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DEATH IN THE FEDERAL COURTS: EXPECTATIONS AND REALITIES OF THE FEDERAL DEATH PENALTY ACT OF 1994

I. INTRODUCTION

"Thou shalt not kill."¹ These four words have echoed throughout the churches, judicial courts, and political meeting places of men and women for time immemorial. Along with their deep religious and political significance, they carry with them a haunting contrast to the current state of mankind: men and women can kill other men and women—legally. In the United States, this "legal" killing, commonly referred to as the "death penalty," traditionally takes place within the confines of the individual state judicial systems,² and generally involves the execution of felons tried and convicted of some form of intentional murder.³

However, under the United States Code, the federal government also has authority to seek the death penalty for defendants accused of certain crimes within federal court jurisdiction.⁴ While this authority has existed since the inception of the republic,⁵ it was vastly expanded with the codification of

1. *Exodus* 20:13.

2. There were, as of February, 1996, 2,800 state death row inmates—compared to eight federal death row inmates. See W. Zachary Malinowski, *5 R.I. Murder Suspects May Face Death Penalty*, *Atty. Gen. Reno to Decide What Penalty to Seek*, *PROVIDENCE J.-BULL.*, Feb. 19, 1996, at A1. While the overall number of death row inmates has gone up consistently since February, 1996, the gap between state and federal death row inmates remains cavernous. See, e.g., David A. Kaplan, *Life and Death Decisions*, *NEWSWEEK*, June 16, 1997, at 28 (noting that there are "now more than 3,000" total people on death row, "only 12 [of which are] federal inmates"); Eric Pooley, *Death or Life? McVeigh Could Be the Best Argument for Executions, but His Case Highlights the Problems That Arise When Death Sentences Are Churned Out in Huge Numbers*, *TIME*, June 16, 1997, at 31 (explaining that there are "more than 3,000 people on death row").

3. See *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987).

4. See generally *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 108 Stat. 1796 (federal death penalty provisions codified in scattered sections of 18 U.S.C.).

5. See *infra* notes 23-28 and accompanying text.

the Federal Death Penalty Act of 1994⁶ (the "Act", the "1994 Act", the "Death Penalty Act", or the "Federal Death Penalty Act") as part of the Violent Crime Control and Law Enforcement Act of 1994.⁷

Largely in response to the American public's desire to expand and expedite the use of the death penalty for violent crimes,⁸ as evidenced by recent public outrage over drug-related killings and terrorist acts,⁹ the 1994 Congress, by a vote of three to one,¹⁰ increased the number of federal crimes potentially invoking a death sentence to sixty.¹¹ This significant expansion of the federal death penalty increased demands by supporting lawmakers and other proponents to try violent criminals under the new federal law.¹² The United States Attorneys General responded, reviewing 243 cases for federal death penalty eligibility since the 1994 expansion and recommending sixty-nine of the 243 for actual capital prosecution¹³—twelve of which ultimately led to imposition of a death sentence.¹⁴

Despite the substantial number of federal prosecutions invoking provisions of the Act,¹⁵ however, the Act's legal sufficiency

6. 18 U.S.C. §§ 3591-3598 (1994).

7. Pub. L. No. 102-322, 108 Stat. 1796.

8. Cf. Faye A. Silas, *The Death Penalty—The Comeback Picks Up Speed*, 71-Apr. A.B.A. J. 48, 48 (1985) (asserting that public support for the death penalty is "at its highest level in half a century"); see also *infra* Part V.

9. See Roberto Suro, *How a Federal Case Becomes a Capital Case; Secret Panel Must Weigh Legal Issues, Cost of Prosecution and Public Demands for Vengeance*, WASH. POST, Jan. 11, 1998, at A14.

10. See *Dozens of Death Penalties*, WASH. POST, Apr. 18, 1994, at A18 (discussing Congressional voting on the Act).

11. See Henry J. Reske, *A Bigger Role For The Feds: 60 Offenses Now Eligible for Death Penalty Under Bill*, 80 A.B.A. J. 14 (1994) (stating that the Federal Death Penalty Act increases the number of federal crimes possibly bringing a death penalty sanction to 60); David Johnston & Steven A. Holmes, *Experts Doubt Effectiveness of Crime Bill*, N.Y. TIMES, Sep. 14, 1994, at A16.

12. See Suro, *supra* note 9, at A14; cf. Pooley, *supra* note 2, at 31 (describing the anxiousness of both survivors and the general public to have Timothy McVeigh prosecuted under the Federal Death Penalty).

13. See Suro, *supra* note 9, at A14. In 1997 alone, of the 136 cases considered, 32 were approved for federal death penalty prosecution. See *id.*

14. See Death Penalty Information Center, *Federal Death Row Prisoners* (last modified Mar. 26, 1998) <<http://www.essential.org/dpic/fedprisoners.html>> (listing current federal death row prisoners sentenced under the 1994 Act).

15. The recent high profile prosecution of Timothy McVeigh in the Oklahoma City bombing trial, discussed *infra* Part IV.C, is one such prosecution.

remains relatively untested. Only one federal appellate circuit has issued an opinion in a case arising under the Act,¹⁶ and the Supreme Court has not yet addressed the application and constitutionality of the Act's controversial provisions.¹⁷

Furthermore, it remains unclear whether the new law will actually result in a surge of executions by the federal government.¹⁸ Typical state death penalty appeals take years to reach fruition, and federal death penalty appeals may suffer this same prolonged fate.¹⁹ Money may also hinder the Act's ultimate effect. Given the nature of capital prosecutions and the lengthy appeals process, death penalty cases usually cost millions of dollars more than those where life imprisonment is sought.²⁰

Nevertheless, by expanding and codifying the ultimate criminal sanction at the federal level, the Death Penalty Act has significantly influenced the ongoing legal debate regarding judicially sanctioned killing. As a result, its ramifications should profoundly effect the use of the death penalty in the United States during the twenty-first century.

This comment surveys the background of the Federal Death Penalty Act of 1994 and evaluates its effect, so far, on the federal court system—emphasizing its use in recent federal cases. Part II provides a brief evolutionary history of the federal death penalty, culminating in the passage of the Federal Death Pen-

16. See *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998) (affirming sentence of death).

17. See Peyton Robinson, *Judge Over Jury: Judicial Discretion in the Federal Death Penalty Under the Drug Kingpin Act*, 45 U. KAN. L. REV. 1491, 1492-93 (1996); see also Tom Kenworthy & Lois Romano, *Jury Condemns McVeigh to Death; It's Okay, Oklahoma Bomber Whispers to Family in Court*, WASH. POST, June 14, 1997, at A1.

18. See George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 329 (1996); see also Johnston & Holmes, *supra* note 11, at A16.

19. See Jack Douglas, Jr. & Ginger D. Richardson, *Appeals Could Tie Up Case for Years*, FORT WORTH STAR-TELEGRAM, June 3, 1997, at 19 (noting that "[the appeals process in federal death penalty cases] is a very frustrating process with a lot of twists and turns" and the death penalty is "not a very swift and sure kind of punishment") (statement of Richard Dieter, Executive Director of the Death Penalty Information Center in Washington, D.C.).

20. See Suro, *supra* note 9, at A14 (explaining that the federal government will have to invest far more resources in typical death penalty cases than it does in life imprisonment cases).

ty Act in 1994. Part III profiles the Federal Death Penalty Act itself, highlighting the individual provisions and the Congressional efforts made to comply with constitutional requirements. Part IV analyzes the judicial scrutiny of the Act in recent federal death penalty cases, focusing on two of the most significant prosecutions under the Act to date. Finally, Part V highlights the overwhelming support for the death penalty in the United States, concluding that the Federal Death Penalty Act represents the will of the people and serves an important role in American criminal jurisprudence.

II. THE ROOTS OF THE FEDERAL DEATH PENALTY ACT OF 1994

Capital punishment has been part of the American penal system for over three centuries.²¹ Dating back to the Massachusetts Bay Colony in 1636, early death penalty offenses included idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion.²²

In 1790, the First Congress of the United States enacted legislation providing death as the penalty for certain specified federal crimes.²³ Acceptance of the death penalty by the Founding Fathers is also apparent from the actual text of the Constitution.²⁴ The Fifth Amendment, adopted in 1791, specifically acknowledges the continued existence of capital punishment by imposing limits on the prosecution in capital cases,²⁵ mandating that:

No person shall be held to answer for a *capital . . . crime*, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same

21. A complete chronological history of the American death penalty is beyond the scope of this comment. Readers interested in an exceptionally thorough historical account of capital punishment in the United States should see *Furman v. Georgia*, 408 U.S. 238, 335-42 (1972) (Marshall, J., concurring), and Sandra R. Acosta, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596 (1990).

