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## THE "NEW AND IMPROVED" FEDERAL DEATH PENALTY: A BRIEF GUIDE

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which indicates a judicial predisposition that is wrongful or inappropriate.<sup>91</sup> Similarly, because section 455(a) speaks of "partiality", a term that only refers to such favoritism that is wrongful or inappropriate, its requirement of recusal whenever a question of a judge's impartiality exists does not preclude the doctrine's application.<sup>92</sup>

## VI. PRACTICAL ADVICE

Conditions of potential bias or misconduct before or during a trial should be addressed by a motion for mistrial or motion for recusal, sometimes called a motion for disqualification.<sup>93</sup> Errors or conditions discovered after trial may be raised on appeal. In either case, appellate courts will require a record of the proceedings in order to gauge whether the judge had an opportunity to correct any errors in response to counsel's timely objection. Another option is for counsel to voir dire the motion to recuse. Such a step will not endear counsel to the trial judge, but by this point the relationship between counsel and the court will probably have deteriorated enough to permit such a choice to be made without further harm to the client's cause.

Making the record entails getting rulings and comments on the record, including exchanges in chambers in their entirety. In a capital case, nothing should be "off the record."

Motions to disqualify state and local judges should use arguments based on both the Due Process clause of the Fourteenth Amendment and the Code of Judicial Conduct, Canon 3(C). As previously discussed, the Canons are essentially similar to 28 U.S.C. § 455. Therefore, it is possible to argue by analogy and cite federal precedents decided under section 455

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1156.

<sup>93</sup> Va. Code Ann. § 19.2-153 (1990) states:

When the judge of a circuit court in which a prosecution is pending is connected with the accused or party injured, or is so situated in respect to the case as in his opinion to render it improper that he should preside at the trial, or if he has rejected

that parallel the relevant Canons. Motion for mistrial can also be made at this point, using both the Canons and federal law to bolster the argument.

As a last resort, any serious judicial misconduct which violates the Canons of Judicial Conduct should be reported to the Judicial Inquiry and Review Commission. While such a complaint may not require reversal, it sends a message to other judges that such behavior will not be accepted passively.

When faced with disqualifying a federal judge, counsel can argue that due process requirements supplement the federal statutory claim under 28 U.S.C. § 455.

## VII. CONCLUSION

The United States Supreme Court did not limit the due process right to an impartial judge to pecuniary situations that mirrored those present in *Ward* and *Tumey*. Rather, the Court expanded the due process rationale in *Mayberry*, *Taylor* and *Johnson* to include situations where the judge became personally embroiled in the matter before him. Further expansion came with *Webb*, where prejudicial conduct towards a defense witness was held to deny the defendant his due process right to an impartial judge.

While not adopting an expansive view of this federal constitutional standard, in *Welsh* the Virginia Court of Appeals did acknowledge that in some cases bias, regardless of its form or source, may be so pervasive as to offend due process. Counsel can then make challenges on both federal and state grounds.

a plea bargain agreement submitted by both parties and the parties do not agree that he may hear the case, he shall enter the fact of record and the clerk of the court shall at once certify this fact to the Chief Justice of the Supreme Court and thereupon another judge shall be appointed . . . .

See also Bacigal, *Virginia Criminal Procedure* (2d ed.), § 16-1.

# THE "NEW AND IMPROVED" FEDERAL DEATH PENALTY: A BRIEF GUIDE

BY: PETER F. MORGAN

## I. INTRODUCTION

With the recent passage of the Federal Death Penalty Act of 1994,<sup>1</sup> Congress dramatically increased the number of federal crimes for which the Government may seek imposition of capital punishment. The substantive component of the Death Penalty Act both created new federal offenses punishable by death and "revived" existing ones that had been declared unconstitutional or appeared questionable in the wake of *Furman v. Georgia*.<sup>2</sup> This revival was made possible by the procedural

component of the Act, which provides a uniform method of sentencing for all federal capital offenses that is closely-modeled after the provisions of the so-called "Federal Drug Kingpin Statute."<sup>3</sup>

The above developments suggest at least the theoretical possibility that the number of federal capital cases requiring appointed or retained defense counsel in the Commonwealth will increase in the near future.<sup>4</sup> Accordingly, the following analysis of the current state of federal death penalty law should prove helpful.

provisions of this earlier statute is assumed here. For a more in-depth discussion, see O'Grady, *What Every Virginia Capital Defense Attorney Should Know About the Federal Drug Kingpin Statute*, Capital Defense Digest, Vol. 6., No. 1, p. 40 (1993).

<sup>4</sup> The actual impact of the statute on Virginia capital defense practice may be minimal, as discussed *infra* in Part V-B.

<sup>1</sup> The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title VI, 108 Stat. 1796, 1994 (to be codified as amended in scattered sections of 8, 18, and 21 U.S.C.) (hereinafter "Federal Death Penalty Act.")

<sup>2</sup> 408 U.S. 238 (1972) (holding death penalty as applied in all jurisdictions unconstitutional).

