lethal gas, and 1 authorized electrocution.

The Federal Government authorizes the method of execution under two different laws. Offenses prosecuted under 28 CFR, Part 26, mandate lethal injection, while those prosecuted under the Violent Crime Control act of 1994 (18 U.S.C. 3596) call for the method of the State in which the conviction took place.

Minimum age

In 1997 eight jurisdictions did not specify a minimum age for which the death penalty could be imposed (table 4).

In some States the minimum age was set forth in the statutory provisions that determine the age at which a juvenile may be transferred to criminal court for trial as an adult. Fourteen States and the Federal system required a minimum age of 18. Sixteen States indicated an age of eligibility between 14 and 17.

Table 3. Method of execution, by State, 1997

Lethal injection		Electrocution	Lethal gas	Hanging	Firing squad
Arizona[a,b]	New Hampshire[a]	Alabama	Arizona[a,b]	Delaware[a,c]	Idaho[a]
Arkansas[a,d]	New Jersey	Arkansas[a,d]	California[a]	New Hampshire[a,e]	Oklahoma[f]
California[a]	New Mexico	Florida	Mississippi[a,g]	Washington[a]	Utah[a]
Colorado	New York	Georgia	Missouri[a]		
Connecticut	North Carolina[a]	Kentucky	North Carolina[a]		
Delaware[a,c]	Ohio[a]	Nebraska	Wyoming[a,h]		
Idaho[a]	Oklahoma[a]	Ohio[a]			
Illinois	Oregon	Oklahoma[f]			
Indiana	Pennsylvania	South Carolina[a]			
Kansas	South Carolina[a]	Tennessee			
Louisiana	South Dakota	Virginia[a]			
Maryland	Texas				
Mississippi[a,g]	Utah[a]				
Missouri[a]	Virginia[a]				
Montana	Washington[a]				
Nevada	Wyoming[a]				

Note: The method of execution of Federal prisoners is lethal injection, pursuant to 28 CFR, Part 26. For offenses under the Violent Crime Control and Law Enforcement Act of 1994, the method is that of the State in which the conviction took place, pursuant to 18 U.S.C. 3596.
[a]Authorizes 2 methods of execution.
[b]Arizona authorizes lethal injection for persons whose capital sentence was received after 11/15/92; for those sentenced before that date, the condemned may select lethal injection or lethal gas.
[c]Delaware authorizes lethal injection for those whose capital offense occurred after 6/13/86; for those whose offense occurred before that date, the condemned may select lethal injection or hanging.
[d]Arkansas authorizes lethal injection for those whose capital offense occurred on or after 7/4/83; for those whose offense occurred before that date, the condemned may select lethal injection or electrocution.
[e]New Hampshire authorizes hanging only if lethal injection cannot be given.
[f]Oklahoma authorizes electrocution if lethal injection is ever held to be unconstitutional, and firing squad if both lethal injection and electrocution are held unconstitutional.
[g]Mississippi authorized lethal injection for those convicted after 7/1/84 and lethal gas for those convicted prior to that date.
[h]Wyoming authorizes lethal gas if lethal injection is ever held to be unconstitutional.

Table 4. Minimum age authorized for capital punishment, 1997

Age 16 or less	Age 17	Age 18	None specified
Alabama (16)	Georgia	California	Arizona
Arkansas (14)[a]	New Hampshire	Colorado	Idaho
Delaware (16)	North Carolina[b]	Connecticut[c]	Louisiana
Florida (16)	Texas	Federal system	Montana
Indiana (16)		Illinois	Pennsylvania
Kentucky (16)		Kansas	South Carolina
Mississippi (16)[d]		Maryland	South Dakota[e]
Missouri (16)		Nebraska	Utah
Nevada (16)		New Jersey	
Oklahoma (16)		New Mexico	
Virginia (14)[f]		New York	
Wyoming (16)		Ohio	
		Oregon	
		Tennessee	
		Washington	

Note: Reporting by States reflects interpretations by State attorney generals' offices and may differ from previously reported ages.
[a]See Ark. Code Ann. 9-27-318(b)(2)(Repl. 1991).
[b]Age required is 17 unless the murderer was incarcerated for murder when a subsequent murder occurred; then the age may be 14.
[c]See Conn. Gen. Stat. 53a-46a(g)(1).
[d]The minimum age defined by statute is 13, but the effective age is 16 based on interpretation of U.S. Supreme Court decisions by the State attorney general's office.
[e]Juveniles may be transferred to adult court. Age can be a mitigating factor.
[f]The minimum age for transfer to adult court by statute is 14, but the effective age is 16 based on interpretation of U.S. Supreme Court decisions by the State attorney general's office.

Table 5. Prisoners under sentence of death, by region, State, and race, 1996 and 1997

Region and State[b]	Prisoners under sentence of death, 12/31/96			Received under sentence of death			Removed from death row (excluding executions)[a]			Executed			Prisoners under sentence of death, 12/31/97		
	Total[c]	White[d]	Black[d]	Total[c]	White	Black	Total[c]	White	Black	Total[c]	White	Black	Total[c]	White	Black
U.S. total	3,242	1,833	1,358	256	146	106	89	58	31	74	45	27	3,335	1,876	1,40
Federal[e]	12	4	8	3	2	1	0	0	0	0	0	0	15	6	9
State	3,230	1,829	1,350	253	144	105	89	58	31	74	45	27	3,320	1,870	1,39
Northeast	223	81	135	13	6	7	4	2	2	0	0	0	232	85	140
Connecticut	4	1	3	0	0	0	0	0	0	0	0	0	4	1	3
New Hampshire	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
New Jersey	11	5	6	3	3	0	0	0	0	0	0	0	14	8	6
New York	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pennsylvania	208	75	126	10	3	7	4	2	2	0	0	0	214	76	131
Midwest	482	236	244	27	18	9	18	13	5	10	5	5	481	236	243
Illinois	161	61	100	6	3	3	6	4	2	2	0	2	159	60	99
Indiana	46	31	15	1	1	0	2	2	0	1	0	1	44	30	14
Kansas	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Missouri	93	50	43	10	8	2	9	7	2	6	5	1	88	46	42
Nebraska	11	8	2	1	1	0	0	0	0	1	0	1	11	9	1
Ohio	170	85	84	8	4	4	1	0	1	0	0	0	177	89	87
South Dakota	1	1	0	1	1	0	0	0	0	0	0	0	2	2	0
South	1,793	1,024	747	157	80	75	52	34	18	60	36	22	1,838	1,034	782
Alabama	152	89	62	15	7	8	5	4	1	3	2	1	159	90	68
Arkansas	38	21	17	5	1	4	1	0	1	4	3	1	38	19	19
Delaware	11	5	6	4	3	1	0	0	0	0	0	0	15	8	7
Florida[f]	374	234	139	18	14	4	21	11	10	1	0	1	370	237	132
Georgia	102	58	44	13	3	9	0	0	0	0	0	0	115	61	53
Kentucky	29	22	7	2	2	0	0	0	0	1	1	0	30	23	7
Louisiana	62	22	40	12	2	10	3	1	2	1	1	0	70	22	48
Maryland	19	4	15	0	0	0	1	1	0	1	0	1	17	3	14
Mississippi	57	26	31	7	4	3	0	0	0	0	0	0	64	30	34
North Carolina	161	77	81	22	7	14	7	6	1	0	0	0	176	78	94
Oklahoma	134	81	42	11	7	4	7	6	1	1	0	0	137	82	45
South Carolina	68	30	38	5	3	2	3	2	1	2	1	1	68	30	38
Tennessee	93	63	28	7	5	2	2	2	0	0	0	0	98	66	30
Texas[g]	444	268	172	32	20	12	1	1	0	37	23	13	438	264	171
Virginia	49	24	25	4	2	2	1	0	1	9	5	4	43	21	22
West	732	488	224	56	40	14	15	9	6	4	4	0	769	515	232
Arizona	121	101	14	8	7	0	7	3	4	2	2	0	120	103	10
California	455	273	171	36	25	11	5	3	2	0	0	0	486	295	180
Colorado	5	3	2	0	0	0	0	0	0	1	1	0	4	2	2
Idaho	18	18	0	1	1	0	0	0	0	0	0	0	19	19	0
Montana	7	6	0	0	0	0	0	0	0	0	0	0	7	6	0
Nevada	83	48	34	4	3	1	0	0	0	0	0	0	87	51	35
New Mexico	4	4	0	0	0	0	0	0	0	0	0	0	4	4	0
Oregon	19	18	0	3	3	0	1	1	0	1	1	0	20	19	0
Utah	9	7	2	1	0	0	0	0	0	0	0	0	10	7	2
Washington	11	10	1	3	1	2	2	2	0	0	0	0	12	9	3
Wyoming	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Note: States not listed and the District of Columbia did not authorize the death penalty as of 12/31/96. Some figures shown for yearend 1996 are revised from those reported in *Capital Punishment 1996*, NCJ 167031. The revised figures include 22 inmates who were either reported late to the National Prisoner Statistics program or were not in custody of State correctional authorities on 12/31/96 (6 each in Pennsylvania and Texas; 2 each in Oklahoma, Tennessee, and Nevada; and 1 each in Indiana, Alabama, Florida, and California) and exclude 7 inmates who were relieved of the death sentence on or before 12/31/96 (2 in Arkansas; and 1 each in Pennsylvania, Louisiana, Mississippi, Oklahoma, and Oregon). The data for 12/31/96 also include 8 inmates who were listed erroneously as being removed from death row (6 in Georgia, and 1 each in Mississippi and the Federal Bureau of Prisons).

[a]Includes 8 deaths from natural causes (2 in California; and 1 each in Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, and Oregon); 4 suicides (in Alabama, Texas, Arizona, and California); and 1 inmate who was killed during an attempted escape (in Arizona).

[b]Alaska, the District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin did not authorize the death penalty as of 12/31/96, and no changes occurred during 1997.

[c]Totals include persons of other races.

[d]The reporting of race and Hispanic origin differs from that presented in tables 9 and 11. In this table white and black inmates include Hispanics.

[e]Excludes persons held under Armed Forces jurisdiction with a military death sentence for murder.

[f]Race has been changed from white to American Indian for 1 inmate.