22. See *Furman*, 408 U.S. at 335 (1972) (Marshall, J., concurring).

23. See *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (plurality opinion) (citing C. 9, 1 Stat. 112 (1790)).

24. See *id.*

25. See *id.*

offen[s]e to be twice put in *jeopardy of life or limb*; . . . nor be *deprived of life*, liberty, or property, without due process of law²⁶

The Fourteenth Amendment, ratified in 1868, "similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of 'life, liberty, or property' without due process of law."²⁷

The historical evidence suggests, therefore, that the death penalty was contemplated by the Framers at both the state and federal levels; and for nearly two centuries after the initial federal capital punishment legislation and the enactment of the Fifth Amendment, the Supreme Court "repeatedly and often expressly . . . recognized that capital punishment is not invalid."²⁸

Yet, actual federal death sentences do not have a significantly extensive historical background; the number of verdicts, and subsequent executions, at the federal level are exceedingly outnumbered by those handed down in the states.²⁹ During the twentieth century, only thirty-four people have been executed by the federal government.³⁰ The most recent federal execution took place on March 15, 1963, when a twenty-eight-year-old convicted kidnapper, Victor H. Feguer, was hanged in Iowa.³¹

26. U.S. CONST. amend. V (emphasis added).

27. *Gregg*, 428 U.S. at 177 (quoting U.S. CONST. amend. XIV, § 1).

28. *Id.* at 177-78. For cases supporting this proposition, but beyond the scope of this comment, see generally *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), *In re Kemmler*, 136 U.S. 436 (1890), and *Wilkerson v. Utah*, 99 U.S. 130 (1878).

29. See Kannar, *supra* note 18, at 329.

30. See *id.*; Kaplan, *supra* note 2, at 28.

31. See Johnston & Holmes, *supra* note 11, at A16; see also Kannar, *supra* note 18, at 329. Feguer's case was appealed to the United States Court of Appeals for the Eighth Circuit, *Feguer v. United States*, 302 F.2d 214 (8th Cir. 1962), where then-Judge Harry Blackmun, who later repudiated the use of the death penalty as a member of the United States Supreme Court, see generally Randall Coyne, *Marking the Progress of a Humane Justice; Harry Blackmun's Death Penalty Epiphany*, 43 U. KAN. L. REV. 367 (1995), wrote the affirming opinion. See *Feguer*, 302 F.2d at 255.

In contrast, the states have executed 443 people since 1976, including twenty-nine in the first five months of 1998 alone.³² This discrepancy is due in part to the lack of a cohesive and cumulative federal death penalty statute prior to 1994.

A. *Opposition to the Death Penalty Mounts*

In 1972, in the landmark case of *Furman v. Georgia*,³³ the Supreme Court of the United States declared the death penalty, as it was applied throughout the United States at the time, unconstitutional.³⁴ At the time the Supreme Court heard the case in 1972, forty-one states, the District of Columbia, and the federal government all authorized the death penalty for at least one crime.³⁵ The approaches taken by the various states and the federal government differed significantly. Overall, however, murder was the crime most frequently punished by death, followed by kidnapping and treason;³⁶ rape was punishable by death in sixteen states and in the federal scheme.³⁷

Of the forty-one states with death penalty provisions in effect when *Furman* reached the Supreme Court, New Mexico, New York, North Dakota, Rhode Island, and Vermont all severely restricted the imposition of the death penalty.³⁸ For example, in 1967, New York downscaled its capital punishment provision, authorizing the death penalty for only two crimes: murder of a police officer and murder by a prisoner serving a life term.³⁹ The restrictions maintained by the other four states were also codified during the same general time span, between 1960 and 1972, all within twelve years of the *Furman* decision.⁴⁰ Nine

32. See Death Penalty Information Center, *Total Since 1976: 461* (visited May 26, 1998) <<http://www.essential.org/dpic/dpicexec.html>>.

33. 408 U.S. 238 (1972).

34. See generally *id.* This case will be discussed in more detail in Part II.B. of this comment.

35. See *id.* at 341 (Marshall, J., concurring).

36. See *id.*

37. See *id.*

38. See *id.* at 341 n.79.

39. See *id.* at 341 n.78.

40. See *id.* at 341 n.79.

states at the time, Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin, prohibited capital punishment altogether.⁴¹

Yet, the elimination of the death penalty by the *Furman* Court does not account for the absence of federal executions between 1963 and 1972. There is not *one* political, judicial, or social factor to account for the lack of executions at the federal level after the Feguer hanging but prior to *Furman*. In analyzing the variables that may have contributed to this void, it is important to first acknowledge that nine years is a short stretch of time—especially since the federal government, in comparison to the states, rarely executed prisoners to begin with.⁴² Nevertheless, the changing sentiment of the American people with regard to the death penalty, as evidenced by the number of states downscaling their death penalty statutes during the twelve years prior to *Furman*, probably had a prolific effect on the lack of federal executions. Congress certainly took notice of the increasingly apparent national interest in modifying capital punishment. In 1967, for example, a Senate bill was introduced to abolish capital punishment for all federal crimes, but it died in committee.⁴³

Also, a careful scrutiny of the historical time period in the several years prior to *Furman*, while beyond the scope of this comment, reveals that the foreign and domestic political upheaval during the 1960s and early 1970s in the United States may have played a role in distracting the federal judiciary from carrying its death penalty cases to fruition. Most likely, however, all of these factors contributed to effecting a change in the way that many Americans, the federal government, and the federal judiciary perceived the death penalty.

As resistance to the death penalty mounted at the state and federal level in the years leading up to *Furman*, the question of whether or not capital punishment was constitutional became ripe for Supreme Court interpretation. Aside from moral and religious issues, some of the arguments propounded by death

41. See *id.* at 341 n.79.

42. See *supra* note 30 and accompanying text.

43. See *Furman*, 408 U.S. at 340-41 (Marshall, J., concurring).

penalty reformists and abolitionists during this important time in American death penalty jurisprudence⁴⁴ included the following: (1) the death penalty was an ineffective deterrent to crime;⁴⁵ (2) the death penalty was discriminatorily applied against African-Americans and other minorities, i.e., a disproportionately high percentage of death row inmates were members of minority groups;⁴⁶ (3) jurors opposing the death penalty in general were often dismissed during *voir dire* evaluations—leaving prosecution-friendly jurors;⁴⁷ (4) there was a risk of putting convicted felons to death later found to be innocent;⁴⁸ and (5) the death penalty negated the possibility of rehabilitation.⁴⁹

In contrast, advocates of the death penalty claimed that, among other things: (1) the threat of the death penalty did serve as a deterrent to violent crime;⁵⁰ (2) capital punishment was favored by the majority of American citizens as a way of properly punishing murderers;⁵¹ and (3) death was the only just penalty for murderers.⁵² In his concurring opinion in *Furman*, Justice Marshall outlined and discussed many of the arguments for and against the death penalty sanction,⁵³ beginning his evaluation with a list of the “six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy.”⁵⁴ Despite the fact Marshall concluded in his *Furman* concurrence that capital punishment, as applied, was unconstitutional,⁵⁵ his list of conceivable purposes provides a solid foundation for understanding arguments propounded by death penalty advocates.⁵⁶

44. Many of these arguments are still used by abolitionists today. See generally Silas, *supra* note 8, at 49; Pooley, *supra* note 2, at 31.

45. See *Furman*, 408 U.S. at 353-54 (Marshall, J., concurring).

46. See Silas, *supra* note 8, at 49.

47. See *id.*

48. See *id.*

49. See *Furman*, 408 U.S. at 346 (Marshall, J., concurring).

50. See Silas, *supra* note 8, at 49.

51. See *id.*

52. See *id.*

53. See generally *Furman*, 408 U.S. at 342-58 (Marshall, J., concurring).

54. *Id.* at 342.