<sup>3</sup> See 21 U.S.C. § 848 (1988). A working familiarity with the

## II. SUBSTANTIVE PROVISIONS: DEFINING CAPITAL CRIMES

Capital murder is not a distinct offense under federal law in the manner of Virginia Code section 18.2-31. Rather, Title 18 of the United States Code provides that "[w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life . . ."<sup>5</sup> The basic definition of first-degree murder was not altered by the Death Penalty Act,<sup>6</sup> merely the list of felonies which become capital offenses when a killing occurs during their commission or attempt.<sup>7</sup> As a result of the Act, the federal death penalty now extends to five basic categories of predicate offenses:

### A. Crimes Against the State

The Death Penalty Act made no major modifications to any of the offenses in this category, all of which were capital prior to its passage. These offenses include assassination of members of Congress, the President or other high-ranking officials, or kidnapping which results in the death of any of these individuals;<sup>8</sup> espionage;<sup>9</sup> and treason.<sup>10</sup>

### B. Crimes Implicating International Affairs

As is the case with crimes against the State, most practitioners will never encounter capital cases from this category. The Death Penalty Act

<sup>5</sup> 18 U.S.C.A. § 1111(b) (Supp. 1995.) This language was substituted for the Code's former sentencing provision, which mandated the death penalty for all first-degree murders except those designated otherwise by a sentencing jury's verdict, but failed to provide any standards to guide the jury's discretion. See Federal Death Penalty Act of 1994, § 60003, 108 Stat. 1959, 1969; 18 U.S.C. § 1111(a) (1988) (amended 1994). The amendment reflects the new uniform sentencing procedures for all federal capital cases prescribed by the Death Penalty Act, discussed *infra* in Part III.

<sup>6</sup> First-degree murder includes "[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing" or "perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed . . ." 18 U.S.C.A. § 1111(a) (Supp. 1995). It also includes any murder committed in the completion or attempt of numerous enumerated felonies, the list of which was expanded by the Death Penalty Act.

<sup>7</sup> Note that the language of the Code merely requires the defendant to be guilty of murder in the first degree—there is no requirement that the defendant be the sole or actual cause of the death of the decedent. Thus, accomplices to federal capital offenses may also be subject to the death penalty, provided they were sufficiently involved to warrant such liability as a constitutional matter. See *Tison v. Arizona*, 481 U.S. 137 (1987) (holding capital punishment may be imposed if defendant participated in major way in felony that resulted in murder, where participation evidenced reckless indifference to value of human life).

<sup>8</sup> 18 U.S.C. §§ 351(a),(b) and 1751(a),(b) (1988). Both of these sections provide for punishment by reference to 18 U.S.C. § 1111, discussed *supra* at note 6.

<sup>9</sup> 18 U.S.C.A. § 794(a) (Supp. 1995). The Death Penalty Act merely amended this section to limit imposition of the death penalty to cases where the death of a U.S. agent abroad results from the offense, or the espionage directly concerns certain specified forms of information such as nuclear weapons plans. As discussed *infra* in Part V-A, imposition of capital punishment for espionage where no homicide results may be constitutionally-impermissible.

amended Code sections governing six offenses implicating international affairs (genocide; killing of foreign officials, and torture, hostage taking, terrorism, or alien smuggling resulting in death) to allow for capital punishment.<sup>11</sup> The Act also created four "new" offenses in this category: murder of U.S. nationals abroad,<sup>12</sup> violence against maritime navigation or maritime fixed platforms resulting in death,<sup>13</sup> violence at airports serving international civil aviation resulting in death,<sup>14</sup> and use of weapons of mass destruction where death results.<sup>15</sup>

### C. Interstate Commerce and Travel Crimes

The Death Penalty Act reinstated the death penalty provisions of the Federal Kidnapping Act,<sup>16</sup> which had been repealed after being declared unconstitutional in *United States v. Jackson*.<sup>17</sup> It also revived several existing capital offenses in this category, including willful destruction of aircraft, motor vehicles, or their facilities where death results; use of explosives resulting in death; destruction by arson or explosives of property used in interstate commerce or belonging to the government, provided it results in death; mailing injurious articles where death results; willful train-wrecking resulting in death; and aircraft piracy resulting in death.<sup>18</sup> Two final capital offenses in this category, murder in aid of racketeering activity and murder for hire involving interstate travel, were newly-authorized by the Act.<sup>19</sup>

<sup>10</sup> 18 U.S.C.A. § 2381 (Supp. 1995). For a discussion of the constitutionality of this provision in cases where no homicide results, see *infra*, Part V-A.

<sup>11</sup> See 18 U.S.C.A. §§ 1091(b)(1) (genocide), 1116(a) (killing of foreign officials), 1203(a) (hostage taking), 2332(a) (terrorism), 2340A(a) (Supp. 1995) (torture); 8 U.S.C.A. § 1324(a) (Supp. 1995) (alien smuggling).

<sup>12</sup> See 18 U.S.C.A. § 1119 (Supp. 1995).

<sup>13</sup> See 18 U.S.C.A. § 2280 (Supp. 1995). This provision actually represents a revival of sorts. Formerly, these sort of crimes were governed by the more general provisions of 18 U.S.C. § 1111(b) under "the special maritime and territorial jurisdiction of the United States." However, that particular application of § 1111(b) was struck down as unconstitutional in the wake of *Furman v. Georgia*, cited *supra* at note 2. See *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977).

<sup>14</sup> See § 18 U.S.C.A. § 37 (Supp. 1995).

<sup>15</sup> See 18 U.S.C.A. § 2332a (Supp. 1995).

<sup>16</sup> Pub. L. No. 772, ch. 645, § 1201, 62 Stat. 683, 760 (1948) (amended 1972).

<sup>17</sup> 390 U.S. 7 (1968). This pre-*Furman* case struck down a sentencing scheme in which capital defendants could only receive the death penalty if they elected to plead not guilty and demanded a jury trial. *Id.* at 572. A similar scheme in 18 U.S.C. § 2113(e), making robberies which result in death a capital offense, was never repealed but conceded by the Solicitor General to be unconstitutional. See *Pope v. United States*, 392 U.S. 651 (1968) (per curiam). These procedures have been superseded by the uniform sentencing provisions of the Death Penalty Act.

