

**POLITICS AND PROSECUTION: A HISTORICAL PERSPECTIVE
ON SHIFTING FEDERAL STANDARDS FOR PURSUING THE
DEATH PENALTY IN NON-DEATH PENALTY STATES**

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“There can be no doubt that despite their titles, ‘United States’ Attorneys undoubtedly make charging and other decisions based on what they see as the needs and values of the communities in which they work. It is therefore not surprising that state-by-state disparities in the administration of federal death sentences correlate with the frequency with which U.S. Attorneys request Main Justice’s approval to seek death sentences. And, arguably, this is not just acceptable, but rather is fundamental if we are to survive as a united federalism in a nation whose values differ profoundly from one part to another.”

—Judge Guido Calabresi

“Implicit in the dissent’s discussion of this point is an unwarranted factual assumption: that a local United States Attorney’s view regarding the appropriate sentence for a crime mirrors the values of the community in which he serves. This is hardly obvious given that United States Attorneys are not elected to their positions but are appointed by the President of the United States, who himself may or may not have received a majority of the votes cast in the district at issue.”

—Judge Reena Raggi²

I. INTRODUCTION

In September 2000, the Department of Justice released a comprehensive statistical survey that examined the Department’s process for seeking the federal death penalty.³ Troubled by allegations of racial and regional disparity in the application of the federal death penalty, President Bill Clinton commissioned the study a few months before Juan Raul Garza was scheduled to be the first prisoner executed by

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¹ *United States v. Fell*, 571 F.3d 264, 287–88 (2d Cir. 2009) (Calabresi, J., dissenting from the denial of rehearing en banc) (citation omitted).

² *Id.* at 279 (Raggi, J., concurring in the denial of rehearing en banc).

³ U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000)* (2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>.

the federal government in more than thirty-seven years.⁴ Analyzing the period from November 1988 through July 2000, the survey tracked the number of recommendations and authorizations to seek the death penalty by judicial district, race of the victim, and race of the defendant.⁵ Though some who read the report differed in their interpretations of the data regarding race,⁶ no one could dispute that the study indicated the existence of clear geographic disparities, demonstrated most notably by the fact that only five of all ninety-four federal districts were responsible for submitting more than 42% of all the cases reviewed by the Department of Justice for capital prosecution.⁷

The Justice Department's study weighed in at 422 pages, analyzing decisions made with regard to 682 defendants and parsing the data into eighty-six different tables.⁸ In June 2001, a supplementary report was released that examined a larger pool of 973 defendants.⁹ The re-

4 See President Bill Clinton, Press Conference (June 28, 2000), available at <http://clinton3.nara.gov/WH/New/html/conference2000-06-28.html> ("The issues at the federal level relate more to the disturbing racial composition of those who have been convicted and the apparent fact that almost all the convictions are coming out of just a handful of states, which raises the question of whether, even though there is a uniform law across the country, what your prosecution is may turn solely on where you committed the crime. I've got a review underway of both those issues at this time."); Press Release, Fed. Bureau of Prisons, Date Set for First Federal Execution Since 1963 (May 26, 2000), available at http://www.bop.gov/news/press/press_releases/ipapr003.jsp. As the result of a short-lived stay of execution, Garza was not the first federal prisoner to be executed; Timothy McVeigh, the Gulf War veteran responsible for the 1995 bombing of the Murrah Federal Building in Oklahoma City that claimed the lives of 168 people, was executed first. See Alex Rodriguez, *U.S. Executes McVeigh: Oklahoma City Bomber is 1st Federal Inmate Put to Death Since '63*, CHI. TRIB., June 11, 2001, at 1.

5 U.S. DEP'T OF JUSTICE, *supra* note 3, at T-14-T-17.

6 *Compare Racial and Geographic Disparities in the Federal Death Penalty System: Hearing Before the Subcomm. on the Const., Federalism, and Prop. Rights of the S. Comm. on the Judiciary*, 107th Cong. 2 (2001) (statement of Sen. Russell D. Feingold) ("[T]here are now 19 individuals on Federal death row; 17 of them are racial or ethnic minorities. That is an extraordinary number.") [hereinafter *Racial and Geographic Disparities in the Federal Death Penalty System*] with *id.* at 8 (statement of Sen. Orrin G. Hatch) ("[T]he studies . . . show that there is no invidious racial discrimination in the application of the Federal death penalty. Indeed, if anything, these studies show that the Federal Government has sought the death penalty for proportionately fewer minorities than whites.").