55. See *id.* at 369-70.

56. The purpose of mentioning Marshall's analysis here is to afford the reader a

By 1972, the battle lines between the two sides of the death penalty debate were drawn. In *Furman*, the Supreme Court "issued its first major statement on the subject."⁵⁷

B. *Setting Constitutional Roadblocks*

The Supreme Court's holding in *Furman* provided a major political and moral victory for death penalty abolitionists. In a 5-4 decision, the Court announced that, based on the Georgia, Florida, and Texas death penalty statutes,⁵⁸ the imposition and implementation of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.⁵⁹ The Court reasoned that the state sentencing provisions in question lacked necessary procedural safeguards designed to guide the sentencing authority's discretion in order to prevent arbitrary imposition of the death sanction.⁶⁰ Because none of the other capital punishment statutes in effect throughout the country at the time of the decision contained such procedural safeguards, the decision essentially rendered all death penalty statutes unconstitutional.⁶¹ Justice Douglas most eloquently summarized the Court's sentiment in his concurring opinion, explaining that "[t]he high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded,

better understanding of death penalty proponent arguments during the relevant time period. Compilation of his list of six conceivable purposes for the death penalty resulted from enormous amounts of historical and empirical research. See generally *id.* at 340-59.

57. Silas, *supra* note 8, at 50.

58. Of the three cases before the Court, one involved imposition of the death penalty for murder (Georgia); the other two were rape cases culminating in death sentences (Texas, Florida).

59. See *Furman*, 408 U.S. at 240 (Douglas, J., concurring).

60. See Paul D. Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-Enforcement*, 24 WAKE FOREST L. REV. 881, 881 (1989) (describing the *Furman* Court's rationale regarding the sentencing schemes of the statutes in question).

61. See Neil C. Schur, *Assessing the Constitutionality and Policy Implications of the 1994 Drug Kingpin Death Penalty*, 2 TEX. F. ON C.L. & C.R. 141, 143 (1996) (suggesting the *Furman* decision declared all state death penalty statutes unconstitutional).

nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily⁶²

All nine Justices in *Furman* filed separate opinions. Of the five concurring opinions, only Justices Brennan and Marshall found capital punishment unconstitutional per se.⁶³ They focused on the cruel and unusual punishment doctrine of the Eighth Amendment.⁶⁴ However, "[t]hree other concurring Justices were concerned that unfettered jury discretion in imposing the death penalty led to its arbitrary [and capricious] exercise."⁶⁵ The dissenters, Justices Burger, Blackmun, Powell, and Rehnquist, emphasized that the death penalty was neither repugnant nor condemnable by modern civilized standards.⁶⁶ They urged deference to legislative interpretation for the most reliable indicators of contemporary values,⁶⁷ concluding that capital punishment was not unconstitutional per se.⁶⁸

Despite the split, the decision effectively abolished the death penalty in the United States, overturning death penalty laws on the books in the forty-one states and the federal government. Ultimately, it "saved the lives" of at least 600 inmates throughout the United States awaiting execution.⁶⁹

62. *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

63. See *id.* at 305 (Brennan, J., concurring); *id.* at 370-72 (Marshall, J., concurring); see also Kamenar, *supra* note 60, at 892 (Only "Justice Brennan [and Justice Marshall] concluded . . . that the [E]ighth [A]mendment prohibits capital punishment in all cases.").

64. See *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 370-72 (Marshall, J., concurring).

65. Lori Searcy & Laurel E. Shanks, *Capital Punishment*, 85 GEO. L.J. 1430, 1430 n.2346 (1997); see *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

66. See *Furman*, 408 U.S. at 385 (Burger, C.J., Blackmun, Powell & Rehnquist, JJ., dissenting) ("[The death penalty] is not a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards.").

67. See *id.* at 385 ("In looking for reliable indicia of contemporary attitude [about capital punishment], none more trustworthy [than individual legislatures] has been advanced."); Searcy and Shanks, *supra* note 65, at 1430 n.2346.

68. See *Furman*, 418 U.S. at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

69. Silas, *supra* note 8, at 50.

The abolitionists won a major battle in the war to have the death penalty permanently abrogated. In reality, however, the war itself was far from won. In reaction to the Supreme Court's decision in *Furman*, thirty-five states,⁷⁰ including Georgia, Florida, and Texas,⁷¹ scrambled to rewrite their death penalty laws—hoping for another shot at Supreme Court interpretation.⁷² Four years after *Furman*, in *Gregg v. Georgia*,⁷³ the Supreme Court reviewed Georgia's rewritten death penalty statute. Much to the chagrin of abolitionists, the Court ruled that the punishment of death for the crime of murder did not, under all circumstances, violate the Eighth and Fourteenth Amendments.⁷⁴ More specifically, in finding that the new Georgia statutory system was constitutional, the court concluded that

the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.⁷⁵

Georgia's rewritten statute, according to the Court, satisfied the concerns in *Furman* by specifying aggravating and mitigating circumstances, requiring automatic appeal of all death sentences to the Georgia Supreme Court, and mandating comparisons of death sentences with those sentences imposed on similarly situated defendants.⁷⁶ In sum, the interpretation of the death penalty handed down by the *Gregg* Court required statutes to be rewritten so as to mandate: (1) guided discretion in sentencing on the part of both the judge and jury; (2) the con-

70. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (plurality opinion).

71. See *id.* at 179 n.23.

72. Cf. *id.* at 180.

73. 428 U.S. 153 (1976) (plurality opinion).

74. See *id.* at 169. Clarifying this point even further, the Court said that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Id.* at 187.

75. *Id.* at 195. See generally *id.* at 187-95.

76. See *id.* at 196-98.

sideration of aggravating and mitigating circumstances; and (3) the conduct of two trials—one for the determination of guilt, and another for sentencing.⁷⁷

Many states immediately modified their death penalty statutes to meet the new requirements. In contrast, after *Furman* and *Gregg* were announced, but prior to 1994, the federal government made only one attempt to constitutionally reformulate its own outdated death penalty scheme.⁷⁸ This first post-*Gregg* federal attempt at constitutional compliance occurred in 1988 when Congress passed the Drug Kingpin Act⁷⁹ (the “1988 Act”, the “Kingpin Act”, or the “Drug Kingpin Act”) as part of the Anti-Drug Abuse Act of 1988.⁸⁰

C. *The First Federal Attempt at Compliance—Haste Makes Waste*

The Drug Kingpin Act authorized the federal death penalty for certain drug-related murders.⁸¹ Specifically, it codified the death penalty sanction for any defendant, while working as part of a criminal enterprise, that intentionally kills, counsels, commands, procures, induces or causes the intentional killing of an individual⁸² or law enforcement officer.⁸³ “Criminal enterprise” is defined in the 1988 Act as an organization used for drug-related felonies, with five or more people, where an individual acts as the supervisor or manager and derives substantial income or resources from that position.⁸⁴ Juries are al-

77. See Silas, *supra* note 8, at 50.

78. See Kannar, *supra* note 18, at 326. One set of authors referred to these undisturbed federal death penalty statutes, rendered useless after *Furman*, as “zombie” statutes. See RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 683 (1994).

79. 21 U.S.C. § 848 (1994).

80. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

81. See 21 U.S.C. § 848(e) (1994).

82. See *id.* § 848(e)(1)(A).

83. See *id.* § 848(e)(1)(B). A law enforcement officer is defined as “a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.” *Id.* § 848(e)(2).

84. See *id.* § 848(c).

lowed full discretion in deciding whether to sentence a defendant involved in such a criminal enterprise to death.⁸⁵

The legislative history behind the 1988 bill shows that Congress aimed the death penalty provisions specifically at triggermen and drug lords from whom the triggermen received their orders.⁸⁶ During Congressional debate, Senator Alfonse D'Amato articulated this rationale, stating that the Kingpin Act "say[s] very carefully that if you are involved in giving orders to take another life . . . or if you execute that order, that you may be charged with appropriate punishment which can be the death penalty."⁸⁷ The story behind the law's nickname lends credence to this legislative intention. While there can be no doubt that the law was designed to incorporate all criminal enterprise members,⁸⁸ Congress directed one section specifically against the leaders or "kingpins" of criminal enterprises, targeting "the principal administrator, organizer, or leader of the enterprise"⁸⁹—hence, the name Drug "Kingpin" Act.

Regardless of the intentions of its drafters, however, the Drug Kingpin Act of 1988 "hastily established a new federal death penalty," neglecting to include anything about the method, manner, or place for carrying out federal death sentences.⁹⁰ Besides being impractical, it was a "transparently symbolic" attempt by Congress to show interest in the federal death penalty during an election year.⁹¹ A telling example of Congress' carelessness is evidenced by the fact that an element of the underlying offense in the 1988 Act doubled as an aggravating circumstance for consideration during sentencing—a "sure way

85. *See id.* § 848(k).

86. *See* Brian Serr, *Of Crime and Punishment, Kingpins, and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision—Problems of Interpretation and Constitutionality*, 25 ARIZ. ST. L.J. 895, 914 (1993) (explaining that there is an abundance of legislative history showing Congress intended the Drug Kingpin Act for use against triggermen and their bosses).