<sup>18</sup> See 18 U.S.C.A. §§ 34 (aircraft or motor vehicle destruction), 844(d) and (f) (explosives and destruction of property), 1716(i)(2) (mailing injurious articles), 1992 (Supp. 1995) (wrecking trains); 49 U.S.C.A. App. § 1472(i) (Supp. 1995) (aircraft piracy).

<sup>19</sup> See 18 U.S.C.A. §§ 1958 (murder for hire), 1959(a)(1) (West Supp. 1995) (racketeering).

#### D. Killings in Federal Institutions or of Federal Personnel

In this category, the killing of certain law enforcement officials was revived as a capital offense<sup>20</sup> while numerous new capital offenses were authorized. The new offenses are: murder by federal life-term prison inmates;<sup>21</sup> murder by escaped federal prisoners;<sup>22</sup> use of firearms during attack on federal facilities that result in death;<sup>23</sup> murder of officials assisting federal law enforcement, or of state correctional officers by federal prisoners;<sup>24</sup> murder of federal court officers or jurors;<sup>25</sup> and retaliatory killings of federal witnesses, victims, or informants.<sup>26</sup>

#### E. High Profile Crimes

While diverse, all of the offenses in this final category are notable for their obvious political significance: drug-trafficking and continuing criminal enterprise,<sup>27</sup> carjackings,<sup>28</sup> civil rights murders,<sup>29</sup> drive-by shootings,<sup>30</sup> rape and child molestation resulting in death,<sup>31</sup> sexual exploitation of children resulting in death,<sup>32</sup> and use of a firearm to commit murder during federal crimes of violence.<sup>33</sup>

### III. PROCEDURAL PROVISIONS: NARROWING THE CLASS OF DEFENDANTS ELIGIBLE FOR DEATH

<sup>20</sup> 18 U.S.C.A. § 1114 (Supp. 1995).

<sup>21</sup> 18 U.S.C.A. § 1118 (Supp. 1995).

<sup>22</sup> 18 U.S.C.A. § 1120 (Supp. 1995).

<sup>23</sup> 18 U.S.C.A. § 930(c) (Supp. 1995).

<sup>24</sup> 18 U.S.C.A. § 1121 (Supp. 1995).

<sup>25</sup> 18 U.S.C.A. § 1503 (Supp. 1995).

<sup>26</sup> 18 U.S.C.A. §§ 1512(a)(2)(A) (murder of federal witnesses to prevent their testimony or aid of investigation) and 1513(a)(2)(A) (Supp. 1995) (murder of witnesses, victims, or informants in retaliation).

<sup>27</sup> 21 U.S.C.A. § 3591(b) (Supp. 1995). The constitutional problems associated with capital punishment for these offenses when they do not result in death is discussed *infra* in Part V-A.

<sup>28</sup> 18 U.S.C.A. § 2119(3) (Supp. 1995).

<sup>29</sup> 18 U.S.C.A. §§ 241, 242, 245(b) and 247(c)(1) (Supp. 1995).

<sup>30</sup> 18 U.S.C.A. § 36(b)(2)(A) (Supp. 1995).

<sup>31</sup> 18 U.S.C.A. § 2245 (Supp. 1995).

<sup>32</sup> 18 U.S.C.A. § 2251(d) (Supp. 1995).

<sup>33</sup> 18 U.S.C.A. § 924(i)(2) (Supp. 1995).

<sup>34</sup> See 18 U.S.C.A. § 3591(a)(2).

<sup>35</sup> Cf. *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994) (upholding death sentence under 21 U.S.C. § 848(e)); *United States v. Villarreal*, 963 F.2d 725 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 353 (1992) (same).

<sup>36</sup> See 18 U.S.C.A. § 3593(a) (Supp. 1995). This statutory notice is somewhat akin to a Bill of Particulars in Virginia practice, and may form the basis for similar assignments of constitutional error if denied or incomplete. See *Lankford v. Idaho*, 500 U.S. 110 (1991) (holding death sentence unconstitutional where state gave written notice that it did not intend to seek death penalty and presented no evidence in support of trial court's decision to impose it).

<sup>37</sup> The sentencer will be the jury which sat during the guilt-innocence phase of the defendant's trial, unless a) the defendant was convicted upon a plea of guilty, b) the defendant's case was heard by a judge only, or c) the prior jury was discharged for good cause. In any of those situations, a special sentencing jury shall be impaneled. Alternately, a judge alone may act as sentencer upon motion of the defendant and agreement of the Government. See 18 U.S.C.A. § 3593(b).