[g]Race has been changed from black to white for 1 inmate.

Characteristics of prisoners under sentence of death at yearend 1997

Thirty-four States and the Federal prison system held a total of 3,335 prisoners under sentence of death on December 31, 1997, a gain of 93, or 2.9% more than at the end of 1996 (table 5).

The Federal prison system count rose from 12 at yearend 1996 to 15 at yearend 1997. Three States reported 39% of the Nation's death row population: California (486), Texas (438), and Florida (370). Of the 39 jurisdictions with statutes authorizing the death penalty during 1997, New Hampshire, New York, Kansas, and Wyoming had no one under a capital sentence, and Connecticut, South Dakota, Colorado, and New Mexico had 4 or fewer.

Among the 35 jurisdictions with prisoners under sentence of death at yearend 1997, 20 had more inmates than a year earlier, 9 had fewer inmates, and 6 had the same number. California had an increase of 31, followed by North Carolina (15) and Georgia (13). Virginia and Texas had the largest decrease (6 each).

During 1997 the number of black inmates under sentence of death increased by 48; the number of whites increased by 43; and the number of persons of other races (American Indians, Alaska Natives, Asians, or Pacific Islanders) rose from 51 to 53.

The number of Hispanics sentenced to death rose from 264 to 283 during 1997 (table 6). Twenty-six Hispanics were received under sentence of death, 2 were removed from death row, and 5 were executed. More than three-fourths of the Hispanics were incarcerated in 4 States: Texas (88), California (79), Florida (41), and Arizona (18).

Table 6. Hispanics and women under sentence of death, by State, 1996 and 1997

Region and State	Under sentence of death, 12/31/96[a]		Received under sentence of death		Death sentence removed[b]		Under sentence of death, 12/31/97	
	Hispanics	Women	Hispanics	Women	Hispanics	Women	Hispanics	Women
U.S. total	264	47	26	2	2	5	283	44
Alabama	0	4	0	0	0	1	0	3
Arizona	18	1	0	0	0	0	18	1
Arkansas	2	0	0	0	0	0	1	0
California	68	8	11	0	0	0	79	8
Colorado	1	0	0	0	0	0	1	0
Florida	40	6	2	0	0	0	41	6
Georgia	1	0	0	0	0	0	1	0
Idaho	0	1	0	0	0	0	0	1
Illinois	8	4	1	0	2	2	7	2
Indiana	2	0	0	0	0	0	2	0
Louisiana	1	0	0	0	0	0	1	0
Mississippi	1	1	0	0	0	0	1	1
Missouri	0	2	0	0	0	1	0	1
Nevada	8	1	0	0	0	0	8	1
New Jersey	0	0	0	1	0	0	0	1
New Mexico	1	0	0	0	0	0	1	0
North Carolina	3	3	0	0	0	0	3	3
Ohio	5	0	0	0	0	0	5	0
Oklahoma	6	4	1	0	0	1	7	3
Oregon	1	0	1	0	0	0	2	0
Pennsylvania	13	4	0	0	0	0	13	4
Tennessee	1	2	0	0	0	0	1	2
Texas	80	6	10	1	0	0	88	7
Utah	2	0	0	0	0	0	2	0
Virginia	2	0	0	0	0	0	1	0

[a]The count of women under sentence of death at yearend 1996 has been revised; 1 inmate in Mississippi was erroneously reported as a female in previous reporting years.
[b]Five Hispanic men were executed in 1997 (2 in Texas; and 1 each in Arkansas, Florida, and Virginia). No women were executed during 1997.

During 1997 the number of women sentenced to be executed decreased from 47 to 44. Two women were received under sentence of death, five were removed from death row, and none were executed. Women were under sentence of death in 15 States. Half of all women on death row at yearend were in California, Texas, Florida, and Pennsylvania.

State	Women under sentence of death, 12/31/97		
	Total	White	Black
Total	44	30	14
California	8	6	2
Texas	7	5	2
Florida	6	4	2
Pennsylvania	4	1	3
North Carolina	3	3	0
Alabama	3	2	1
Oklahoma	3	2	1
Tennessee	2	2	0
Illinois	2	0	2
Arizona	1	1	0
Idaho	1	1	0
Mississippi	1	1	0
Missouri	1	1	0
New Jersey	1	1	0
Nevada	1	0	1

Men were 99% (3,291) of all prisoners under sentence of death (table 7). Whites predominated (56%); blacks comprised 42%; and other races (1.6%) included 28 American Indians, 17 Asians, and 8 persons of unknown race. Among those for whom ethnicity was known, 9% were Hispanic.

The sex, race, and Hispanic origin of those under sentence of death at yearend 1997 were as follows:

	Persons under sentence of death, by sex, race, and Hispanic origin, 12/31/97		
	White	Black	Other
Male	1,846	1,392	53
Hispanic	262	12	7
Female	30	14	0
Hispanic	1	1	0

Among inmates under sentence of death on December 31, 1997, for whom information on education was available, three-fourths had either completed high school (38%) or finished 9th, 10th, or 11th grade (38%). The percentage who had not gone beyond eighth grade (14%) was larger than that of inmates who had attended some college (10%). The median level of education was the 11th grade.

Of inmates under a capital sentence and with reported marital status, half had never married; a fourth were married at the time of sentencing; and nearly a fourth were divorced, separated, or widowed.

Table 7. Demographic characteristics of prisoners under sentence of death, 1997

Characteristic	Prisoners under sentence of death, 1997		
	Yearend	Admissions	Removals
Total number under sentence of death	3,335	256	163
Sex			
Male	98.7%	99.2%	96.9%
Female	1.3	0.8	3.1
Race			
White	56.3%	57.0%	63.2%
Black	42.2	41.4	35.6
Other*	1.6	1.6	1.2
Hispanic origin			
Hispanic	9.2%	12.0%	4.5%
Non-Hispanic	90.8	88.0	95.5
Education			
8th grade or less	14.2%	13.3%	16.2%
9th-11th grade	37.6	34.1	34.6
High school graduate/GED	38.0	45.0	40.4
Any college	10.1	7.6	8.8
Median	11th grade	12th grade	11th grade
Marital status			
Married	24.5%	23.9%	32.5%
Divorced/separated	21.3	20.0	19.5
Widowed	2.6	4.3	5.8
Never married	51.5	51.7	42.2

Note: Calculations are based on those cases for which data were reported. Missing data by category were as follows:

	Yearend	Admissions	Removals
Hispanic origin	258	39	6
Education	504	45	27
Marital status	304	26	9

*At yearend 1996, "other" consisted of 25 American Indians, 18 Asians, and 8 self-identified Hispanics. During 1997, 4 American Indians were admitted; 1 American Indian and 1 Asian were removed.

Persons under sentence of death, by race, 1968-97

Number under sentence of death on December 31

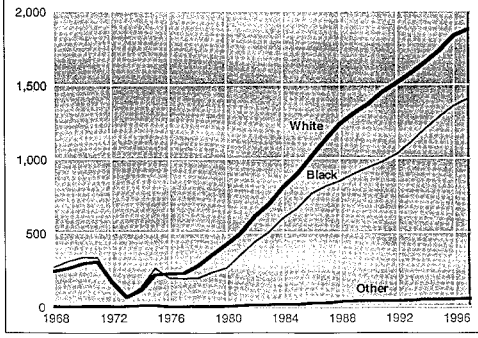


Figure 2

Among all inmates under sentence of death for whom date of arrest information was available, more than half were age 20 to 29 at the time of arrest for their capital offense; 13% were age 19 or younger; and less than 1% were age 55 or older (table 8). The average age at time of arrest was 28 years. On December 31, 1997, 39% of all inmates were age 30 to 39, and 70% were age 25 to 44. The youngest offender under sentence of death was age 18; the oldest was 82.

Table 8. Age at time of arrest for capital offense and age of prisoners under sentence of death at yearend, 1997

	Prisoners under sentence of death			
	At time of arrest		On December 31, 1997	
Age	Number*	Percent	Number	Percent
Total number under sentence of death on 12/31/97	2,975	100 %	3,335	100 %
17 or younger	69	2.3	0	
18-19	311	10.5	14	0.4
20-24	824	27.7	275	8.2
25-29	685	23.0	497	14.9
30-34	471	15.8	578	17.3
35-39	315	10.6	727	21.8
40-44	155	5.2	521	15.6
45-49	85	2.9	354	10.6
50-54	35	1.2	216	6.5
55-59	16	0.5	88	2.6
60 or older	9	0.3	65	1.9
Mean age	28 yrs		37 yrs	
Median age	26 yrs		37 yrs	

Note: The youngest person under sentence of death was a black male in Alabama, born in November 1979 and sentenced to death in October 1997. The oldest person under sentence of death was a white male in Arizona, born in September 1915 and sentenced to death in June 1983.
*Excludes 360 inmates for whom the date of arrest for capital offense was not available.

Entries and removals of persons under sentence of death

Between January 1 and December 31, 1997, 29 State prison systems reported receiving 253 prisoners under sentence of death; the Federal Bureau of Prisons received 3 inmates. Forty-two percent of the inmates were received in 4 States: California (36), Texas (32), North Carolina (22), and Florida (18).

All 256 prisoners who had been received under sentence of death had been convicted of murder. By sex and race, 144 were white men, 106 were black men, 4 were American Indian men, and 2 were white women. Of the 256 new admissions, 26 were Hispanic men.

Eighteen States reported a total of 76 persons whose sentence of death was overturned or removed. Appeals courts vacated 38 sentences while upholding the convictions and vacated 35 sentences while overturning the convictions. Florida (21 exits) had the largest number of vacated capital sentences. South Carolina reported two commutations of a death sentence, and Virginia reported one.

As of December 31, 1997, 43 of the 76 persons who were formerly under sentence of death were serving a reduced sentence, 23 were awaiting a new trial, 9 were awaiting resentencing, and 1 was found not guilty after being retried.

In addition, 13 persons died while under sentence of death in 1997. Eight of these deaths were from natural causes — two in California and one each in Missouri, North Carolina, Oklahoma, Oregon, South Carolina, and Tennessee. Four suicides occurred — one each in Alabama, Arizona, California, and Texas. One inmate in Arizona was killed during an attempted escape.