87. 134 CONG. REC. S7416 (daily ed. June 8, 1988) (statement of Sen. D'Amato).

88. *See* 21 U.S.C. § 848(a) ("Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment")

89. *See id.* § 848(b)(1).

90. Kannar, *supra* note 18, at 326.

91. *See id.*

of guaranteeing that at least one 'aggravating circumstance' is going to be found in every case in which a conviction is returned.⁹²

The empirical evidence to date casts even further doubt on the practicality of the Drug Kingpin Act. Between 1988 and May, 1995, the law had been approved for use in only forty-six cases, at a rate of approximately six or seven a year.⁹³ As of March, 1998, a total of merely six people had been sentenced to death under the 1988 Act, none of which have actually been executed.⁹⁴ In addition, the limited scope of the law, narrowly confined to penalizing drug-related murderers, raised concerns about its overall effectiveness.⁹⁵ Six years would pass before many of these concerns were addressed by the federal government.

In 1994, when Congress finally did address the concerns, they did so in a powerfully sweeping fashion. As one commentator noted, the "real 'federalizing death' extravaganza took place not in 1988 . . . but just prior to the 1994 election, [when Congress passed the Federal Death Penalty Act of 1994], effective in September of that year."⁹⁶

III. THE ACT

Congress designed the Federal Death Penalty Act of 1994 to accomplish two major objectives.⁹⁷ First, it greatly expands the number of federal crimes potentially invoking a sentence of death.⁹⁸ Members of Congress debating the bill placed the number of new death penalty crimes at sixty.⁹⁹ Second, it "pro-

92. *Id.* at 327.

93. *See id.* at 327 (citing Richard Barbieri, *Bombing Suspect's Legal Defense in Limbo*, THE RECORDER, May 2, 1995, at 1).

94. *See* Death Penalty Information Center, *Federal Death Penalty* (last modified Mar. 26, 1998) <<http://www.essential.org/dpic/feddp.html>>.

95. *Cf.* Sandra D. Jordan, *Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHI.-KENT L. REV. 79, 92 (1991).

96. Kannar, *supra* note 18, at 328.

97. *See* Kevin J. Sullivan & Gaela K. Gehring, *Capital Punishment*, 83 GEO. L.J. 1281, 1308 (1995).

98. *See id.*

99. *See, e.g.*, 140 CONG. REC. S12421-01, S12433 (daily ed. Aug. 24, 1994) (statement of Sen. Kerrey) (stating that there were "about 60" new death penalties). "It is

vides a new federal system for sentencing, imposing, and reviewing the death [penalty] for certain federal crimes.¹⁰⁰

Oddly, however, the new provisions in the Act contain no statement of purpose, and there is little insight into legislative purpose in the Congressional Record beyond the two major objectives discussed above.¹⁰¹ For example, there exists little substantive discussion on the overall effectiveness, merits, and morality of the death penalty.¹⁰² Instead, members focused on the procedural aspects of the Act, i.e., the appropriateness of the number of new death penalty crimes,¹⁰³ and whether the federal court system was equipped to “handle the influx of cases under the new provisions.”¹⁰⁴ Despite these arguably alarming shortcomings during Congressional debate, President Clinton signed the Act into law on September 13, 1994.¹⁰⁵

A. *The New Federal Death Penalty Crimes*

The Act dramatically expanded the small base of pre-1994 federal death penalty crimes, including those covered by the Drug Kingpin Act of 1988. Prior to 1994, according to one scholar, federal capital punishment statutes in effect could be categorized one of three ways.¹⁰⁶ The first category included non-homicidal crimes, namely treason¹⁰⁷ and espionage.¹⁰⁸ The second category covered crimes involving precarious human activity ultimately resulting in death. Included in this category were kidnapping of high-level government officials where death

indisputable that the quantity of crimes for which the death penalty has been made available has substantially increased.” Charles Kenneth Eldred, *The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293, 293 n.2 (1994).

100. See Sullivan & Gehring, *supra* note 97, at 1308.

101. See Eldred, *supra* note 99, at 294.

102. See *id.* at 295.

103. See, e.g., 140 CONG. REC. E1807-02 (daily ed. Aug. 21, 1994) (statement of Rep. LaFalce) (“I believe the slew of new death penalties contained in this bill—over 60—are, to say the least, excessive.”).

104. Eldred, *supra* note 99, at 295; see also 140 CONG. REC. H2322-02, H2325 (daily ed. Apr. 14, 1994) (statement of Rep. Glickman) (“FBI Director Freeh recently said that [the federal courts] are already understaffed for the current workload. We are doing them a disservice by adding these . . . death penalty offenses.”).

105. See Douglas & Richardson, *supra* note 19, at 19.

106. See Eldred, *supra* note 99, at 296.

107. See 18 U.S.C. § 2381 (1988).

108. See *id.* § 794.

results,¹⁰⁹ the destruction of aircraft facilities, motor vehicles, and motor vehicle facilities resulting in death,¹¹⁰ the wrecking of a train where death results,¹¹¹ death resulting from aircraft hijacking,¹¹² and the mailing of injurious articles culminating in death.¹¹³ The third category of pre-1994 federal capital punishment provisions encompassed crimes involving the physical killing of another human being. This category included first degree murder in federal maritime and special jurisdiction areas,¹¹⁴ murder during a bank robbery,¹¹⁵ and murder of high-level government officials, including the President,¹¹⁶ Vice President,¹¹⁷ members of Congress,¹¹⁸ and Supreme Court Justices.¹¹⁹

Crimes enacted and amended by the Federal Death Penalty Act of 1994 fall into only the second and third categories of those pre-1994 provisions: crimes where some dangerous human activity ultimately results in death and crimes involving the actual physical killing of other people.¹²⁰

To fully comprehend the complexities and vastness of the Act, it is important to draw a distinction between the provisions actually enacted into the United States Code by the Act and those simply amended. Ten sections were newly enacted, five in each of the applicable categories. The five capital punishment crimes enacted in the "physical killing" category are (1) murder committed during a drug-related drive-by shooting,¹²¹ (2) murder by a federal prisoner under a sentence of life imprisonment,¹²² (3) murder of a United States national by another

109. *See id.* § 1751(b); *id.* § 351(b).

110. *See id.* § 34.

111. *See id.* § 1992.

112. *See* 49 U.S.C. app. §§ 1472-1473 (1988).

113. *See* 18 U.S.C. § 1716.

114. *See id.* § 1111.

115. *See id.* § 2113 (1988 & Supp. V 1993).

116. *See id.* § 1751(a) (1988).

117. *See id.*

118. *See id.* § 351(a).

119. *See id.*

120. *See* Eldred, *supra* note 99, at 296.

121. *See* 18 U.S.C. § 36 (1994).

122. *See id.* § 1118.

United States national where the killing occurs in a foreign nation,¹²³ (4) murder by an escaped federal prisoner already sentenced to life imprisonment,¹²⁴ and (5) murder of a state official working with federal law enforcement personnel or of a state correctional officer engaged in transporting the murderer interstate.¹²⁵

The five new enactments involving precarious activity resulting in death are (1) violent acts at international airports by United States nationals or persons found in the United States,¹²⁶ (2) rape or child molestation,¹²⁷ (3) violence against maritime navigation,¹²⁸ (4) violence against maritime fixed platforms,¹²⁹ and (5) use of a weapon of mass destruction against a United States citizen, any person within the United States, or property owned, leased, or used by the United States.¹³⁰

“Physical killing” crimes not enacted, but rather amended by the Act to potentially invoke the federal death penalty include the following: carjacking where death results;¹³¹ murder in a federal facility or during an attack on a federal facility,¹³² murder of a court officer or juror killed in the course of the murderer’s attempt to influence the victim;¹³³ murder of a witness, victim, or informant in retaliation for assisting in law enforcement;¹³⁴ and first degree murder committed by firing a weapon into a crowd of two or more people in furtherance of a crime.¹³⁵

Finally, crime provisions codified as amended by the Act to invoke the federal death penalty when dangerous human activity results in death include kidnapping,¹³⁶ hostage taking,¹³⁷

123. *See id.* § 1119.

124. *See id.* § 1120.

125. *See id.* § 1121.

126. *See id.* § 37.

127. *See id.* § 2245.

128. *See id.* § 2280.

129. *See id.* § 2281.

130. *See id.* § 2332a.

131. *See id.* § 2119.

132. *See id.* § 930.