#### A. Procedural Provisions of Death Penalty Act Generally

In addition to authorizing capital punishment for additional offenses, the Death Penalty Act provides a uniform set of sentencing procedures for all capital cases which supersedes the procedures provided by the Drug Kingpin Statute.<sup>34</sup> At the time of this writing, no reported cases had considered the construction of these new provisions. Nevertheless, because of the substantial similarity between them and 21 U.S.C. § 848, it seems likely that they will withstand facial legal challenge and operate in the manner assumed here.<sup>35</sup>

The two basic procedural rights of capital defendants established by 21 U.S.C. § 848 were preserved by the Death Penalty Act. The first is pre-trial notification of Government intent to seek the death penalty and the aggravating factors for which proof will be introduced.<sup>36</sup> The second is a sentencing hearing, at which the sentencer<sup>37</sup> must balance the appropriate aggravating and mitigating factors in determining whether death should be imposed.<sup>38</sup>

The Death Penalty Act also incorporates nearly all of the basic procedural aspects of sentencing hearings under the Drug Kingpin Statute, such as the burdens of proof<sup>39</sup> and standards for admissibility of evidence.<sup>40</sup> Perhaps most importantly, federal defendants still cannot be sentenced to death unless the sentencer finds both a threshold mental state (*e.g.* the intent to kill) and at least one aggravating factor related to the circumstances of the offense or the likely future dangerousness of the defendant.<sup>41</sup>

<sup>38</sup> See 18 U.S.C.A. § 3593(e). Note that all jury findings with respect to aggravating factors must be **unanimous**, as well as the jury's recommendation of death. See § 3593(d) and (e). However, a juror may consider any statutory or non-statutory mitigating factor which he considers established, regardless of the number of jurors who concur with that judgment. See §§ 3592(a), 3593(d). These latter provisions regarding mitigating evidence are constitutionally-required. See *McKoy v. North Carolina*, 494 U.S. 433 (1990) (striking down state death penalty statute requiring unanimous jury findings as to mitigating factors); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (holding death penalty unconstitutional where advisory jury was precluded from considering non-statutory mitigating factors, and trial judge refused to consider them).

<sup>39</sup> The government must continue to prove all aggravating factors beyond a reasonable doubt, while the burden remains on the defendant to prove the presence of mitigation by a preponderance of the evidence. See 18 U.S.C.A. § 3593(c). This type of burden-shifting in capital schemes was approved by the United States Supreme Court in *Walton v. Arizona*, 497 U.S. 639 (1990).

<sup>40</sup> 18 U.S.C.A. § 3593(c) provides that:

The government may present any information relevant to an aggravating factor for which notice has been provided . . . Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

Because the statute provides no standard of proof with respect to admission of unadjudicated prior conduct, it may provide a basis for constitutional challenge in cases where such evidence is in fact admitted. Cf. Fenn, *Anything Someone Else Says Can and Will Be Used Against You in A Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Capital Defense Digest, Vol. 5, No. 2, p. 31 (1993).

<sup>41</sup> The presence of a particular mental state was formerly a category of "aggravation" under 21 U.S.C. § 848(n); it is now a separate threshold determination that must be made by the sentencer. See 18 U.S.C.A. § 3591(a); see also *Tison v. Arizona*, 481 U.S. 137 (1987) (discussing

## B. Significant Differences Between Federal Drug Kingpin Statute and Death Penalty Act

Although the sentencing procedures under 21 U.S.C. § 848 and the Death Penalty Act are highly similar, they are not identical. As will be discussed below, the latter Act is a much more carefully-crafted piece of legislation, and it was seemingly influenced by recent Supreme Court opinions regarding the administration of capital sentencing schemes at the state level.

### 1. Expansion of Statutory Aggravating Factors

In light of the numerous additional offenses for which capital punishment is authorized under the Death Penalty Act, the statute provides three new offense-specific lists of aggravating factors: aggravators for espionage and treason,<sup>42</sup> aggravators for continuing criminal enterprise offenses,<sup>43</sup> and a catch-all category for all remaining federal capital murders.<sup>44</sup>

### 2. Use of Victim-Impact Evidence

In addition to using any other aggravating factor of which the defense has been notified,<sup>45</sup> the Government is now permitted to seek the death penalty based upon the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact

application of similar four-prong threshold mental state finding). Although it may be a distinction without a difference, the federal capital sentencing scheme has thus become a "one-tiered" rather than "two-tiered" system, because there is now only one class of aggravating factors against which the sentencer must balance any available mitigation.

Practitioners should also note that the Death Penalty Act retains the "heinousness" factor codified at 21 U.S.C. § 848(n)(12). See 18 U.S.C.A. § 3592 (c)(6) (Supp. 1995). This factor is highly similar to Virginia's "vileness" factor, and may be constitutionally-suspect under *Godfrey v. Georgia*, 446 U.S. 420 (1980). Cf. Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 24 (1991). But see *United States v. Pitera*, 795 F. Supp. 546 (E.D.N.Y. 1992) (rejecting similar challenge to 21 U.S.C. § 848(n)(12) on grounds that requirement of torture or serious physical abuse provides sufficient narrowing construction); *United States v. Pretlow*, 779 F. Supp. 758 (D.N.J. 1991) (same); *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990) (same).

<sup>42</sup> See 18 U.S.C.A. § 3592(b). The specific aggravating factors for these offenses include prior espionage or treason offenses, whether a grave risk to national security resulted from the offense, and whether the defendant "knowingly created a grave risk of death to another person."

<sup>43</sup> 18 U.S.C.A. § 3592(d). The aggravators specified by the Death Penalty Act include all of those allowed under 21 U.S.C. § 848(n), plus the following additional factors: whether the defendant has previously been convicted of an offense for which a sentence of death or life imprisonment was authorized, use of a firearm in committing the offense, whether the offense (or the continuing criminal enterprise of which it was part) involved distribution of drugs near schools or use of minors in trafficking, and whether the drugs being distributed were mixed with "lethal adulterants."