From 1977, the year after the Supreme Court upheld the constitutionality of revised State capital punishment laws, to 1997, a total of 5,416 persons entered prison under sentence of death. During these 21 years, 432 persons were executed, and 2,029 were removed from under a death sentence by appellate court decisions and reviews, commutations, or death.[1]

[1]An individual may have been received and removed from under a sentence of death more than once. Data are based on the most recent sentence.

Among individuals who received a death sentence between 1977 and 1997, 2,726 (50%) were white, 2,208 (41%) were black, 401 (7%) were Hispanic, and 81 (1%) were of other races. The distribution by race and Hispanic origin of the 2,029 inmates who were removed from death row between 1977 and 1997 was as follows: 1,057 whites (52%), 835 blacks (41%), 107 Hispanics (5%), and 30 persons of other races (2%). Of the 432 who were executed, 241 (56%) were white, 160 (37%) were black, 26 (6%) were Hispanic, and 5 (1%) were of other races.

Criminal history of inmates under sentence of death in 1997

Among inmates under a death sentence on December 31, 1997, for whom criminal history information was available, 65% had past felony convictions, including 9% with at least one previous homicide conviction (table 9).

Among those for whom legal status at the time of the capital offense was reported, 42% had an active criminal justice status. Nearly half of these were on parole, and about a fourth were on probation. The others had charges pending, were incarcerated, had escaped from incarceration, or had some other criminal justice status.

Criminal history patterns differed by race and Hispanic origin. More blacks (70%) than whites (63%) or Hispanics (60%) had a prior felony conviction.

About the same percentage of blacks (9%), whites (8%), and Hispanics (8%) had a prior homicide conviction. A slightly higher percentage of Hispanics (26%) or blacks (22%) than whites (16%) were on parole when arrested for their capital offense.

Since 1988, data have been collected on the number of death sentences imposed on entering inmates. Among the 2,868 individuals received under sentence of death during that time, about 1 in every 7 entered with 2 or more death sentences.

Number of death sentences received	Inmates
Total	100%
1	86
2	10
3 or more	4
Number admitted under sentence of death, 1988-97	2,868

Table 9. Criminal history profile of prisoners under sentence of death, by race and Hispanic origin, 1997

	Prisoners under sentence of death							
	Number				Percent[a]			
	All[b]	White	Black	Hispanic	All[b]	White	Black	Hispanic
U.S. total	3,335	1,613	1,393	283	100%	100%	100%	100%
Prior felony convictions								
Yes	2,011	939	895	153	65.3%	63.0%	69.5%	59.5%
No	1,068	552	393	104	34.7	37.0	30.5	40.5
Not reported	256							
Prior homicide convictions								
Yes	281	127	125	22	8.6%	8.0%	9.2%	8.1%
No	2,980	1,457	1,234	251	91.4	92.0	90.8	91.9
Not reported	74							
Legal status at time of capital offense								
Charges pending	225	121	86	16	7.6%	8.4%	7.0%	6.5%
Probation	301	141	132	25	10.1	9.7	10.7	10.2
Parole	578	237	270	63	19.5	16.4	21.8	25.7
Prison escapee	38	25	10	2	1.3	1.7	0.8	0.8
Incarcerated	76	35	35	4	2.6	2.4	2.8	1.6
Other status	30	16	12	1	1.0	1.1	1.0	0.4
None	1,721	872	691	134	58.0	60.3	55.9	54.7
Not reported	366							

[a]Percentages are based on those offenders for whom data were reported.
Detail may not add to total because of rounding.
[b]Includes persons of other races.

Executions

According to data collected by the Federal Government, from 1930 to 1997, 4,291 persons were executed under civil authority (table 10).[2]

[2]Military authorities carried out an additional 160 executions, 1930-97.

Table 10. Number of persons executed, by jurisdiction, 1930-97

State	Number executed	
	Since 1930	Since 1977
U.S. total	4,291	432
Texas	441	144
Georgia	388	22
New York	329	
California	296	4
North Carolina	271	8
Florida	209	39
South Carolina	175	13
Ohio	172	
Mississippi	158	4
Louisiana	157	24
Pennsylvania	154	2
Alabama	151	16
Virginia	138	46
Arkansas	134	16
Kentucky	104	1
Illinois	100	10
Tennessee	93	
Missouri	91	29
New Jersey	74	
Maryland	70	2
Oklahoma	69	9
Washington	49	2
Colorado	48	1
Arizona	46	8
Indiana	46	5
District of Columbia	40	
West Virginia	40	
Nevada	35	6
Federal system	33	
Massachusetts	27	
Connecticut	21	
Oregon	21	2
Delaware	20	8
Iowa	18	
Utah	18	5
Kansas	15	
New Mexico	8	
Wyoming	8	1
Montana	7	1
Nebraska	7	3
Idaho	4	1
Vermont	4	
New Hampshire	1	
South Dakota	1	

After the Supreme Court reinstated the death penalty in 1976, 29 States executed 432 prisoners:

1977	1	1989	16
1979	2	1990	23
1981	1	1991	14
1982	2	1992	31
1983	5	1993	38
1984	21	1994	31
1985	18	1995	56
1986	18	1996	45
1987	25	1997	74
1988	11		

During this 21-year period, 6 States executed 304 prisoners: Texas (144), Virginia (46), Florida (39), Missouri (29), Louisiana (24), and Georgia (22). These States accounted for more than two-thirds of all executions. Between 1977 and 1997, 240 white non-Hispanic men, 160 black non-Hispanic men, 26 Hispanic men, 3 American Indian men, 2 Asian men, and 1 white non-Hispanic woman were executed.

During 1997 Texas carried out 37 executions; Virginia executed 9 persons; Missouri, 6; Arkansas, 4; Arizona, Illinois, and South Carolina, 2 each; and Colorado, Florida, Indiana, Kentucky, Louisiana, Maryland, Nebraska, Oklahoma, and Oregon, 1 each. Colorado had its first execution since 1967, and Kentucky had its first execution since 1962. All persons executed in 1997 were male. Forty-one were white; 26 were black; 5 were Hispanic; 1 was American Indian; and 1 was Asian.

From 1977 to 1997, 5,796 prisoners were under death sentences for varying lengths of time (table 11). The 432 executions accounted for nearly 8% of those at risk. A total of 2,029 prisoners (35% of those at risk) received other dispositions. About the same percentage of whites (8%), blacks (7%), and Hispanics (6%) were executed. Somewhat larger percentages of whites (36%) and blacks (35%) than Hispanics (26%) were removed from under a death sentence by means other than execution.

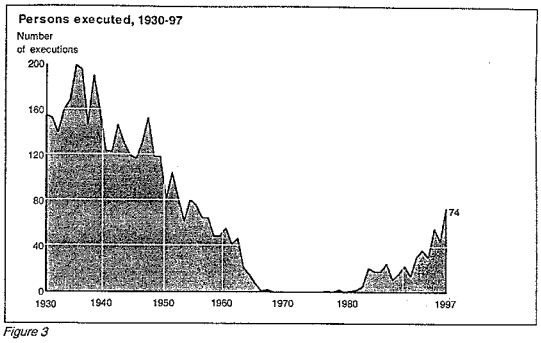


Figure 3

Table 11. Prisoners under sentence of death who were executed or received other dispositions, by race and Hispanic origin, 1977-97

Race/Hispanic origin[b]	Total under sentence of death, 1977-97[c]	Prisoners executed		Prisoners who received other dispositions[a]	
		Number	Percent of total	Number	Percent of total
Total	5,796	432	7.5%	2,029	35.0%
White	2,911	241	8.3%	1,057	36.3%
Black	2,388	160	6.7	835	35.0
Hispanic	416	26	6.3	107	25.7
Other	81	5	6.2	30	37.0

[a]Includes persons removed from a sentence of death because of statutes struck down on appeal, sentences or convictions vacated, commutations, or death other than by execution.
[b]White, black, and other categories exclude Hispanics.
[c]Includes persons sentenced to death prior to 1977 who were still under sentence of death on 12/31/97 (12), persons sentenced to death prior to 1977 whose death sentence was removed between 1977 and 12/31/97 (368), and persons sentenced to death between 1977 and 12/31/97 (5,416).

Among prisoners executed from 1977 to 1997, the average time spent between the imposition of the most recent sentence received and execution was more than 9 years (table 12). White prisoners had spent an average of 8 years and 9 months, and black prisoners, 10 years and 2 months. The 74 prisoners executed in 1997 were under sentence of death an average of 11 years and 1 month.

For the 432 prisoners executed between 1977 and 1997, the most common method of execution was lethal injection (284). Other methods were electrocution (134), lethal gas (9), hanging (3), and firing squad (2).

Method of execution	Executions, 1977-97 White	Black	Hispanic	American Indian	Asian
Total	241	160	26	3	2
Lethal injection	161	94	24	3	2
Electrocution	69	63	2	0	0
Lethal gas	6	3	0	0	0
Hanging	3	0	0	0	0
Firing squad	2	0	0	0	0

Among prisoners under sentence of death at yearend 1997, the average time spent in prison was 7 years and 1 month, down 8 months from that of 1996.

Inmates under sentence of death	Elapsed time since sentencing Mean	Median
Total	85 mos	73 mos
Male	86	73
Female	78	68
White	88	79
Black	83	69
Hispanic	82	71

The median time between the imposition of a death sentence and yearend 1997 was 73 months. Overall, the average time for women was 6.5 years, slightly less than that for men (7.2 years). On average, whites, blacks, and Hispanics had spent from 82 to 88 months under a sentence of death.

Table 12. Time under sentence of death and execution, by race, 1977-97

Year of execution	Number executed All races*	White	Black	Average elapsed time from sentence to execution for: All races*	White	Black
Total	432	265	162	111 mos	105 mos.	122 mos.
1977-83	11	9	2	51 mos.	49 mos.	58 mos.
1984	21	13	8	74	76	71
1985	18	11	7	71	65	80
1986	18	11	7	87	78	102
1987	25	13	12	86	78	96
1888	11	6	5	80	72	89
1989	16	8	8	95	78	112
1990	23	16	7	95	97	91
1991	14	7	7	116	124	107
1992	31	19	11	114	104	135
1993	38	23	14	113	112	121
1994	31	20	11	122	117	132
1995	56	33	22	134	128	144
1996	45	31	14	125	112	153
1997	74	45	27	133	126	147

Note: Average time was calculated from the most recent sentencing date.
*Includes American Indians and Asians.