133. *See id.* § 1503.

134. *See id.* § 1513.

135. *See id.* § 36.

136. *See id.* § 1201.

alien smuggling,¹³⁸ genocide,¹³⁹ conspiracy against a person's civil rights,¹⁴⁰ and deprivation of civil rights under color of law.¹⁴¹

Some commentators, including Congressmen debating the Act, criticized the inclusion of some of the more obscure provisions, covering such crimes as murder of a federal poultry inspector, murder resulting from an attack using firearms on a federal facility, and genocide.¹⁴² The provision in the 1994 Act that may be "the most intriguing," however, is the one in that portion of the 1994 bill establishing federal death penalty implementation procedures.¹⁴³ That section proclaims that:

No employee of any State department of corrections, the United States Department of Justice, the Federal Bureau of Prisons, or the United States Marshals Service . . . shall be required . . . to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee.¹⁴⁴

This prosecutorial opt-out provision represents an effort "to establish something like a conscientious objector status for federal employees vis a vis the new federal death penalty."¹⁴⁵ The section is intriguing to death penalty observers because it appears to insert a bit of morality into a statute whose legislative history is extremely secularized.¹⁴⁶ Allowing federal government officials to opt out of death penalty prosecutions signi-

137. See *id.* § 1203(a).

138. See *id.* § 1342.

139. See *id.* § 1091(b)(1).

140. See *id.* § 241.

141. See *id.* § 242.

142. See 140 CONG. REC. S6078-02, S6092 (daily ed. May 19, 1994) (statement of Sen. D'Amato) ("You are a chicken inspector and you get shot . . . or you commit some exotic crime . . . those are not the crimes that are savaging cities."); Johnston & Holmes, *supra* note 11, at A16.

143. Kannar, *supra* note 18, at 331.

144. 18 U.S.C. § 3597(b) (1994).

145. Kannar, *supra* note 18, at 331-32.

146. *Cf. id.* at 334 (stating that the exception "perhaps sends a little bit of a message that the practice of law is to be seen as having at least some modicum of real moral content").

fies a faint recognition of the moral issues surrounding the death penalty by both Congress and other prosecution-minded members of the legal profession.¹⁴⁷

B. *Complying with Constitutional Interpretation*

Although the Act suffers from potentially significant deficiencies with regard to its legislative history,¹⁴⁸ the 103d Congress appears to have made a genuine effort at drafting a constitutionally valid death penalty statute. Compliance with the constitutional requirements set forth in *Gregg* guided the imposition of many of the provisions propounded in the Act.

For example, the Act "actually spells out the manner in which a federal death sentence is to be implemented."¹⁴⁹ One relevant provision mandates that the prisoner be committed to the custody of the Attorney General until all appeals are exhausted, at which point he or she is transferred to the care of a United States Marshal.¹⁵⁰ The United States Marshal then supervises implementation of the sentence in the manner established by the law of the state in which the sentence is imposed.¹⁵¹ If the law of the particular sentencing state does not allow for the death penalty, the court is responsible for designating another state, the law of which does allow for capital punishment, to administer the death sentence.¹⁵² In comparison, the 1988 Drug Kingpin Act failed to address implementation matters altogether.¹⁵³

In addition to implementation measures, the Federal Death Penalty Act dramatically altered other procedural aspects of carrying out a federal death sentence, requiring the use of state

147. See *id.* at 335. For a fascinating and thorough perspective on this section of the Federal Death Penalty Act, see *id.* at 331-36.

148. See *supra* Part III.

149. Kannar, *supra* note 18, at 330. This provision of the Act is found in 18 U.S.C. § 3596(a) (1994).

150. See 18 U.S.C. § 3596(a) (1994).

151. See *id.*

152. See *id.*

153. See Kannar, *supra* note 18, at 330.

facilities¹⁵⁴ and the hiring of the local state executioner and other "appropriate" state officials.¹⁵⁵

Miscellaneous provisions scattered throughout the Act similarly reflect Congressional efforts at constitutional compliance.¹⁵⁶ Specifically, it is apparent that Congress sought prevention of discriminatory practices in the overall death sentencing process.¹⁵⁷ For instance, the Act requires courts to instruct juries not to consider the sex, race, color, religious beliefs, or national origin of the defendant or the victim.¹⁵⁸ Furthermore, the Act exempts from capital punishment pregnant women,¹⁵⁹ mentally retarded persons,¹⁶⁰ and persons incapable of understanding imposition of the death penalty.¹⁶¹ Finally, to assure adequate representation, the Act requires appointment of two counsel to all defendants in capital cases.¹⁶²

More important than any of the above mentioned provisions for successful compliance with the constitutional standards set forth in *Gregg*, however, are those governing the use of aggravating and mitigating factors in deciding whether or not a sentence of death is justified. Aggravating and mitigating factors are taken into account under the new Act at a separate death penalty hearing.¹⁶³

Before the trial, the aggravating factor(s) must be enumerated within a notice statement to the defendant alerting the defendant of the prosecution's decision to pursue the death penalty.¹⁶⁴ Aggravating factors for murder-related death penalties include, among others, any of the following: death during commission of another crime, previous conviction of a violent felony involving a firearm, previous conviction of an offense for which

154. See 18 U.S.C. § 3597(a) (1994). The Drug Kingpin Act of 1988 mandated the use of a federal facility in Indiana.

155. See *id.*

156. See Sullivan & Gehring, *supra* note 97 at 1308.

157. See *id.*

158. See 18 U.S.C. § 3593(f).

159. See *id.* § 3596(b).

160. See *id.* § 3596(c).

161. See *id.*

162. See *id.* § 3005.

163. See *id.* § 3593(b).

164. See *id.* § 3593(a).

a sentence of death or life imprisonment was authorized by statute, grave risk of death to one or more persons in addition to the victim of the offense, procurement of offense by payment, pecuniary gain, planning or premeditation, previous conviction of two or more felony drug offenses, vulnerability of the victim, previous conviction for serious federal drug offenses, victim's status as a high public official, and multiple killings or attempted killings.¹⁶⁵

Aggravating factors for imposition of a drug offense death penalty include the following: previous conviction for serious drug felony, use of a firearm, distribution of a controlled substance to persons under twenty-one, distribution of a controlled substance near schools, and the use of minors in trafficking controlled substances.¹⁶⁶ The aggravating factors for espionage and treason are three-fold: (1) prior espionage or treason offenses; (2) knowing creation of a grave risk to national security; and (3) knowing creation of a grave risk of death.¹⁶⁷ A death sentence can be imposed only after at least one aggravating factor is proved beyond a reasonable doubt.¹⁶⁸

A separate sentencing hearing is held before a jury if the prosecution files a notice, as described above, and the defendant is subsequently found guilty or pleads guilty.¹⁶⁹ At this hearing, the prosecution may again present information relevant to any aggravating factors enumerated in the original notice.¹⁷⁰ The defendant may counter with information relevant to mitigating factors.¹⁷¹ Mitigating factors enumerated in the Act include any of the following: impaired capacity, duress, minor participation, equally culpable defendants, lack of prior criminal record, victim's consent, and any other factors in the defendant's background that "mitigate against imposition of the death sentence."¹⁷²

165. *See id.* § 3592(c).

166. *See id.* § 3592(d).

167. *See id.* § 3592(b).

168. *See id.* § 3593(e).

169. *See id.* § 3593(b).

170. *See id.* § 3593(c).

171. *See id.*

172. *Id.* § 3592(a).

If the jury fails to find that the prosecution proved at least one of the statutory aggravating factors beyond a reasonable doubt, the federal death penalty may not be imposed.¹⁷³ Assuming, however, the jury does find one statutory aggravating factor beyond a reasonable doubt, it must then consider that factor, plus any nonstatutory aggravating factor for which the prosecution has provided notice,¹⁷⁴ and weigh them against the mitigating factors to determine if capital punishment is justified.¹⁷⁵

The defendant has the burden of proving the existence of any mitigating factors only by a preponderance of the evidence.¹⁷⁶ Comparatively, as mentioned above, the government must establish the existence of statutory aggravating factors beyond a reasonable doubt.¹⁷⁷ Also, mitigating factors can be considered by one or more jurors regardless of the number of other jurors who agree the factor has been established;¹⁷⁸ whereas findings with respect to both statutory and nonstatutory aggravating factors must be unanimous.¹⁷⁹

With the inclusion of these carefully drafted provisions, the final version of the Federal Death Penalty Act appeared to incorporate the necessary safeguards to survive a constitutional challenge based on the *Gregg* criteria. However, its fate rested with the federal courts—and it would not be long before the courts would get their opportunity to interpret the constitutionality of the statute in both routine homicide prosecutions and national high-profile murder trials.