<sup>44</sup> § 18 U.S.C.A. § 3592(c). There are some 15 specific aggravators in this category, including a wide variety of specific types of prior convictions, whether the defendant knowingly created a risk of grave bodily harm to another person, whether the offense was committed for pecuniary gain or involved substantial planning and premeditation, the vulnerability of the victim, and the heinousness of the crime. *Id.*

statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.<sup>46</sup>

### 3. Tilting Toward Mandatory Imposition of the Death Sentence?

Formerly, capital defendants convicted under 21 U.S.C. § 848 were entitled to a jury instruction that "[t]he jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence . . ." <sup>47</sup> This language is conspicuously absent from an otherwise identical provision in the Death Penalty Act, which now reads as follows:

[The sentencer] shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death . . . Based upon this consideration, the [sentencer] by unanimous vote shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.<sup>48</sup>

The precise import of this amendment is unclear: although Congress certainly **could** have made imposition of the death penalty manda-

The mere fact that the offense results in death may also serve as an aggravating factor for these crimes, thus giving a built-in advantage to the prosecution. Cf. O'Grady, *supra* note 3, at 47 (discussing similar aspect of 21 U.S.C. § 848). However, this type of aggravating factor has been held constitutional. See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (approving its use in state sentencing scheme); *Pitera*, 795 F. Supp. at 556 (upholding its use in Drug Kingpin Statute).

<sup>45</sup> 18 U.S.C.A. § 3592. All three lists of aggravating factors include the following language: "The [sentencer] may consider whether any other aggravating factor for which notice has been given exists." See *Barclay v. Florida*, 463 U.S. 939 (1983) (approving death sentence based on both statutory and non-statutory aggravators).

Of course, the Government may not rely upon certain types of aggravating factors as a constitutional matter, even if it does provide sufficient statutory notice. See, e.g., *Dawson v. Delaware*, 112 S.Ct. 1093 (1992) (holding First and Fourteenth Amendments prohibit introduction in capital sentencing proceeding of defendant's membership in racist organization, where evidence has no relevance to issues being decided in proceeding); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (noting in dicta that an aggravating factor is invalid if "it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," and citing cases).

<sup>46</sup> 18 U.S.C.A. § 3593(a). The U.S. Supreme Court recently affirmed the constitutionality of this practice. See *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>47</sup> 21 U.S.C. § 848(k) (1988) (amended in 1994).

<sup>48</sup> 18 U.S.C.A. § 3593(e). See also *Boyd v. California*, 494 U.S. 370 (1990) (holding such balancing schemes do not violate the Eighth Amendment where there is no "reasonable likelihood" that jurors would believe they were precluded from considering mitigating evidence because of aggravating circumstances of crime). Note that the jury is expressly required to choose between death and life imprisonment, thereby precluding any potential problems under *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994). See Pohl & Turner, *If At First You Don't Succeed: The Real and Potential Impact of Simmons v. South Carolina in Virginia*, Capital Defense Digest, Vol. 7, No. 1, p. 28 (1994).

tory where there is sufficient aggravation as a constitutional matter,<sup>49</sup> it may simply have intended to disallow the former instruction. Elsewhere, the Death Penalty Act merely states that “[u]pon recommendation under [future section 3593(e) of 18 U.S.C.] that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly.”<sup>50</sup> This provision precludes judicial override of a jury’s recommendation, but does not clarify whether a particular recommendation is ever required.<sup>51</sup>

#### 4. Implementation of Capital Sentences

The Death Penalty Act, like 21 U.S.C. § 848(l), categorically prohibits the execution of any person who is mentally-retarded or was under eighteen years of age at the time he or she committed the offense.<sup>52</sup> However, the Act also contains three additional limitations on implementation of capital sentences which are unique to it:

- a) It forbids execution of a woman while she is pregnant.<sup>53</sup>
- b) It excludes crimes committed within the boundaries of a Native American reservation (unless the appropriate tribal governing body has agreed that the Act will have effect) and all prosecutions under the Uniform Code of Military Justice.<sup>54</sup>
- c) It prohibits execution of any person “who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.”<sup>55</sup>

This standard represents an simplification of the language found in the Drug Kingpin Act, which prohibited the execution of anyone who, “as a result of mental disability[,] cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.”<sup>56</sup>

The method of execution in all federal capital cases is now dictated by the law of the state where the sentencing court sits, or according to the law of the state specified by the sentencing court in states where there is no death penalty.<sup>57</sup>

<sup>49</sup> See *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (upholding state statute which requires mandatory imposition of death penalty if jury unanimously finds at least one aggravating circumstance and no mitigating circumstances).

<sup>50</sup> 18 U.S.C.A. § 3594 (Supp. 1995).

<sup>51</sup> Some light on this problem may be shed by current debate in Congress over the Effective Death Penalty Act of 1995, cited and discussed *infra* in Part IV. The chair of the House Subcommittee on Crime, Rep. Bill McCollum (R-Fla.), suggested last month that “[u]nder current law, the jury in a [federal] capital case is given the complete discretion to impose the death penalty, life imprisonment, or some lesser penalty regardless of the severity of the facts found to exist.” 141 Cong. Rec. H1401 (daily ed. Feb. 8, 1995).

<sup>52</sup> See 18 U.S.C.A. §§ 3591, 3596(c) (Supp. 1995). The statute thus limits the imposition of capital punishment to a greater degree than what is constitutionally-required under recent Supreme Court decisions. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (rejecting argument that Constitution categorically prohibits execution of retarded defendants); *Stanford v. Kentucky*, 494 U.S. 361 (1989) (holding Eighth Amendment does not bar execution of defendants who were sixteen or seventeen at time they committed offense).

<sup>53</sup> 18 U.S.C.A. § 3596(c).