Advance count of executions: January 1, 1998 - December 31, 1998

To provide the latest data on capital punishment, BJS initiated an ongoing collection effort in 1997 that gathers information following each execution. The data include the date of execution, the jurisdiction, the method used, and the name, race, and sex of each person executed.

During 1998, 18 States had executed 68 prisoners. This is an 8% decrease from the 74 executed in 1997.

Texas carried out 20, about 30% of all executions in 1998. Virginia executed 13 inmates, the most in that State since the Federal Government began tracking executions on an annual basis.

Lethal injection accounted for 60 of the executions; 7 were carried out by electrocution; and 1, by lethal gas.

Forty-eight of those executed were white, 18 black, 1 American Indian, and 1 Asian. Two women were executed (1 each in Texas and Florida). This was the first year since 1984 that any women have been executed.

State	Number of executions	Method used
Texas	20	Lethal injection
Virginia	13	Lethal injection[a]
South Carolina	7	Lethal injection
Arizona	4	Lethal injection
Florida	4	Electrocution
Oklahoma	4	Lethal injection
Missouri	3	Lethal injection
North Carolina	3	Lethal injection[b]
Alabama	1	Electrocution
Arkansas	1	Lethal injection
California	1	Lethal injection
Georgia	1	Electrocution
Illinois	1	Lethal injection
Indiana	1	Lethal injection
Maryland	1	Lethal injection
Montana	1	Lethal injection
Nevada	1	Lethal injection
Washington	1	Lethal injection
Total	68	

[a]Virginia executed 1 person by electrocution.
[b]North Carolina executed 1 person by lethal gas.

Final counts for all of 1998 will appear in *Capital Punishment 1998*, a BJS Bulletin, released in late 1999. This annual report will comprise data collected from State and Federal departments of correction. It will also include demographic characteristics, criminal history, time under sentence of death, method of removal including executions, and trends since 1973. The report will cover all persons under sentence of death on December 31, 1998, as well as those received from court and removed from under sentence of death.

Methodology

Capital punishment information is collected annually as part of the National Prisoner Statistics program (NPS-8). This data series is collected in two parts: data on persons under sentence of death are obtained from the department of correction in each jurisdiction currently authorizing capital punishment and are updated annually; information on the status of death penalty statutes is obtained from the Office of the Attorney General in each of the 50 States, the District of Columbia, and the Federal Government. Data collection forms and more detailed tables are available in *Correctional Populations in the United States,* published annually. NPS-8 covers all persons under sentence of death at any time during the year who were held in a State or Federal nonmilitary correctional facility. Included are capital offenders transferred from prison to mental hospitals and those who may have escaped from custody. Excluded are persons whose death sentences have been overturned by the court, regardless of their current incarceration status.

The statistics reported in this Bulletin may differ from data collected by other organizations for a variety of reasons: (1) NPS-8 adds inmates to the number under sentence of death not at sentencing but at the time they are admitted to a State or Federal correctional facility. (2) If in one year inmates entered prison under a death sentence or were reported as being relieved of a death sentence but the court had acted in the previous year, the counts are adjusted to reflect the dates of court decisions. (See the note on table 5 for the affected jurisdictions.) (3) NPS counts are always for the last day of the calendar year and will differ from counts for more recent periods.

All data in this report have been reviewed for accuracy by the data providers in each jurisdiction prior to publication.

Appendix table 1. Prisoners sentenced to death and the outcome sentence, by year of sentencing, 1973-97

		Number of prisoners removed from under sentence of death							
				Appeal or higher courts overturned					
Year of sentence	Number sentenced to death	Execution	Other death	Death penalty statute	Conviction	Sentence	Sentence commuted	Other or unknown reasons	Under sentence of death, 12/31/97
1973	42	2	0	14	9	8	9	0	0
1974	149	9	4	65	15	30	22	1	3
1975	298	6	4	171	24	67	21	2	3
1976	234	12	5	137	17	42	15	0	6
1977	138	17	3	40	26	33	7	0	12
1978	186	32	4	21	34	60	8	0	27
1979	152	21	9	2	28	58	5	1	28
1980	175	33	11	3	27	48	7	0	46
1981	230	42	12	0	39	74	4	1	58
1982	269	45	13	0	35	64	7	0	105
1983	253	43	12	1	22	57	6	2	110
1984	284	33	10	2	36	57	6	8	132
1985	270	22	3	1	42	64	4	3	131
1986	304	30	15	0	41	49	6	5	158
1987	287	19	11	4	34	54	2	6	157
1988	292	21	10	0	32	49	3	0	177
1989	261	10	8	0	27	48	3	0	165
1990	251	7	5	0	29	29	1	0	180
1991	269	6	6	0	27	25	3	0	202
1992	289	7	2	0	17	30	3	0	230
1993	291	7	6	0	13	13	3	0	249
1994	317	3	4	0	16	10	1	0	283
1995	325	3	6	0	6	5	0	0	305
1996	317	2	0	0	2	0	0	0	313
1997	256	0	1	0	0	0	0	0	255
Total, 1973-97	6,139	432	164	461	598	974	146	29	3,335

Note: For those persons sentenced to death more than once, the numbers are based on the most recent death sentence.

Appendix table 2. Prisoners under sentence of death on December 31, 1997, by State and year of sentencing

State	Year of sentence for prisoners sentenced to and remaining on death row, 12/31/97												Under sentence of death, 12/31/97	Average number of years under sentence of death as of 12/31/97
	1974-79	1980-81	1982-83	1984-85	1986-87	1988-89	1990-91	1992-93	1994	1995	1996	1997		
Florida	25	12	20	33	33	41	52	50	29	31	26	18	370	8.1
Texas	15	16	16	26	43	52	46	68	45	43	36	32	438	7.0
California	9	18	47	38	47	64	55	73	23	36	40	36	486	7.7
Georgia	9	4	6	6	16	11	16	13	8	7	6	13	115	8.2
Tennessee	6	7	9	12	15	9	14	6	4	4	5	7	98	10.2
Arizona	4	7	11	11	7	14	19	20	9	5	5	8	120	8.2
Nebraska	2	2		1	1	1			1		2	1	11	10.3
Nevada	2	4	9	8	4	12	11	3	8	10	12	4	87	7.5
South Carolina	2	3	3	4	5	5	8	9	7	10	8	4	68	6.7
Alabama	1	3	14	11	16	17	11	14	22	15	20	15	159	6.6
Arkansas	1		1		2	2	3	9	6	4	5	5	38	4.8
Illinois	1	12	15	13	17	16	21	22	8	13	15	6	159	8.1
Kentucky	1	1	8	2	4	1	2	4	3		2	2	30	9.5
North Carolina	1	3	5	4	1		15	47	25	28	25	22	176	4.1
Pennsylvania		4	15	18	25	33	22	29	22	22	14	10	214	7.2
Mississippi		3	5		3	3	11	13	5	5	9	7	64	5.8
Indiana		2	5	8	6	3	5	5	2	3	4	1	44	8.8
Idaho		1	2	4	1	4	2	2	1		1	1	19	9.3
Oklahoma		1	6	15	23	16	16	9	9	13	18	11	137	6.9
Maryland		1		3		3	1	1		1	7		17	6.4
Ohio			10	30	21	18	21	22	13	17	17	8	177	7.3
Louisiana			3	7	7	1	3	11	6	11	9	12	70	5.1
Missouri			2	7	12	9	11	11	8	10	8	10	88	6.1
Utah			1	2		3	1	1			1	1	10	7.9
Delaware			1			1		9				4	15	4.7
Montana			1		1	1		2			2		7	*
Virginia					3	2	7	10	10	6	1	4	43	4.6
Colorado					1		1			1	1		4	*
New Jersey					1		2	1	2	2	3	3	14	3.5
Connecticut							2	1		1			4	*
Washington							2	2	2	1	2	3	12	3.2
Oregon							1	6	5	2	3	3	20	3.2
Federal system							1	5		2	4	3	15	2.6
South Dakota								1				1	2	*
New Mexico										2	2		4	*
Total	79	104	215	263	315	342	382	479	283	305	313	255	3,335	7.1

Note: For those persons sentenced to death more than once, the numbers are based on the most recent death sentence.
*Averages not calculated for fewer than 10 inmates.

Appendix table 3. Number sentenced to death and number of removals, by jurisdiction and reason for removal, 1973-97

State	Total sentenced to death, 1973-97	Number of removals, 1973-97					Under sentence of death, 12/31/97
		Executed	Died	Sentence or conviction overturned	Sentence commuted	Other removals	
U.S. total	6,139	432	164	2,033	146	29	3,335
Federal	16	0	0	1	0	0	15
Alabama	276	16	9	91	1	0	159
Arizona	210	8	8	68	5	1	120
Arkansas	85	16	1	29	1	0	38
California	648	4	27	115	15	1	486
Colorado	16	1	1	9	1	0	4
Connecticut	6	0	0	2	0	0	4
Delaware	36	8	0	13	0	0	15
Florida	777	39	22	326	18	2	370
Georgia	270	22	8	118	6	1	115
Idaho	35	1	1	12	2	0	19
Illinois	255	10	7	71	1	7	159
Indiana	87	5	1	33	2	2	44
Kentucky	61	1	2	27	1	0	30
Louisiana	174	24	3	70	6	1	70
Maryland	45	2	1	23	2	0	17
Massachusetts	4	0	0	2	2	0	0
Mississippi	152	4	1	80	0	3	64
Missouri	145	29	6	21	1	0	88
Montana	15	1	0	6	1	0	7
Nebraska	24	3	2	6	2	0	11
Nevada	119	6	4	19	3	0	87
New Jersey	46	0	2	22	0	8	14
New Mexico	26	0	1	16	5	0	4
New York	3	0	0	3	0	0	0
North Carolina	431	8	6	237	4	0	176
Ohio	324	0	6	131	10	0	177
Oklahoma	278	9	7	124	1	0	137
Oregon	41	2	1	18	0	0	20
Pennsylvania	290	2	8	66	0	0	214
Rhode Island	2	0	0	2	0	0	0
South Carolina	151	13	4	63	3	0	68
South Dakota	2	0	0	0	0	0	2
Tennessee	179	0	5	74	0	2	98
Texas	738	144	15	97	44	0	438
Utah	25	5	0	9	1	0	10
Virginia	107	46	3	6	8	1	43
Washington	31	2	1	16	0	0	12
Wyoming	9	1	1	7	0	0	0
Percent	100%	7.0%	2.7%	33.1%	2.4%	0.5%	54.3%

Note: For those persons sentenced to death more than once, the numbers are based on the most recent death sentence.