173. See 18 U.S.C. § 3593(d) (1994); see also *United States v. Nguyen*, 928 F. Supp. 1525, 1532 (D. Kan. 1996).

174. See 18 U.S.C. § 3593(d).

175. See *id.* § 3593(e); see also *Nguyen*, 928 F. Supp. at 1532.

176. See 18 U.S.C. § 3593(c); see also *Nguyen*, 928 F. Supp. at 1532.

177. See 18 U.S.C. § 3593(c); see also *Nguyen*, 928 F. Supp. at 1532.

178. See 18 U.S.C. § 3593(d).

179. See *id.*

IV. THE CASES¹⁸⁰

Orlando Hall and Bruce Webster were the first ever targets of the new federal death penalty.¹⁸¹ Both men were charged and sentenced to death under the Act for the September 24, 1994, fatal kidnapping of Arlington, Texas teenager Lisa Rene.¹⁸² Rene was taken from her home, gang-raped, beaten with a shovel, and buried alive by the two men.¹⁸³ Hall and Webster were successfully prosecuted under the provision of the Act covering kidnapping resulting in death.¹⁸⁴ They have since been joined by a growing number of other criminal suspects for whom the federal government is seeking the death penalty.¹⁸⁵ In some of these cases, the Act's constitutionally debatable provisions have survived close judicial scrutiny.¹⁸⁶

A. *Early Judicial Treatment of the Act*

In *United States v. Nguyen*,¹⁸⁷ the defendant was charged with using a firearm to commit murder during the course of a robbery,¹⁸⁸ a federal offense under the 1994 Act.¹⁸⁹ The government notified Nguyen that it intended to prove several non-

180. As of this writing, many of the opinions arising under the Federal Death Penalty Act of 1994 have not yet been published in text or online. Therefore, whenever appropriate, reliable alternative case information sources are used and cited accordingly.

181. See Chris Payne, *Jury's Still Out on Federal Death Penalty; Views on Recent Bill Still Vary as Legislation Affects Local Murder Case*, DALLAS MORNING NEWS, June 2, 1996, at 1A. Note that the court opinions for the Webster and Hall cases were not published at the time of this writing.

182. See Selwyn Crawford, *Death Penalty Given; Man Sentenced in Slaying of Girl, 16*, DALLAS MORNING NEWS, Nov. 7, 1995, at 19A; Chris Payne, *Jurors Give Lisa Rene Killer Death; Panel Confers 10 Hours, Rejects Retardation Claim*, DALLAS MORNING NEWS, June 20, 1996, at 25A.

183. See Payne, *supra* note 182, at 25A.

184. See 18 U.S.C. § 1201 (1994); Payne, *supra* note 182.

185. See Payne, *supra* note 181, at 1A.

186. See, e.g., *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998); *United States v. Johnson*, No. 96CR379, 1997 WL 534163, at *1 (N.D. Ill. Aug. 20, 1997); *United States v. McVeigh*, 944 F. Supp. 1478 (D. Colo. 1996); *United States v. Chanthadara*, 928 F. Supp. 1055 (D. Kan. 1996); *United States v. Nguyen*, 928 F. Supp. 1525 (D. Kan. 1996).

187. 928 F. Supp. at 1525 (D. Kan. 1996).

188. See *id.* at 1531.

189. See 18 U.S.C. § 924(i).

statutory factors at the sentencing phase, namely that (1) Nguyen participated in an act of violence that demonstrated reckless disregard for human life, and that the victim died as a result; (2) Nguyen was not remorseful; (3) Nguyen represented a lingering threat to the lives and safety of others in the future; (4) Nguyen caused permanent harm to the family of the victim due to the close proximity of the murder to the victim's husband and two daughters; and (5) Nguyen had little hope for rehabilitation.¹⁹⁰

The defendant challenged the constitutionality of these non-statutory factors, arguing that allowing the government to define the factors violated the Eighth Amendment because it could result in arbitrary and capricious sentencing.¹⁹¹ The court rejected the challenge, quoting a relevant passage from an earlier Supreme Court case: "[T]he Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among [the class of persons eligible for the death penalty], those defendants who will actually be sentenced to death."¹⁹²

Nguyen also attacked the two statutory aggravating factors alleged against him as unconstitutional.¹⁹³ The government claimed that (1) Nguyen committed the offense in a heinous, cruel, or depraved manner in that the crime included torture or serious physical abuse;¹⁹⁴ and (2) that he expected pecuniary gain as a result.¹⁹⁵

Nguyen first argued that the "heinous, cruel, or depraved" factor¹⁹⁶ was broad enough to encompass every first degree murder and, thus, unconstitutional.¹⁹⁷ The court rejected this contention, labeling it as an unwarranted extension of the Supreme Court's statement in *Godfrey v. Georgia*,¹⁹⁸ that a "person of ordinary sensibility could fairly characterize almost every

190. See *Nguyen*, 928 F. Supp. at 1538.

191. See *id.*

192. *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (footnote omitted)).

193. See *id.* at 1533.

194. See 18 U.S.C. § 3592(c)(6); *Nguyen*, 928 F. Supp. at 1533.

195. See 18 U.S.C. § 3592(c)(8); *Nguyen*, 928 F. Supp. at 1533.

196. 18 U.S.C. § 3592(c)(6).

197. See *Nguyen*, 928 F. Supp. at 1533.

198. 446 U.S. 420 (1980).

murder as 'outrageously or wantonly vile, horrible or inhuman.'¹⁹⁹ Nguyen further maintained that the same factor was unconstitutionally vague.²⁰⁰ Again, the court dismissed the challenge, explaining that the modifying language in the statute furnished guidance for the choice between death and a lesser penalty.²⁰¹

Finally, Nguyen contended that the "pecuniary gain" aggravating factor²⁰² could not be constitutionally applied to his case because of its ambiguous nature.²⁰³ The court found nothing at all ambiguous about the language of the provision, preferring to construe it according to its plain language.²⁰⁴

In *United States v. Johnson*,²⁰⁵ one of the defendants, Daryl Lamont Johnson, sought to strike both the statutory and non-statutory aggravating factors from the government's notice. The statutory aggravating factors used by the government were two-fold: (1) intentional act to take someone's life or use lethal force,²⁰⁶ and (2) substantial planning and premeditation.²⁰⁷

Johnson asserted that the vagueness of the first statutory aggravating factor violated the Eighth Amendment's prohibition against factors that do not narrow the type of murders eligible for capital punishment.²⁰⁸ The applicable provision directs the jury to determine whether the defendant "participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act."²⁰⁹ The court

199. *Nguyen*, 928 F. Supp. at 1534 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (citation omitted)).

200. *See id.* at 1533.

201. *See id.*

202. 18 U.S.C. § 3592(c)(8) (1994).

203. *See Nguyen*, 928 F. Supp. at 1534.

204. *See id.* at 1535.

205. No. 96 CR 379, 1997 WL 534163, at *1 (N.D. Ill., Aug. 20, 1997).

206. *See* 18 U.S.C. § 3591(a)(2)(C); *Johnson*, 1997 WL 534163, at *2.

207. *See* 18 U.S.C. § 3592(c)(9); *Johnson*, 1997 WL 534163, at *2.

208. *See Johnson*, 1997 WL 534163, at *2.

209. *See* 18 U.S.C. § 3591(a)(2)(C).

found that the explicit instruction to the jury provided more than adequate guidance to avoid unconstitutional vagueness.²¹⁰

Regarding the second statutory factor, Johnson argued that it, too, was vague in failing to narrow the class of murders subject to death.²¹¹ The court abruptly discarded the argument, asserting that "the terms 'premeditation,' 'planning,' and 'substantial' are not unconstitutionally vague."²¹²

The court also rejected Johnson's challenges to the following nonstatutory aggravating factors levied against him: (1) vileness of the crime; (2) future dangerousness; and (3) victim impact.²¹³ In sum, the court held that the nonstatutory factors served an "individualizing" function, separate from statutory factors, but equally constitutional; they were not unconstitutionally vague—rather, the "dangerousness" factor was even more specific than required. The court emphasized that aggravating factors could constitutionally be part of the underlying offense.²¹⁴

While it may be difficult to objectively proclaim the Act's overall "success"²¹⁵ at this point in its short history, its codification has certainly provided the government with a prosecutorial weapon on par with the Act's legislative cousins in death penalty states throughout the country. The cases discussed up to this point provide a general foundation for understanding early judicial interpretation of the Act and the constitutional viability of the Act's mandate for the use of aggravating factors—at least in the lower federal courts. However, the two cases discussed in Parts IV.A. and IV.B., below, most convincingly illuminate the expectations and realities of the Federal Death Penalty Act of 1994 for two reasons. First, both cases are

210. See *Johnson*, 1997 WL 534163, at *2.

211. See *id.* at *4.

212. *Id.* (citations omitted).