<sup>54</sup> 18 U.S.C.A. § 3598 (Supp. 1995).

#### 5. Appellate Review of Death Sentences

While the basic procedures for review established by 21 U.S.C. § 848(q) have been incorporated into the Death Penalty Act, the scope of review of death sentences is now more precisely-defined than under prior law. First of all, the Act makes explicit that death sentences can be reversed for reasons other than passion, prejudice, or insufficient evidence of aggravation only if the “legal error requiring reversal of the sentence . . . was properly preserved for appeal under the rules of criminal procedure.”<sup>58</sup> Second, the Act mandates that “[t]he court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless.”<sup>59</sup>

#### 6. Provision of Additional Counsel for Non-Indigents

In one of the few provisions evident of political compromise, the Death Penalty Act amended 18 U.S.C. § 3005 to a) entitle capital defendants to two lawyers rather than one and b) require that “at least 1 [of these defense lawyers] shall be learned in the law applicable to capital cases, and [shall] have free access to the accused at all reasonable hours.”<sup>60</sup> Section 3005, unlike the provisions of 21 U.S.C. § 848(q)(4), makes no requirement of indigence. However, it entitles a capital defendant only to the appointment of counsel—it does not provide for the furnishing of “investigative, expert, or other reasonably necessary services . . . .”<sup>61</sup>

### IV. UNRESOLVED ISSUES: WHAT YOU WON'T FIND IN THE DEATH PENALTY ACT, BUT ARE LIKELY TO SEE IN THE NEXT FEW YEARS

Although the scope of the Death Penalty Act was highly ambitious, provisions regarding two important issues in all federal capital cases—habeas corpus review and challenges based on racial disparities in sentencing—had to be dropped from the final version of the Act in order to secure its passage. Because of the importance of these issues and the

<sup>55</sup> 18 U.S.C.A. § 3596(c).

<sup>56</sup> 21 U.S.C. § 848(l); see also *Ford v. Wainwright*, 477 U.S. 399 (1985). In *Ford* a plurality of the Court held that the Eighth Amendment categorically prohibits the execution of the insane, without providing a definition of sanity for purposes of execution. *Id.* at 409-10.

However, Justice Powell noted in his concurring opinion that “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.” *Id.* at 422 (emphasis added). In reaching this conclusion, he pointed out that a standard of sanity which is focused on “the defendant’s ability to assist in his defense”—such as the one found in the Drug Kingpin Statute—is not constitutionally-mandated because it gives too little weight to the State’s interest in finality and has been rejected by most state legislatures. *Id.* at 421 n.2, 422 n.3.

Apparently, the drafters of the Death Penalty Act found Justice Powell’s rationale persuasive.

<sup>57</sup> 18 U.S.C.A. § 3596(a). There was no specified method of execution under 21 U.S.C. § 848, so the Justice Department issued a rule specifying lethal injection. See O’Grady, *supra* note 3, at 47.

<sup>58</sup> 18 U.S.C.A. § 3595(c)(2)(C) (Supp. 1995).

<sup>59</sup> 18 U.S.C.A. § 3595(c)(2).

<sup>60</sup> 18 U.S.C.A. § 3005 (Supp. 1995).

<sup>61</sup> See 21 U.S.C. § 848(q)(4)(A) (1988).

likelihood that they will be addressed by some form of legislation in the next couple of years, they are worth examining briefly here.

### A. Habeas Corpus Reform

The idea of "reforming" (*i.e.* limiting) federal habeas corpus review of death sentences has been gathering political momentum for quite some time now.<sup>62</sup> Prior efforts, such as the one proposed by Rep. Don Edwards (D-California) this past March, were defeated because of Republican objections to making such limitations contingent upon provision of adequate defense counsel at an early stage in the appeals process.<sup>63</sup>

However, at the time this article went to press, a Republican-sponsored bill (the "Effective Death Penalty Act of 1995"<sup>64</sup>) had already passed the House by a vote of 297 to 132 and was being considered by the Senate.<sup>65</sup> The House-approved version of the Effective Death Penalty Act would restrict habeas corpus review of federal death sentences in two significant ways: 1) it would bar any additional requests for habeas relief beyond the initial petition, unless the subsequent requests were based upon newly-discovered evidence of actual innocence of the crime;<sup>66</sup> and 2) it would impose a two-year period of limitation for initiation of habeas proceedings regarding federal convictions.<sup>67</sup>

### B. Racial Bias in Capital Sentencing

In response to the Supreme Court's decision in *McCleskey v. Kemp*,<sup>68</sup> Congress has also repeatedly considered legislation that would allow capital defendants to use statistics demonstrating systematic racial disparities in sentencing.<sup>69</sup> Last year, a proposed measure along these lines known as the Racial Justice Act<sup>70</sup> was approved by the House Judiciary Committee and reported to the floor for consideration.<sup>71</sup> Ultimately, however, the Death Penalty Act adopted the cautionary jury instruction provided in 21 U.S.C. § 848(o)(1) as a less-controversial alternative.<sup>72</sup>

Currently, there is no corresponding "racial justice" legislation before Congress. Furthermore, approval of such a provision this session

<sup>62</sup> Congress considered similar habeas reform proposals during its development of comprehensive anti-crime legislation in both 1992 and 1994. See Idelson, *Anti-Crime Measures Move to House's Front Burner*, Congressional Quarterly Weekly Report, Vol. 52, No. 10 (March 12, 1994), p. 600, 601.