Appendix table 4. Executions, by State and method, 1977-97

State	Number executed	Lethal injection	Electro-cution	Lethal gas	Firing squad	Hanging
Total	432	284	134	9	2	3
Alabama	16	0	16	0	0	0
Arizona	8	7	0	1	0	0
Arkansas	16	15	1	0	0	0
California	4	2	0	2	0	0
Colorado	1	1	0	0	0	0
Delaware	8	7	0	0	0	1
Florida	39	0	39	0	0	0
Georgia	22	0	22	0	0	0
Idaho	1	1	0	0	0	0
Illinois	10	10	0	0	0	0
Indiana	5	2	3	0	0	0
Kentucky	1	0	1	0	0	0
Louisiana	24	4	20	0	0	0
Maryland	2	2	0	0	0	0
Mississippi	4	0	0	4	0	0
Missouri	29	29	0	0	0	0
Montana	1	1	0	0	0	0
Nebraska	3	0	3	0	0	0
Nevada	6	5	0	1	0	0
North Carolina	8	7	0	1	0	0
Oklahoma	9	9	0	0	0	0
Oregon	2	2	0	0	0	0
Pennsylvania	2	2	0	0	0	0
South Carolina	13	8	5	0	0	0
Texas	144	144	0	0	0	0
Utah	5	3	0	0	2	0
Virginia	46	22	24	0	0	0
Washington	2	0	0	0	0	2
Wyoming	1	1	0	0	0	0

Note: These tables show the distributions of execution methods used since 1977. Lethal injection was used in 66% of the executions carried out. Eleven States — Arizona, Arkansas, California, Delaware, Indiana, Louisiana, Nevada, North Carolina, South Carolina, Utah, and Virginia — have employed 2 methods.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jan M. Chaiken, Ph.D., is director.

BJS Bulletins present the first release of findings from permanent data collection programs.

This Bulletin was written by Tracy L. Snell under the supervision of Allen J. Beck. Paula M. Ditton, James J. Stephan, and Lauren E. Glaze provided statistical review. Tina Dorsey and Tom Hester edited the report. Marilyn Marbrook administered production. Yvonne Boston prepared the printer's package.

At the Bureau of the Census, Patricia A. Clark collected the data under the supervision of Gertrude Odom and Kathleen Creighton.

Data may be obtained from the National Archive of Criminal Justice Data at the University of Michigan, 1-800-999-0960. The data sets are archived as Capital Punishment, 1973-97.

The data and the report, as well as others from the Bureau of Justice Statistics, are also available through the Internet:

http://www.ojp.usdoj.gov/bjs/

TAB B

Federal Death Penalty Prosecutions in States Which Do Not Impose the Death Penalty
As of September 1, 1999

No.	*Name of Defendant(s)*	*Federal District*	*Date of Authorization*	*Status*	*Federal Interest*
1.	Walter, Abram Paul	D. Alaska	2/20/97	Notice of intent to seek death penalty withdrawn— plea agreement.	In federal post office, robbery of federal property, murder of federal employee (postmistress).
2.	Goldston, Anthony Harris, Mario McCollough, John Hoyle, Mark	D. D.C.	1/26/93	Notice of intent to seek death penalty withdrawn— AG decision.	Defendants were members of a drug distribution organization who murdered rival drug dealers and others in furtherance of their continuing criminal enterprise. Under federal jurisdiction the full scope of the criminal activity could be investigated and prosecuted more effectively.
3.	Perry, Wayne A.	D. D.C.	6/8/93	Notice of intent to seek death penalty withdrawn— plea agreement.	Defendant was a gunman-for-hire to a drug organization that distributed cocaine in D.C. and to surrounding states. Under federal jurisdiction the full scope of the criminal activity could be investigated and prosecuted more effectively.

No.	Name of Defendant(s)	Federal District	Date of Authorization	Status	Federal Interest
4.	McCauley, Donzell M.	D. D.C.	3/20/95	Notice of intent to seek death penalty withdrawn— plea agreement.	Defendant was charged with the murder of a law enforcement officer during the commission of a narcotics felony. Under federal jurisdiction the full scope of the criminal activity could be investigated and prosecuted more effectively.
5.	Chong, Richard Lee Tuk	D. Hawaii	2/1/99	Pending trial	The defendant committed a murder during the course of a federal narcotics crime. The federal system with its stricter sentencing guidelines and more secure penitentiaries is better equipped than the state penal system to deal with a repeat violent offender like the defendant.
6.	Kauffman, Christopher McMahan, Jamie Jarold	S.D. Iowa	12/22/97	Notice of intent to seek death penalty withdrawn— plea agreement.	The murders were committed in the course of carjackings for the purpose of executing a scheme to rob a federally insured bank.

No.	Name of Defendant(s)	Federal District	Date of Authorization	Status	Federal Interest
7.	Gilbert, Kristen	D. Mass.	4/30/99	Pending trial	The murders occurred at the Veteran's Affairs Medical Center. The U.S. shares concurrent jurisdiction with the Commonwealth of Massachusetts over the VAMC, which is federal property. The victims were all veterans and the defendant was a federal employee charged with caring for the victims.
8.	Brown, Reginald Williams, Michael Wilkes, Charles O'Bryant, Lonnie Culbert, Stacey	E.D. Mich.	12/23/92	Notice of intent to seek death penalty withdrawn— AG decision [applicable to Reginald Brown only]. Notice of intent to seek death penalty withdrawn— plea agreement.	Defendants were leaders of a drug organization that distributed cocaine on a weekly basis in Detroit and to surrounding states. Under federal jurisdiction the full scope of the criminal activity could be investigated and prosecuted more effectively.

No.	Name of Defendant(s)	Federal District	Date of Authorization	Status	Federal Interest
9.	McKelton, Antonio	E.D. Mich.	7/16/98	Notice of intent to seek death penalty withdrawn— AG decision.	Defendant robbed a federally chartered and insured bank and murdered a guard at one of the bank's ATMs. The U.S. has a substantial interest in prosecuting robberies of federally chartered and insured banks and murders of guards of those banks.
10.	Garcia, Efraim	E.D. Mich.	12/10/98	The capital count was dismissed by the Court based upon the lack of a nexus with interstate commerce.	Defendant's gang activities have substantially affected interstate commerce. The gang has established chapters in other jurisdictions. This prosecution is the result of the F.B.I.'s investigation. Only in federal court can all of the applicable charges be combined in a single prosecution.

No.	*Name of Defendant(s)*	*Federal District*	*Date of Authorization*	*Status*	*Federal Interest*
11.	Bass, John	E.D. Mich.	8/13/99	Pending trial	The murders were committed in furtherance of significant drug trafficking across state lines. The Federal Bureau of Investigation is the lead investigative agency. Only in federal court can all of the applicable charges be combined in a single prosecution.
12.	Rosario-Montanez, Ian	D. P.R.	1/16/97	Notice of intent to seek death penalty withdrawn— plea agreement.	Defendant murdered a bank guard while robbing a bank. The FBI was the lead agency, investigated the case, and used its laboratory to analyze evidence. Serious bank robberies traditionally have been prosecuted federally in Puerto Rico pursuant to an MOU with Puerto Rico.

No.	Name of Defendant(s)	Federal District	Date of Authorization	Status	Federal Interest
13.	Colon-Miranda, Andres Rosario-Rodriguez, Edwin Martinez-Velez, David	D. P.R.	11/6/97	Notice of intent to seek death penalty dismissed by court as untimely.	The murders were committed as part of a drug war between two groups. The homicides in this case are related to federal drug-trafficking crimes which were committed in different local districts within P.R., so no single local office would have jurisdiction. The drug trafficking also involved periodic deliveries of narcotics to N.Y. and from South America.

No.	*Name of Defendant(s)*	*Federal District*	*Date of Authorization*	*Status*	*Federal Interest*
14.	Torres-Gomez, Edsel	D. P.R.	10/23/98	Pending trial	Defendant solicited two murders to maintain his control of the local narcotics trade and dissuade competition. The drug offense took place in N.Y. and Colombia, South America as well as P.R. The FBI, DEA, and ATF investigated. The local judicial and penal systems lack the capacity to adequately keep the defendant in custody and prosecute him successfully.

No.	Name of Defendant(s)	Federal District	Date of Authorization	Status	Federal Interest
15.	Pena-Gonzalez, Nicholas Valle-Lassalle, Victor Rodriguez-Marrero, Jose Nieves-Alonzo, Heriberto	D. P.R.	12/17/98	Pending trial for all defendants, except for Nieves-Alonzo where notice of intent to seek death penalty withdrawn-- plea agreement--and Pena-Gonzalez. The Court dismissed the notice as to Pena-Gonzalez based upon his lack of representation in the internal DOJ review and authorization process. The appeal of the Court's order is pending.	Defendants murdered two members of their drug trafficking organization in order to keep their organization secure. Federal law enforcement agencies (the DEA and U.S. Customs Service) have invested a lot of time and effort into this investigation. The underlying drug offense implicates both interstate and foreign commerce interests. Local officials lack the capacity to insure the safety of government witnesses and to keep the defendants in custody.

No.	Name of Defendant(s)	Federal District	Date of Authorization	Status	Federal Interest
16.	Gines-Perez, Luis Melendez-Perez, Ricardo	D. P.R.	4/5/99	Pending trial	Defendants shot an employee of their drug and money laundering operation. The drug and money laundering activities extend beyond any single, local jurisdiction, and has an international component. The federal government has invested significant investigative resources in this matter and the local prosecutor believes a unified federal prosecution would be best.
17.	Dean, Chris William	D. Vt.	1/13/99	Notice of intent to seek the death penalty was withdrawn pursuant to the terms of a plea agreement.	Defendant mailed pipe bomb from Indiana to victim in Vermont. The U.S. has a strong interest in prosecuting individuals who use instrumentalities of interstate commerce to commit violent crimes, and whose conduct concomitantly endangers the safety of persons who work in interstate commerce. Federal law enforcement agencies, ATF, and the FBI, investigated the crime.