213. See *id.* at *1.

214. See *id.* at *6 (citations omitted).

215. The word "success" is placed in quotations here because it can have several different connotations in the context of this comment. For example, one may view the Act's "success" by: (1) the number of cases prosecuted under the Act; (2) the number of cases where federal defendants were actually sentenced to die; or (3) the acceptance of the federal death penalty by the American public. The author views the Act's "success" as the potential combination of all three factors.

prominent—one, for being the only case that an appellate circuit has issued an opinion affirming a conviction under the Act;²¹⁶ the other, for its high profile status and the massive national and international publicity it generated.²¹⁷ Second, both cases arguably represent situations for which the Federal Death Penalty Act was truly designed and intended.²¹⁸

B. United States v. Jones²¹⁹

*[I]n Louis Jones, we had a case that . . . the [federal death penalty] statutes contemplated.*²²⁰

On February 18, 1995, United States Air Force Private Tracie McBride was abducted at gunpoint from Goodfellow Air Force Base in Texas.²²¹ McBride's ex-husband, Louis Jones had taken her back to his apartment, tied her up, and placed her in a closet.²²² Jones then drove McBride to a remote location where he struck her over the head with a tire iron several times until she was dead.²²³ A subsequent autopsy revealed evidence that Jones had also sexually assaulted her.

Jones was indicted and charged with kidnapping resulting in death—a federal crime according to the new provisions of the Federal Death Penalty Act.²²⁴ The United States Attorney prosecuting Jones opted to seek the death penalty and filed the appropriate notice.²²⁵ In its notice, the government set forth

216. See *infra* Part IV.B.

217. See *infra* Part IV.C.

218. See *infra* Parts IV.A, IV.B. Note that the fact Congress did not clearly flush out its own intentions in designing the 1994 Act, see discussion *supra* Part III, does not reflect on the accuracy of this statement; the statement must be taken in context. Public outrage over murder and terrorism provided a major impetus for the 1994 expansion of the federal death penalty. See *supra* text accompanying note 9. Thus, crimes involving defendants who committed such acts are the "intended" situations referred to here.

219. 132 F.3d 232 (5th Cir. 1998).

220. Payne, *supra* note 181, at 1A (statement of Roger McRoberts, lead prosecutor in the Jones trial).

221. See Jones, 132 F.3d at 237.

222. See *id.*

223. See *id.*

224. See 18 U.S.C. § 1201 (1994).

225. See Jones, 132 F.3d at 237.

four statutory aggravating factors: (1) Jones caused the death or injury resulting in the death during a kidnapping;²²⁶ (2) Jones knowingly created a grave risk of death to one or more persons in the commission of the crime;²²⁷ (3) Jones committed the offense in an especially heinous, cruel, and depraved manner involving torture and serious physical abuse to the victim;²²⁸ and (4) Jones substantially planned and premeditated the murder.²²⁹ The government also added three nonstatutory factors: (1) the future danger of Jones; (2) the victim's youth, her slight stature, and her background; and (3) the victim's personal characteristics and the effect on her family.²³⁰

Jones submitted several mitigating factors, including his insignificant prior criminal record, his severe mental and emotional disturbance at the time of the crime, his military service, and the remorse he felt.²³¹ After weighing the aggravating and mitigating factors to determine the propriety of the death penalty, the trial jury found Jones guilty on October 23, 1995, and returned a unanimous verdict recommending death on November 3, 1995.²³²

After his conviction in the trial court, Jones appealed his case to the Fifth Circuit Court of Appeals.²³³ In his appeal, he challenged the constitutionality of the Federal Death Penalty Act on four grounds: (1) the prosecutor's ability to define nonstatutory aggravating factors amounted to an unconstitutional delegation of legislative power; (2) the lack of proportionality review²³⁴ combined with the prosecutor's unrestrained authority to allege nonstatutory aggravating factors rendered the statute unconstitutional; (3) the relaxed evidentiary standard at the sentencing hearing²³⁵ combined with the unrestrained use of

226. See 18 U.S.C. § 3592(c)(1); *Jones*, 132 F.3d at 238 n.1.

227. See 18 U.S.C. § 3592(c)(5); *Jones*, 132 F.3d at 238 n.1.

228. See 18 U.S.C. § 3592(c)(6); *Jones*, 132 F.3d at 238 n.1.

229. See 18 U.S.C. § 3592(c)(9); *Jones*, 132 F.3d at 238 n.1.

230. See *Jones*, 132 F.3d at 238 n.2.

231. See *id.* at 239 n.3.

232. See *id.* at 238-39.

233. See *id.* at 237.

234. "Proportionality review examines the appropriateness of a sentence for a particular crime by comparing the gravity of the offense and the severity of the penalty with sentencing practices in other prosecutions for similar offenses." *Id.* at 240 (citing *Pulley v. Harris*, 465 U.S. 37, 43 (1984)).

235. The Federal Death Penalty Act mandates a relaxed evidentiary standard at

nonstatutory aggravating factors rendered the jury's recommendation arbitrary; and (4) the unconstitutionality of the death penalty under all circumstances.²³⁶

The court of appeals considered these challenges, along with other issues raised by Jones, ultimately holding that the sentencing provisions of the Federal Death Penalty Act were constitutional and "that the defendant's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor."²³⁷

Before coming to its conclusion, however, the court confronted each of Jones's four challenges individually. First, the court found that the delegation of authority to the Department of Justice to define nonstatutory aggravating factors fell squarely within the executive branch's broad discretion in deciding whether to prosecute.²³⁸ According to the court, therefore, there was no violation of the nondelegation doctrine of the Constitution.²³⁹ The court explained that limitations already exist to guide the prosecution in exercising this authority: the Federal Death Penalty Act mandates prior notice for all aggravating factors, due process requires that aggravating information narrows the class of people eligible for the death penalty, the trial court can limit admission of useless or prejudicial information, and the jury must find one statutory factor beyond a reasonable doubt before it can consider nonstatutory factors.²⁴⁰ The court said that these restrictions ensure prevention of unconstitutional delegation.²⁴¹

Second, the court determined that the Constitution did not mandate proportionality review as long as the statute in question provides for other safeguards to prevent arbitrary imposition of a death sentence.²⁴² The Federal Death Penalty Act,

the sentencing hearing to give the jury an opportunity to hear all relevant information, unrestrained by the Federal Rules of Evidence. *See* 18 U.S.C. § 3593(c) (1994).

236. *See Jones*, 132 F.3d at 239.

237. *Id.* at 253.

238. *See id.* at 239 (citing *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996)).

239. *See* U.S. CONST. art. I, § 1. "All legislative powers herein granted shall be vested in . . . Congress . . ." *Id.*

240. *See Jones*, 132 F.3d at 239-40 (citations omitted).

241. *See id.* at 240.

242. *See id.* at 241.

the court said, provides the requisite safeguards by limiting the number of offenses, narrowing the class of eligible defendants by requiring a finding of one statutory aggravating factor, and providing for appellate review to ensure that the death sanction is not imposed under influence of prejudice or arbitrariness.²⁴³

Third, the court ruled that the relaxed evidentiary standard at the sentencing hearing did not effect the reliability of information, but rather contributed to accomplishing the sentencing required by the Constitution.²⁴⁴ Writing for the court, Judge Parker emphasized the importance of the jury receiving sufficient information regarding the defendant in order to make a proper sentencing determination.²⁴⁵ Should the need arise, he maintained, the district court can prevent any sort of "evidentiary free-for-all . . . by excluding . . . information under the standard enunciated in [18 U.S.C.] § 3593 (c)."²⁴⁶

Finally, in dismissing Jones's fourth challenge, the court cited the well-documented Supreme Court authority for the proposition that the death penalty does not violate the Constitution under all circumstances.²⁴⁷

Jones is a landmark for those commentators banking on the constitutionality of the Act because it was decided by a United States court of appeals. Thus, an influential federal court has ratified important aspects of the Federal Death Penalty Act only three and one-half years after the Act's inception.

243. *See id.* (citations omitted).