<sup>63</sup> Idelson, *High Court Shifts Slightly on Death Row Appeals*, Congressional Quarterly Weekly Report, Vol. 53, No. 4 (Jan. 28, 1995), p. 287.

<sup>64</sup> H.R. 729, 104th Cong., 1st Sess. (1995).

<sup>65</sup> See 141 Cong. Rec. H1433 (daily ed. Feb. 8, 1995). The bill, which was based upon the recommendations of the Habeas Corpus Study Committee chaired by retired Justice Powell. *Id.* at H1400 (statement of Rep. McCollum).

<sup>66</sup> The new evidence of innocence must be clear and convincing in order for defendants to secure review; an amendment that would have lowered the burden to a preponderance of the evidence standard was defeated on the floor of the House. See Idelson, *House GOP Crime Bills Win Easy Passage*, Congressional Quarterly Weekly, Vol. 53, No. 6, p. 456, 458 (Feb. 11, 1995).

<sup>67</sup> See 141 Cong. Rec. H1400-01 (daily ed. Feb. 8, 1995). The legislation would also significantly restrict federal habeas corpus review of state capital sentences, but a discussion of these provisions falls beyond the scope of this article.

<sup>68</sup> 481 U.S. 279 (1987).

<sup>69</sup> Such a bill actually passed the House of Representatives in 1990, but was rejected by that Chamber when reintroduced the following session. See Idelson, *supra* note 61, at 601.

<sup>70</sup> H.R. 4017, 103rd Cong., 1st Sess. (1994).

is improbable given the recent shift of committee control into Republican hands.<sup>73</sup> Nevertheless, the issue of racial disparities in capital sentencing remains a serious one to such groups as the Congressional Black Caucus<sup>74</sup> and is likely to be revisited once again in coming years.<sup>75</sup>

## V. CONCLUSION

### A. Mounting Constitutional Challenges to the New Federal Death Penalty

As the preceding sections of this article have hopefully made clear, there is simply very little that is constitutionally questionable about the "new and improved" federal death penalty. Perhaps the only remaining ground for constitutional challenge arises from the fact that the sentencing provisions of certain federal crimes authorize—at least implicitly—the imposition of the death penalty in cases where no homicide occurred during the commission of the offense.

Currently, four federal crimes fall in this category: 1) treason, 2) certain forms of espionage; 3) trafficking in large quantities of drugs; and 4) attempting, authorizing, or advising the killing of any officer, juror, or witness in cases involving a continuing criminal enterprise.<sup>76</sup> Imposition of capital punishment for these offenses does not run afoul of any Supreme Court precedent *per se*, but appears disproportionate under *Coker v. Georgia*<sup>77</sup> if the crime does not result in a homicide.<sup>78</sup> Assuming that the Court continues to apply the same sort of proportionality analysis found in *Coker*, death sentences in these cases would probably fail to pass constitutional muster if challenged.

### B. Significance of Death Penalty Act to Capital Defense Practice in Virginia

Although the Death Penalty Act greatly increased the number of capital crimes under federal law, the statute is unlikely to make a significant difference in the actual number of executions or capital prosecutions in Virginia. This is so for at least three reasons.

<sup>71</sup> See Idelson, *Major Crime Package Heads for House Floor Debate*, Congressional Quarterly Weekly Report, Vol. 52, No. 11, p. 671, 674 (March 19, 1994).

<sup>72</sup> See 18 U.S.C.A. § 3593(f) (Supp. 1995). The instruction provides that "in considering whether a sentence of death is justified, [the jury] shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim . . ." *Id.* The statute also requires each juror to sign a certificate indicating that their decision was not motivated by such impermissible factors. *Id.*

<sup>73</sup> See Idelson, *Partisan Fault Lines Spark Delay on Anti-Crime Bill*, Congressional Quarterly Weekly Report, Vol. 52, No. 12, p. 743, 744 (March 26, 1994) (noting strong opposition of many Republicans to such "racial justice" provisions).

<sup>74</sup> See 141 Cong. Rec. H1402 (daily ed. Feb. 8, 1995) (statement of Rep. Mfume) (noting historical problem of racial disparities in capital sentencing). Rep. Mfume (D-California) is an influential member of the Caucus.

<sup>75</sup> A recent survey of the racial composition of federal capital defendants since 1988 found that approximately 83% of the prosecutions had been against African-Americans or Hispanics (34 out of 41 defendants.) See McNally & Bruck, *The 1994 Crime Bill: Nationalizing Death*, Federal Death Penalty Defense Newsletter, p. 8 (January 1995).

<sup>76</sup> See 18 U.S.C.A. §§ 794(a) (espionage), 2381 (treason), and § 3591(b) (CCE and drug trafficking offenses).

<sup>77</sup> 433 U.S. 584 (1977).

<sup>78</sup> In *Coker*, the U.S. Supreme Court held that execution "is an excessive [and therefore unconstitutional] penalty for the rapist who, as such, does not take human life." *Id.* at 598 (plurality opinion of White, J.).

First, many of the capital crimes created or revived by the Act represent extreme examples of federal jurisdiction (e.g. murder on offshore drilling platforms) which will arise only rarely, if at all.