No.	Name of Defendant(s)	Federal District	Date of Authorization	Status	Federal Interest
18.	Ables, Janette A. Brown, Barbara M. Brown, Ricky Lee	N.D. W.Va.	5/24/99	Pending trial	The defendants set fire to their residence killing five children. Significant federal assistance was provided by the ATF in the investigation. A federal grand jury was used in the investigation, and an independent federal case of perjury before the grand jury was been developed as a result of the investigation. In addition, federal prosecution maximizes the chances of a joint trial.

TAB C

U.S. Department of Justice

Office of Justice Programs

Bureau of Justice Assistance

Washington, D.C. 20531

MEMORANDUM TO: Arnold Hopkins, Special Assistant, OAAG

THROUGH: Richard H. Ward III, Deputy Director, BJA

Mary F. Santonastasso, Director, SLAD

FROM: Aleda Robinson, Reporting Coordinator, SLAD

SUBJECT: Indigent Defense Initiatives Supported with Byrne Formula Grant Funds

DATE: October 5, 1999

The Byrne Formula Grant Program is a partnership among federal, state, and local governments to create safer communities and improve criminal justice systems. The Bureau of Justice Assistance (BJA) awards grants to states for use by states and units of local government to improve the functioning of the criminal justice system, with emphasis on violent crime and serious offenders, and to enforce state and local laws that establish offenses similar to those in the federal Controlled Substances Act. Grants may be used to provide personnel, equipment, training, technical assistance, and information systems for more widespread apprehension, prosecution, adjudication, detention, and rehabilitation of offenders who violate such state and local laws. Grants may also be used to provide assistance (other than compensation) to victims of these offenders. There are 26 legislatively authorized purpose areas for which formula grant funds may be used.

Byrne Formula Grant funds awarded to the 50 states, 5 territories, and District of Columbia totaled $473,530,000 in Fiscal Year (FY) 1996 and $496,831,000 in FY 1997. Data regarding the expenditure purposes of Byrne Formula funds are self-reported by State Administrative Agencies (SAAs) to BJA in two reporting formats, the Program Allocations List (Attachment A) and the Individual Project Report (IPR). Attachment A data serves to report projected funding activities on a broad program level. IPR data, on the other hand, reports actual funded activities on a specific project level. While these reports reflect what is reported to BJA by the SAAs, they represent only the Byrne portion of project funding streams and do not represent the extent to which Byrne funds may be leveraged with other state and local resources to support a given project.

In response to requests regarding the use of Byrne Formula Grant funds for indigent defense or public defender programs, BJA can generate both Attachment A and IPR reports based on keyword searches. Thus, the report criteria used for this search was based on the keywords "indigent" or "defense." All program or project titles reported in the Attachment A or IPR databases containing either of these two keywords were extracted for both FY 1996 and FY 1997. Therefore, the data is not limited only to indigent defense or public defender programs since other initiatives may also contain "defense" in the program or project title. However, the reports serve to provide a general estimate for the level of Byrne Formula Grant funds allocated to these general purposes. The following reflects the funding levels reported to BJA for the above criteria:

Keyword: *"indigent"*

FY 1996	Attachment A	$105,000
	IPR	$244,000
FY 1997	Attachment A	$105,000
	IPR	$221,400

Keywords: *"indigent"* or *"defense"*

FY 1996	Attachment A	$1,009,963
	IPR	$2,486,756
FY 1997	Attachment A	$3,439,054
	IPR	$2,947,098

A report was also generated using a broader search criteria in order to capture data regarding other Byrne funded programs that may also relate to indigent defense or public defender initiatives. The more inclusive search criteria targeted Attachment A and IPR data containing one or more of the following key words in either the program titles or project titles reported to BJA: "indigent," "defense," "treatment," "court effectiveness," or "defender." That information is not included, however, because the broader search resulted in the inclusion of programs that were unrelated to indigent defense, as well as highly inflated funding amounts that do not adequately reflect the level of Byrne Formula funds supporting indigent defense initiatives.

BJA is in the process of developing and implementing a new reporting scheme for the Byrne Formula Grant Program, as well as for other grant programs administered within BJA. The new reporting scheme should allow BJA to more easily identify and report out on priority funding initiatives, including those targeting indigent defense and public defender activities.

Bureau of Justice Assistance
Byrne Formula Grant Program
Word Search for "Attachment A"
1996

State Name	Program	Purpose Area	Federal Amount
Rhode Island	Indigent Defense	10	$105,000.00
		Total:	*$105,000.00*

Report based on Attachment A information for Program Title(s) containing indigent

Bureau of Justice Assistance
Byrne Formula Grant Program
Word Search for "Attachment A"
1997

State Name	Program	Purpose Area	Federal Amount
Rhode Island	Indigent Defense	10	$105,000.00
		Total:	*$105,000.00*

Report based on Attachment A information for Program Title(s) containing indigent

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 RHODE ISLAND

Purpose Area: 10

Subgrant Number: 96-SI-141 Purpose Area: 10 Start Date: 07/01/1996 End Date: 06/30/1997 CJRI Program: No
Subgrantee: Office Of Public Defender
Program Title: Indigent Defense Program Code:
Project Title: INDIGENT DEFENSE PROJECT
Federal Funds: $105,000.00 Pass-thru Funds: $105,000.00 Matching Funds: $35,000.00

Subgrant Number: 96-SI-142 Purpose Area: 10 Start Date: 07/01/1996 End Date: 06/30/1997 CJRI Program: No
Subgrantee: Office Of Public Defender
Program Title: Indigent Defense Program Code:
Project Title: INDIGENT DEFENSE
Federal Funds: $139,000.00 Pass-thru Funds: $139,000.00 Matching Funds: $46,335.00

Subtotals for Purpose Area - 10 Number of Projects: 2
Federal Funds: $244,000.00 Pass-thru Funds: $244,000.00 Matching Funds: $81,335.00

RHODE ISLAND Totals: Number of Projects: 2
Total Federal Funds: $244,000.00 *Total Pass-thru Funds:* $244,000.00 *Total Matching Funds:* $81,335.00

Search Criteria: Program Titles (Indigent) OR Project Titles (Indigent).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1997 INDIANA

Purpose Area: **11**

Subgrant Number: **97DB-080** Purpose Area: **11** Start Date: **04/01/1998** End Date: **03/31/1999** CJRI Program: **No**

Subgrantee: **In Public Defender Council**

Program Title: **Operational Effectiveness** Program Code:

Project Title: **INDIGENT DEFENSE TA PROJECT**

Federal Funds: **$221,400.00** Pass-thru Funds: **$0.00** Matching Funds: **$73,800.00**

Subtotals for Purpose Area - **11** Number of Projects: **1**

Federal Funds: **$221,400.00** Pass-thru Funds: **$0.00** Matching Funds: **$73,800.00**

INDIANA Totals: Number of Projects: **1**

Total Federal Funds: **$221,400.00** *Total Pass-thru Funds:* **$0.00** *Total Matching Funds:* **$73,800.00**

Search Criteria: Program Titles (Indigent) OR Project Titles (Indigent).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Word Search for "Attachment A"
1996

State Name	Program	Purpose Area		Federal Amount
Arkansas	Public Defense: Drugs and Violent Crime	10		$97,332.00
Connecticut	Youthful Offender Defense Unit	10		$102,000.00
Illinois	Specialized Defense Initiatives	10		$694,396.00
	Specialized Defense Training	10		$11,235.00
			State Total:	*$705,631.00*
Rhode Island	Indigent Defense	10		$105,000.00
			Total:	*$1,009,963.00*

Report based on Attachment A information for Program Title(s) containing indigent, or defense

Bureau of Justice Assistance
Byrne Formula Grant Program
Word Search for "Attachment A"
1997

State Name	Program	Purpose Area		Federal Amount
Arkansas	Public Defense: Drugs and Violent Crime	10		$97,971.00
California	Fast Track Prosecution/Fast Track Defense	10		$1,987,341.00
Connecticut	Youthful Offender Defense Unit	10		$395,373.00
Illinois	Specialized Defense Initiatives	10		$853,369.00
Rhode Island	Indigent Defense	10		$105,000.00
			Total:	*$3,439,054.00*

Report based on Attachment A information for Program Title(s) containing indigent, or defense

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 ARKANSAS

Purpose Area: 10

Subgrant Number: 96-27 Purpose Area: 10 Start Date: 03/01/1996 End Date: 03/31/1997 CJRI Program: No
Subgrantee: Pulaski County, Arkansas
Program Title: Public Defense: Drugs and Violent Crime Program Code:
Project Title: 6TH DISTRICT-PUBLIC DEFENDER-DRUG COURT
Federal Funds: $43,336.00 Pass-thru Funds: $43,336.00 Matching Funds: $15,541.00

Subgrant Number: 96-34 Purpose Area: 10 Start Date: 04/01/1996 End Date: 03/31/1997 CJRI Program: No
Subgrantee: Pulaski County, Arkansas
Program Title: Public Defense: Drugs and Violent Crime Program Code:
Project Title: 6TH DISTRICT, PUBLIC DEFENDER-VIOLENT CRIMES
Federal Funds: $53,996.00 Pass-thru Funds: $53,996.00 Matching Funds: $18,313.00

Subtotals for Purpose Area - 10 Number of Projects: 2
Federal Funds: $97,332.00 Pass-thru Funds: $97,332.00 Matching Funds: $33,854.00

ARKANSAS Totals: Number of Projects: 2
Total Federal Funds: $97,332.00 *Total Pass-thru Funds:* $97,332.00 *Total Matching Funds:* $33,854.00

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND. MP. OH. OK. OR. PA. PR. RI. SC. SD. TN. TX. UT. VT. VI. VA. WA. WV. WI. WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 CALIFORNIA

Purpose Area: **10**

Subgrant Number: **DC95B40190** Purpose Area: **10** Start Date: **06/28/1996** End Date: **06/30/1997** CJRI Program: **No**