244. *See id.* at 242 (citing *United States v. Nguyen*, 928 F. Supp. 1525, 1546-47 (D. Kan. 1996)).

245. *See Jones*, 132 F.3d at 241 (citing *Lowenfield v. Phelps*, 484 U.S. 231, 238-39 (1988)).

246. *Jones*, 132 F.3d at 242.

247. *See id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 300-03 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976)).

C. *The Bombing of the Federal Building in Oklahoma City*

*[T]he sheer horror . . . and . . . calculating manner of [the bombing] left little doubt that this was the kind of case that deserved [the federal death penalty].*²⁴⁸

If the Oklahoma City bombing had taken place any time before September, 1994, Timothy McVeigh may never have had to worry about the prospect of sitting on death row and, eventually, facing death by lethal injection for the brutal crime he committed on April 19, 1995.²⁴⁹ His was a uniquely federal crime, involving a federal building and federal employees. Prior to 1994, the federal capital punishment scheme did not provide for death to terrorist criminals like McVeigh.²⁵⁰ However, the Federal Death Penalty Act put an end to this peace of mind that McVeigh and other federal criminals like him may have experienced while awaiting sentencing.

On June 13, 1997, in the United States District Court for the District of Colorado, McVeigh was sentenced to death for his part in the Oklahoma City bombing.²⁵¹ His was the first terrorism case prosecuted under the new federal death penalty statute to actually proceed to sentencing.²⁵² "McVeigh, sitting with his elbows on the defense table and his hands clasped in front of his face, appeared absolutely unshaken by United States District Court Judge Richard P. Matsch's announcement of the jury's recommendation that McVeigh die for his

248. Suro, *supra* note 9, at A14 (paraphrasing statements of United States Justice Department officials made over the course of the McVeigh trial). Another Justice official expressed similar sentiments: "[This crime was] so cold and so brutal that [it] make[s] you ask yourself: If not now, then when will you ever ask for the [federal] death penalty." *Id.*

249. This statement is made based on the assumption that McVeigh would not be prosecuted under Oklahoma state law. Oklahoma officials have expressed an interest in charging McVeigh with state capital crimes, see David E. Rovella, *Okl. DA to Try McVeigh Whatever His Fed Jury Fate; He Says U.S. Law is Flawed; Critics Say Publicity is Goal*, NAT'L L.J., June 16, 1997, at A9, but a discussion of whether or not they could legally do so is beyond the scope of this comment. Oklahoma is one of 38 states with the death penalty. See Kenworthy & Romano, *supra* note 17 at A1.

250. See discussion of pre-1994 federal death penalties *supra* Part III.A.

251. See Kenworthy & Romano, *supra* note 17, at A1.

252. See *id.*

crimes."²⁵³ He may have been the only person unshaken by the announcement.

Along with most of the families of the victims, federal death penalty proponents were extremely pleased with the sentence. McVeigh's crime was precisely the kind of heinous crime the public majority and many other death penalty proponents had in mind prior to codification of the 1994 Act.²⁵⁴ One United States Justice Department official commented that "[o]ne could easily argue that the Oklahoma City bombing case is a national case and ought to be prosecuted by the federal government [under the federal death penalty]."²⁵⁵ Most effectively summarized in the simple words of a father of two of the bombing's victims, "[t]he punishment fit the crime."²⁵⁶

During the course of his trial, McVeigh, like Jones, made several motions challenging various provisions of the Death Penalty Act.²⁵⁷ Again, as in *Jones*, the prosecution was successful in blocking substantive constitutional challenges and garnering favorable holdings from the court.²⁵⁸ Most notably, the court upheld the four statutory aggravating factors identified in the government notices: (1) death during commission of another crime;²⁵⁹ (2) grave risk of death to one or more persons in addition to the victim;²⁶⁰ (3) substantial planning and premeditation to cause death or commit an act of terrorism;²⁶¹ and (4) vulnerability of the victims due to old age, youth, and infirmity.²⁶²

253. *Id.*

254. See Suro, *supra* note 9, at A14; Cf. Pooley, *supra* note 2, at 31 (noting the overwhelming support for the death penalty in America).

255. Payne, *supra* note 181, at 1A (statement of Kevin McNally, attorney with the Federal Death Penalty Resource Counsel Project in Frankfurt, Kentucky).

256. Kenworthy & Romano, *supra* note 17, at A1 (statement of Jim Denny of Oklahoma City, Oklahoma, whose two children were seriously injured in the bombing).

257. See, for example, *United States v. McVeigh*, 944 F. Supp. 1478, 1485-87 (1996), where McVeigh challenged the constitutionality of the use of nonstatutory aggravating factors by the prosecution and the use of "information" that may be inadmissible in proving aggravating factors.

258. See *id.* at 1491.

259. See 18 U.S.C. § 3592(c)(1) (1994); *McVeigh*, 944 F. Supp. at 1488-90.

260. See 18 U.S.C. § 3592(c)(5); *McVeigh*, 944 F. Supp. at 1490.

261. See 18 U.S.C. § 3592(c)(9); *McVeigh*, 944 F. Supp. at 1490.

262. See 18 U.S.C. § 3592(c)(11); *McVeigh*, 944 F. Supp. at 1490-91.

Unlike *Jones*, however, a national audience religiously followed McVeigh's trial. As a result, the majority of the American public received their first substantive dose of the workings of the Federal Death Penalty Act and its practicality in crimes such as McVeigh's. Critics of the federal death penalty were surely disquieted by its constitutional sustaining power during the trial.²⁶³ Proponents, on the other hand, lauded the fact that, in a nationally renowned trial, successful imposition of the Federal Death Penalty Act culminated in a sentence of death.²⁶⁴

V. CONCLUSION

The death penalty has played a prominent role in American criminal jurisprudence, at both the state and federal levels, since the earliest days of the republic.²⁶⁵ Despite constitutional challenges culminating in the brief abolition of the death penalty from 1972 to 1976,²⁶⁶ capital punishment ultimately survived as a sanction for particular criminal behavior. The Supreme Court decision in *Gregg*, combined with strong public support, put pressure on Congress to revise the federal version of the death penalty. In 1994, both Congress and the President responded.²⁶⁷

The Federal Death Penalty Act of 1994, designed and passed by the 103d Congress of the United States, returned the federal death penalty to the forefront of American political debate.²⁶⁸ In addition to serving as a catalyst for debate, however, the Act has provided a powerful tool for the federal government and the American people in the battle against violent crime—especially homicidal acts. Invariably, the Act serves as a mantle of justice for the families of victims in federal cases such as the Oklaho-

263. Cf. Pooley, *supra* note 2, at 31 (discussing the problem with gauging the McVeigh case, involving a white mass murderer who enjoyed a \$10 million defense, against typical federal death penalty cases, usually involving poor minority defendants represented by court appointed attorneys).

264. Cf. *supra* note 248 and accompanying text.

265. See *supra* Part II.

266. See *supra* Part II.A-B.

267. See *supra* Part III.

268. Cf. Kaplan, *supra* note 2, at 28.

ma City bombing—where the federal death penalty was formerly unavailable.

More importantly, however, the Act represents the will of the citizenry to maintain the death penalty sanction in the United States. Recent polls show that seventy-five percent of the public favors the death penalty for individuals convicted of serious crimes.²⁶⁹ Similarly, Congress, the President, and the courts are all solidly in favor of capital punishment.²⁷⁰ The Act, by its attempted compliance with constitutional and judicial requirements, responsibly codifies the will of the people at the federal level and helps bridge the gap between state and federal death penalty jurisprudence. It serves as federal and, more specifically, Congressional recognition of the strong support for the death penalty by American voters; and it provides a sort of federal “stamp of approval” for the continued use of the death penalty as a criminal sanction within the individual states.

Finally, it is important to acknowledge that both the efficacy and morality of the death penalty will always be the subject of some debate. Nevertheless, it would be difficult to deny that the implementation of the Act, combined with overwhelming public support for capital punishment, has carved out a significant place for the federal death penalty in future American criminal jurisprudence. The recent judicial scrutiny supporting the Act’s constitutionality suggests this effect may be permanent. Future cases, however, will inevitably present issues that only the Supreme Court can decide. Until that time, the Act’s “success,” while apparent, will remain relative.

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269. See Pooley, *supra* note 2, at 31. Sixty-five percent of those polled said they favored the death penalty for someone convicted of sexually molesting a child, regardless of whether the child was killed; 47 percent would authorize the death penalty for rape convicts. See *id.*

270. See Pooley, *supra* note 2, at 31.

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