Second, the federal government has historically been extremely hesitant to utilize the ultimate sanction, even in those sorts of capital cases which do frequently arise.<sup>79</sup> Between 1989 and 1994, the Government initiated only forty-one death penalty prosecutions under the Drug Kingpin Statute,<sup>80</sup> despite the fact that over 1300 drug-related homicides occur each year in the United States.<sup>81</sup>

Third, the willingness of jurors to recommend death in federal capital cases is much lower than one might presume based upon a cursory examination of recent trends in public opinion polls regarding capital punishment.<sup>82</sup> While some of the distortions inherent to national polls are taken into account when their results are published,<sup>83</sup> they remain inaccurate gauges of opinion because they rely upon simple "yes-no" questions which fail to measure the intensity of support of those surveyed.<sup>84</sup> In other words, poll results indicating that approximately eight out of every ten Americans "favor" capital punishment are seriously misleading because they fail to indicate how many "supporters" feel strongly enough to actually sentence a person to death.<sup>85</sup>

In addition, less well-publicized (but far more revealing) polls indicate that public support levels for capital punishment drop considerably when the alternative of life imprisonment without parole is offered.<sup>86</sup> As previously discussed in Part II, this sentencing option is currently available for all first-degree murders under federal law.

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<sup>79</sup> For one possible explanation of this phenomenon, consult Paul O'Grady's excellent Digest article on the Drug Kingpin Statute. See O'Grady, *supra* note 3, at 47.

<sup>80</sup> See McNally and Bruck, *The 1994 Crime Bill*, *supra* note 75, at 8. The first defendant sentenced to death under the Drug Kingpin Statute, an Alabama drug dealer named David Chandler, has received a stay of executing pending further collateral review of his case under 28 U.S.C. Section 2255. *Id.* at 7. Mr. Chandler's case raised many of the same issues as *Simmons v. South Carolina*, *supra* note 47, because the trial judge failed to advise the jury that the defendant had no chance of receiving parole if he were sentenced to life. *Id.* However, a petition for rehearing relying upon *Simmons* was denied by the U.S. Supreme Court on August 24, 1994. *Id.*

<sup>81</sup> See O'Grady, *supra* note 3, at 40.

<sup>82</sup> According to results from The Gallup Poll, public support for capital punishment sank to its lowest point in 1966; at that time, a plurality of those surveyed actually opposed the death penalty. See Dionne, Jr., *Capital Punishment Gaining Favor as Public Seeks Retribution*, *Corrections Today*, Aug. 1990, p. 181. However, the percentage of Americans who favor executing convicted murderers has sporadically increased ever since, reaching its current level of around eighty percent in the late 1980's. *Id.*

<sup>83</sup> These are typically expressed as the poll's "margin of error," which reflects not only that the survey base may not be sufficiently large to constitute a truly representative cross-section of the population, but also the more fundamental problem that people being surveyed will lie when they think their opinion is inconsistent with prevailing social mores. Unfortunately, this latter problem is particularly acute with respect to a highly controversial topic such as capital punishment.

<sup>84</sup> This deficiency has been widely noted and criticized in the social science literature on public opinion regarding capital punishment. See, e.g., Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, in *Capital Punishment in the United States* 125, 138 (Bedeau & Pierce eds., 1976).

Finally, although a majority of Americans cite deterrence as their principal reason for supporting capital punishment when questioned, this stated justification frequently masks their true motivation: the desire to see convicted murderers get their "just deserts."<sup>87</sup> Ironically, in its attempt to respond to the perceived public clamor for tougher criminal laws, Congress may have gone beyond the actual retributive desires of the populace at large and authorized sentences which will never be imposed.<sup>88</sup>

### C. Responsibilities of Virginia Defense Attorneys in Federal Capital Cases

Although the landscape of the law changed considerably with the passage of the Death Penalty Act last year, two of the observations regarding federal capital cases that previously appeared in this Digest remain applicable. First, it seems likely that the federal bench will continue to rely on state practitioners with capital experience to defend federal defendants because of the rarity with which such cases will arise.<sup>89</sup> Second, while certain groups of individuals receive greater statutory protection under the U.S. Code than under Virginia law, the protection of the rights of all capital defendants is principally a function of their defense counsel's competent advocacy. To ensure she can provide such advocacy, defense counsel is strongly encouraged to contact the Virginia Capital Case Clearinghouse or attorneys experienced in defense of federal capital cases<sup>90</sup> as soon as the need arises.

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<sup>85</sup> Equating the abstract support for capital punishment found in poll results with sentencing decisions is highly-suspect because most people are poorly-informed about the death penalty, and the topic has little personal relevance to them. See Bohm, *American Death Penalty Attitudes: A Critical Examination of Recent Evidence*, *Criminal Justice and Behavior*, Vol. 14, No. 3, p. 380, 381 (September 1987.) Consistent with that fact, one jury simulation study found that less than one-third of those who initially voiced support for capital punishment were willing to actually recommend a death sentence when placed in a trial-like setting. See Haas and Inciardi, *Lingering Doubts About a Popular Punishment*, in *Challenging Capital Punishment* 11 (Haas & Inciardi eds., 1988).

<sup>86</sup> For example, a 1989 Amnesty International poll of 822 voting-age Virginia residents found that support for the death penalty dropped from 64 percent to 45 percent when respondents were provided with the option of life imprisonment without parole.

<sup>87</sup> See Bohm, *American Death Penalty Attitudes*, *supra* note 85, at 383.

<sup>88</sup> Of the seventeen defendants who have been sentenced for federal capital crimes since 1988, eleven have been sentenced to some form of life sentence after the jury voted against death. See McNally & Bruck, *The 1994 Crime Bill*, *supra* note 75, at 8. The size of the federal death row, which currently stands at six defendants, has not increased since July 1993. *Id.*

<sup>89</sup> See O'Grady, *supra* note 3, at 48.

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