Subgrantee: **County Of Los Angeles, District Attorney's Office**

Program Title: **Fast Track Prosecution/Fast Track Defense** Program Code:

Project Title: **Los Angeles Felony Accelerated Sentencing Teams (LAFAST)**

Federal Funds: **$1,556,366.00** Pass-thru Funds: **$1,556,366.00** Matching Funds: **$0.00**

Subtotals for Purpose Area - **10** Number of Projects: **1**

Federal Funds: **$1,556,366.00** Pass-thru Funds: **$1,556,366.00** Matching Funds: **$0.00**

CALIFORNIA Totals: Number of Projects: **1**

Total Federal Funds: **$1,556,366.00** *Total Pass-thru Funds:* **$1,556,366.00** *Total Matching Funds:* **$0.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND. MP. OH. OK. OR. PA. PR. RI. SC. SD. TN. TX. UT. VT. VI. VA. WA. WV. WI. WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 ILLINOIS

Purpose Area: **10**

Subgrant Number: **4696** Purpose Area: **10** Start Date: **07/01/1999** End Date: **09/30/1999** CJRI Program: **No**

Subgrantee: **County Of Cook On Behalf Of The Office Of The Public Defender**

Program Title: **County Public Defender Services** Program Code:

Project Title: **Defense Service Juvenile**

Federal Funds: **$102,985.00** Pass-thru Funds: **$102,985.00** Matching Funds: **$34,328.00**

Subgrant Number: **4697** Purpose Area: **10** Start Date: **08/01/1997** End Date: **07/31/1998** CJRI Program: **No**

Subgrantee: **County Of Kane On Behalf Of The Office Of The Public Defender**

Program Title: **County Public Defender Services** Program Code:

Project Title: **Violent Crime Defense**

Federal Funds: **$95,000.00** Pass-thru Funds: **$95,000.00** Matching Funds: **$31,667.00**

Subtotals for Purpose Area - **10** Number of Projects: **2**

Federal Funds: **$197,985.00** Pass-thru Funds: **$197,985.00** Matching Funds: **$65,995.00**

Purpose Area: **20**

Subgrant Number: **4698** Purpose Area: **20** Start Date: **12/01/1997** End Date: **12/31/1998** CJRI Program: **No**

Subgrantee: **County Of Makison On Behalf Of The Office Of The Pubic Defender**

Program Title: **Violent Offender Prosecution** Program Code:

Project Title: **Violent Crime Defense Program**

Federal Funds: **$73,500.00** Pass-thru Funds: **$0.00** Matching Funds: **$24,500.00**

Subtotals for Purpose Area - **20** Number of Projects: **1**

Federal Funds: **$73,500.00** Pass-thru Funds: **$0.00** Matching Funds: **$24,500.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 ILLINOIS

ILLINOIS Totals: Number of Projects: 3

Total Federal Funds: $271,485.00 *Total Pass-thru Funds:* $197,985.00 *Total Matching Funds:* $90,495.00

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 INDIANA

Purpose Area: 20

Subgrant Number: 96DB-021 Purpose Area: 20 Start Date: 07/01/1996 End Date: 06/30/1997 CJRI Program: No

Subgrantee: **Indiana University School Of Law - Indianapolis**

Program Title: **Alternatives to Detention** Program Code:

Project Title: **LAW SCHOOL CRIMINAL DEFENSE CLINIC**

Federal Funds: $95,000.00 Pass-thru Funds: $0.00 Matching Funds: $31,666.66

Subtotals for Purpose Area - 20 Number of Projects: 1

Federal Funds: $95,000.00 Pass-thru Funds: $0.00 Matching Funds: $31,666.66

INDIANA Totals: Number of Projects: 1

Total Federal Funds: $95,000.00 *Total Pass-thru Funds:* $0.00 *Total Matching Funds:* $31,666.66

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
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Individual Project Report
1996 KENTUCKY

Purpose Area: 26

Subgrant Number: **5373-N26-1/96** Purpose Area: **26** Start Date: **07/01/1996** End Date: **06/30/1997** CJRI Program: No

Subgrantee: **Department Of Public Advocacy**

Program Title: **Death Penalty Prosecution** Program Code:

Project Title: **CAPITAL POST-CONVICTION DEFENSE**

Federal Funds: **$39,608.61** Pass-thru Funds: **$0.00** Matching Funds: **$13,202.87**

Subtotals for Purpose Area - **26** Number of Projects: **1**

Federal Funds: **$39,608.61** Pass-thru Funds: **$0.00** Matching Funds: **$13,202.87**

KENTUCKY Totals: Number of Projects: **1**

Total Federal Funds: **$39,608.61** *Total Pass-thru Funds:* **$0.00** *Total Matching Funds:* **$13,202.87**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND. MP. OH. OK. OR. PA. PR. RI. SC. SD. TN. TX. UT. VT. VI. VA. WA. WV. WI. WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 NEW YORK

Purpose Area: **10**

Subgrant Number: **NC96734730** Purpose Area: **10** Start Date: **12/01/1997** End Date: **03/31/1998** CJRI Program: **No**

Subgrantee: **Nassau County**

Program Title: **Enhanced Adjudication** Program Code:

Project Title: **ENHANCED DEFENSE**

Federal Funds: **$60,218.00** Pass-thru Funds: **$60,218.00** Matching Funds: **$20,073.00**

Subtotals for Purpose Area - **10** Number of Projects: **1**

Federal Funds: **$60,218.00** Pass-thru Funds: **$60,218.00** Matching Funds: **$20,073.00**

NEW YORK Totals: Number of Projects: **1**

Total Federal Funds: **$60,218.00** *Total Pass-thru Funds:* **$60,218.00** *Total Matching Funds:* **$20,073.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND. MP. OH. OK. OR. PA. PR. RI. SC. SD. TN. TX. UT. VT. VI. VA. WA. WV. WI. WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 PENNSYLVANIA

Purpose Area: **16**

Subgrant Number: **96-DS-16-7542** Purpose Area: **16** Start Date: **07/01/1998** End Date: **06/30/1999** CJRI Program: **No**
Subgrantee: **Chester Co Public Defender's Office**
Program Title: **Juvenile Offender Prosecution** Program Code:
Project Title: **Juvenile Prosecution & Defense Capacity Building**
Federal Funds: **$30,643.00** Pass-thru Funds: **$30,643.00** Matching Funds: **$30,643.00**

Subgrant Number: **96-DS-16-7539** Purpose Area: **16** Start Date: **07/01/1998** End Date: **06/30/1999** CJRI Program: **No**
Subgrantee: **Delaware County Da's Office**
Program Title: **Juvenile Offender Prosecution** Program Code:
Project Title: **Juvenile Prosecution & Defense Capacity Building**
Federal Funds: **$29,800.00** Pass-thru Funds: **$29,800.00** Matching Funds: **$29,800.00**

Subgrant Number: **96-DS-16-7531** Purpose Area: **16** Start Date: **07/01/1998** End Date: **06/30/1999** CJRI Program: **No**
Subgrantee: **Franklin County Da's Office**
Program Title: **Juvenile Offender Prosecution** Program Code:
Project Title: **Juvenile Prosecution & Defense Capacity Building**
Federal Funds: **$21,040.00** Pass-thru Funds: **$21,040.00** Matching Funds: **$21,040.00**

Subtotals for Purpose Area - **16** Number of Projects: **3**
Federal Funds: **$81,483.00** Pass-thru Funds: **$81,483.00** Matching Funds: **$81,483.00**

PENNSYLVANIA Totals: Number of Projects: **3**
Total Federal Funds: **$81,483.00** *Total Pass-thru Funds:* **$81,483.00** *Total Matching Funds:* **$81,483.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
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Individual Project Report
1996 RHODE ISLAND

Purpose Area: **10**

Subgrant Number: **96-SI-141** Purpose Area: **10** Start Date: **07/01/1996** End Date: **06/30/1997** CJRI Program: **No**
Subgrantee: **Office Of Public Defender**
Program Title: **Indigent Defense** Program Code:
Project Title: **INDIGENT DEFENSE PROJECT**
Federal Funds: **$105,000.00** Pass-thru Funds: **$105,000.00** Matching Funds: **$35,000.00**

Subgrant Number: **96-SI-142** Purpose Area: **10** Start Date: **07/01/1996** End Date: **06/30/1997** CJRI Program: **No**
Subgrantee: **Office Of Public Defender**
Program Title: **Indigent Defense** Program Code:
Project Title: **INDIGENT DEFENSE**
Federal Funds: **$139,000.00** Pass-thru Funds: **$139,000.00** Matching Funds: **$46,335.00**

Subtotals for Purpose Area - **10** Number of Projects: **2**
Federal Funds: **$244,000.00** Pass-thru Funds: **$244,000.00** Matching Funds: **$81,335.00**

RHODE ISLAND Totals: Number of Projects: **2**
Total Federal Funds: **$244,000.00** *Total Pass-thru Funds:* **$244,000.00** *Total Matching Funds:* **$81,335.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1996 SOUTH CAROLINA

Purpose Area: **10**

Subgrant Number: **1F96074** Purpose Area: **10** Start Date: **10/01/1997** End Date: **06/30/1998** CJRI Program: **No**

Subgrantee: **Charleston County**

Program Title: **Expand Public Defender Resources** Program Code:

Project Title: **Life W/O Parole Strike Force Defense Team**

Federal Funds: **$41,263.00** Pass-thru Funds: **$41,263.00** Matching Funds: **$13,756.00**

Subtotals for Purpose Area - **10** Number of Projects: **1**

Federal Funds: **$41,263.00** Pass-thru Funds: **$41,263.00** Matching Funds: **$13,756.00**

SOUTH CAROLINA Number of Projects: **1**

Total Federal Funds: **$41,263.00** *Total Pass-thru Funds:* **$41,263.00** *Total Matching Funds:* **$13,756.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND. MP. OH. OK. OR. PA. PR. RI. SC. SD. TN. TX. UT. VT. VI. VA. WA. WV. WI. WY

Bureau of Justice Assistance
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1997 ARKANSAS

Purpose Area: **10**

Subgrant Number: **97-17** Purpose Area: **10** Start Date: **04/01/1997** End Date: **03/31/1998** CJRI Program: **No**

Subgrantee: **Pulaski County, Arkansas**

Program Title: **Public Defense: Drugs and Violent Crime** Program Code:

Project Title: **6TH DISTRICT, PUBLIC DEFENDER-VIOLENT CRIMES**

Federal Funds: **$54,939.00** Pass-thru Funds: **$54,939.00** Matching Funds: **$18,313.00**

Subgrant Number: **97-18** Purpose Area: **10** Start Date: **04/01/1997** End Date: **03/31/1998** CJRI Program: **No**

Subgrantee: **Pulaski County, Arkansas**

Program Title: **Public Defense: Drugs and Violent Crime** Program Code:

Project Title: **6TH DISTRICT-PUBLIC DEFENDER-DRUG COURT**

Federal Funds: **$43,032.00** Pass-thru Funds: **$43,032.00** Matching Funds: **$14,344.00**

Subtotals for Purpose Area - **10** Number of Projects: **2**

Federal Funds: **$97,971.00** Pass-thru Funds: **$97,971.00** Matching Funds: **$32,657.00**

ARKANSAS Totals: Number of Projects: **2**

Total Federal Funds: **$97,971.00** *Total Pass-thru Funds:* **$97,971.00** *Total Matching Funds:* **$32,657.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
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Individual Project Report
1997 CALIFORNIA

Purpose Area: **10**

Subgrant Number: **DC97B50190** Purpose Area: 10 Start Date: **07/01/1997** End Date: 06/30/1998 CJRI Program: No

Subgrantee: **County Of Los Angeles, District Attorney's Office**

Program Title: **Fast Track Prosecution/Fast Track Defense** Program Code:

Project Title: **Los Angeles Felony Accelerated Sentencing Teams (LAFAST)**

Federal Funds: **$1,987,341.00** Pass-thru Funds: **$1,987,341.00** Matching Funds: **$0.00**

Subtotals for Purpose Area - **10** Number of Projects: **1**

Federal Funds: **$1,987,341.00** Pass-thru Funds: **$1,987,341.00** Matching Funds: **$0.00**

CALIFORNIA Totals: Number of Projects: **1**

Total Federal Funds: **$1,987,341.00** *Total Pass-thru Funds:* **$1,987,341.00** *Total Matching Funds:* **$0.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

Bureau of Justice Assistance
Byrne Formula Grant Program
Individual Project Report
1997 INDIANA

Purpose Area: 11

Subgrant Number: 97DB-012 Purpose Area: 11 Start Date: 07/01/1997 End Date: 06/30/1998 CJRI Program: No
Subgrantee: Iu Law School,indianapolis
Program Title: Operational Effectiveness Program Code:
Project Title: I.U. LAW SCHOOL CRIMIONAL DEFENSE CLINIC
Federal Funds: $125,022.00 Pass-thru Funds: $0.00 Matching Funds: $41,673.00

Subgrant Number: 97DB-080 Purpose Area: 11 Start Date: 04/01/1998 End Date: 03/31/1999 CJRI Program: No
Subgrantee: In Public Defender Council
Program Title: Operational Effectiveness Program Code:
Project Title: INDIGENT DEFENSE TA PROJECT
Federal Funds: $221,400.00 Pass-thru Funds: $0.00 Matching Funds: $73,800.00

Subtotals for Purpose Area - 11 Number of Projects: 2
Federal Funds: $346,422.00 Pass-thru Funds: $0.00 Matching Funds: $115,473.00

INDIANA Totals: Number of Projects: 2
Total Federal Funds: $346,422.00 *Total Pass-thru Funds:* $0.00 *Total Matching Funds:* $115,473.00

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

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Individual Project Report
1997 CONNECTICUT

Purpose Area: **10**

Subgrant Number: **NC:97.10-04YR3** Purpose Area: **10** Start Date: **07/01/1997** End Date: **06/30/1998** CJRI Program: **No**

Subgrantee: **State Of Ct Office Of The Chief Public Defender**

Program Title: **Youthful Offender Defense Unit** Program Code:

Project Title: **Youthful Offenders**

Federal Funds: **$373,163.00** Pass-thru Funds: **$0.00** Matching Funds: **$124,388.00**

Subtotals for Purpose Area - **10** Number of Projects: **1**

Federal Funds: **$373,163.00** Pass-thru Funds: **$0.00** Matching Funds: **$124,388.00**

Purpose Area: **26**

Subgrant Number: **NC:97.26-01YR3** Purpose Area: **26** Start Date: **07/01/1997** End Date: **06/30/1998** CJRI Program: **No**

Subgrantee: **State Of Ct Office Of The Chief Public Defender**

Program Title: **Death Penalty Litigation - Defense Unit** Program Code:

Project Title: **Death Penalty**

Federal Funds: **$142,201.00** Pass-thru Funds: **$0.00** Matching Funds: **$47,401.00**

Subtotals for Purpose Area - **26** Number of Projects: **1**

Federal Funds: **$142,201.00** Pass-thru Funds: **$0.00** Matching Funds: **$47,401.00**

CONNECTICUT Totals: Number of Projects: **2**

Total Federal Funds: **$515,364.00** *Total Pass-thru Funds:* **$0.00** *Total Matching Funds:* **$171,789.00**

Search Criteria: Program Titles (Indigent,Defense) OR Project Titles (Indigent, Defense).

Purpose Area(s): 01 , 02 , 03 , 04 , 05 , 06 , 07A, 07B, 08 , 09 , 10 , 11 , 12 , 13 , 14 , 15A, 15B, 16 , 17 , 18 , 19 , 20 , 21 , 22 , 23 , 24 , 25 , 26 , 99

State(s): AL, AK, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, MP, OH, OK, OR, PA, PR, RI, SC, SD, TN, TX, UT, VT, VI, VA, WA, WV, WI, WY

ADDITIONAL SUBMISSION FOR THE RECORD

THE UNIVERSITY OF UTAH,
July 23, 1999.

RE: Performance of the Current Administration in
Supreme Court Criminal Cases

Senator STROM THURMOND, *Chairman,*
Subcommittee on Criminal Justice Oversight,
Senate Committee on the Judiciary,
Senate Dirksen Office Building,
Washington, DC.

DEAR CHAIRMAN THURMOND: I understand that you are interested in the performance of the current Administration in defending the interests of effective law enforcement. I write to provide some statistical information that bears on this question.

As you may recall, on November 14, 1995, I testified before the Senate Judiciary Committee concerning the performance of the Administration in criminal cases before the United States Supreme Court. That testimony collected statistics on *amicus* briefs filed by the United States in state criminal cases. (More information about this methodology is set out in an attachment to this letter.) One set of statistics showed that such filings in all criminal cases had fallen sharply when the current Administration assumed control of the Justice Department. During the Court Terms 1989 to 1992, when political appointees in the Bush Administration reviewed such filings, the United States filed supportive *amicus* briefs in 53 percent of all criminal cases. In Court Terms 1993 and 1994, when appointees in the Clinton administration made the decisions, such briefs were filed in only 29 percent of all cases. I tentatively concluded from data that the current Administration was, contrary to its public promises, in fact less committed to supporting the states in criminal cases was than its predecessor.

When I testified in 1995, I cautioned that it would be informative to continue to follow the data and see whether this pattern continued in subsequent years. I have recently updated my data and can report that the problem of lower support for the states persists. In the three most recent years the current Administration has filed briefs in a far lower percentage: 38 percent in 1995, 36 percent in 1996, and 23 percent in 1997 (the most recent year for which data is available). Over all, compared to the Bush Administration's record of supporting the states in 53 percent of the criminal cases in front of the Supreme Court, the Clinton Administration has supported them in only 29 percent.

A similar picture emerges if one narrows the focus to an important subset of criminal cases: death penalty cases. During the Bush Administration, supporting *amicus* briefs were filed in 37 percent of all capital cases. For the five years of the Clinton Administration for which data is available, such briefs have been filed in only 17 percent of all cases.

Based on this expanded data, the differences between the two Administrations have become even clearer than when I testified earlier. As a result, I feel even more confident that the current Administration is less interested in supporting effective law enforcement than was its predecessor.

The methodology for all of these calculations is precisely the same as that elaborated in my earlier testimony. If I can provide any further information on this subject, please do not hesitate to contact me.

Sincerely,

PAUL G. CASSELL,
Professor of Law.

ATTACHMENT—METHODOLOGY FOR CALCULATIONS

To gather information on the subject of supporting the states in "criminal cases," the following methodology was used. Because defining "criminal" cases could be the subject of debate, I used a neutral source for my data base: the annual *United States Law Week* "Review of the Supreme Court's Term," which summarizes the Supreme Court's opinions in the area of "criminal law." For each of the last nine Court terms (four during the Bush Administration and five during the Clinton Administra-

tion [1]), my research assistant then identified the cases in which a state was a party and, if so, whether they had been supported (or opposed) by the United States as an *amicus curiae.* Because the number of criminal cases varies from year to year,[2] statistics based on absolute numbers might be questioned by some. To avoid that issue, my research assistant derived a percentage of criminal cases in which the state was supported by the United States. This was determined through an electronic search of a legal database for an *amicus* brief filing by the Solicitor General's Office. For purposes of this computation, consolidated cases were treated as one "case."

After all of the state criminal cases were compiled and verified, the number of Solicitor General *amicus* briefs filed for one given Supreme Court term was divided by the total number of state criminal cases decided for that same term; the number from this calculation is the percentage of *amicus* briefs filed by the Solicitor General's Office in support of the states for that given year/Supreme Court term.

The same procedure was done regarding state death penalty cases—namely, the number of Solicitor General's *amicus* briefs filed in state death penalty cases for a Supreme Court term was divided by the total number of state death penalty cases decided for the same term; the number from this calculation equals the percentage of *amicus* briefs filed by the Solicitor General's Office in support of the states in death penalty cases for the given Supreme Court term.

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[1] It appeared that most of the briefs for cases argued during the transitional October Term 1992 were filed during the Bush Administration.

[2] *See* 64 U.S.L.W. at 3127 (summarizing the Supreme Court's 1994 to 1995 Term and concluding that the Court's "output of criminal law cases declined for the second year in a row").