7 See U.S. DEP'T OF JUSTICE, *supra* note 3, at T-15-T-17; see also *Racial and Geographic Disparities in the Federal Death Penalty System*, *supra* note 6, at 15 (statement of Larry Thompson, Deputy Att'y Gen. of the United States) (noting that the Eastern District of Virginia, the District of Puerto Rico, the District of Maryland, the Eastern District of New York, and the Southern District of New York were "the districts which generated the largest numbers of capital offense charges, accounting collectively for about half of the cases submitted to the Department's review procedure").

8 See U.S. DEP'T OF JUSTICE, *supra* note 3.

9 See U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), available at

lease of those two reports generated a flurry of attention both in academic circles and among the news reports of the mainstream media.¹⁰ Since then, much ink has been devoted to scrutinizing the federal death penalty.

Prison population figures recently published by the Bureau of Justice Statistics suggest that out of the more than 2.3 million people incarcerated in the United States,¹¹ about 3,297 of them (0.1%) are awaiting execution.¹² Of those 3,297, only fifty-five (1.7%) are on federal death row.¹³ Equally remarkable is the tiny number of federal executions compared to “stateside” executions. Since 1977, 1,173 people have been executed in the United States.¹⁴ Of those individuals, only three (0.3%) were federal convicts.¹⁵ Since the creation of the American republic more than two centuries ago, the federal government has executed 340 people,¹⁶ whereas the State of Texas has executed more than that many in the past fifteen years.¹⁷ As one commentator has noted, “the score of prisoners on federal death row are in some respects little more than a footnote.”¹⁸

<http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>. In addition to the 682 cases in the 2000 report, the Supplemental Report examined 60 cases that had gone or were going through the review process or involved fugitives, and 231 cases that (1) should have been, but were not, submitted to the capital case review procedure; (2) were exempted from submission because the defendant pled to a noncapital offense; or (3) could have been brought as death-eligible cases but were not.

10 It is not coincidental that these reports were published and so much attention directed to the federal death penalty around the same time that the United States was preparing for the first federal execution in nearly four decades. See *supra* note 4 and accompanying text.

11 HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 16 (2009), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf> (stating that custody count excludes inmates held in U.S. Territories, military facilities, immigration facilities, jails in Indian country, and juvenile facilities).

12 DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (2009), <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

13 Death Penalty Information Center, Federal Death Row Prisoners, <http://www.deathpenaltyinfo.org/federal-death-row-prisoners> (last visited Oct. 3, 2009) (listing fifty-eight federal death row inmates including John Wayne Johnson, a convicted murderer who will be sentenced in February 2010, David Runyon, a convicted murderer who will be sentenced in December 2009, and David Paul Hammer, a long-time death row inmate whose death sentence was vacated in *United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005), *appeal dismissed* 564 F.3d 628 (3d Cir. 2009)).

14 Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions> (last visited Oct. 3, 2009).

15 DEATH PENALTY INFO. CTR., FEDERAL EXECUTIONS 1927–2003, <http://www.deathpenaltyinfo.org/article.php?scid=29&did=149>.

16 John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL’Y 195, 209 (2004).

17 Death Penalty Information Center, *supra* note 14.

18 Brigham, *supra* note 16, at 212.

Given the comparatively small number of individuals subject to the federal death penalty, some scholars have thought it necessary to defend the institution as a worthy candidate for study. We share the opinion of Rory K. Little, a law professor who served as Associate Deputy Attorney General and a member of the Justice Department's Capital Case Review Committee, that the "unique federalist nature of the American system" arouses particular intrigue in the context of application of the death penalty.¹⁹ Professor Little predicted that the Federal Government's shift in 2000 from "merely not preventing some of the subsidiary states from [executing offenders]" toward self-implemented executions at the national level would have symbolic significance for the United States at home and abroad.²⁰ It is not clear that international critics of capital punishment have noticed the change.²¹ However, American observers have noted that the recent rise in federal death penalty prosecutions, federal death sentences, and federal executions evokes serious and interesting questions of federalism, uniformity, states' rights, and community values.²²

Understanding American federalism at its most basic level requires familiarity with the hierarchy of national and local power established by the Framers. Article VI of the United States Constitution declares that federal law is the "supreme Law of the Land" and supercedes conflicting state and local laws.²³ Accordingly, Congress may "authorize its own lawful punishments for criminal conduct within its jurisdictional reach, regardless of state or local objections."²⁴ As the Supreme Court has held, "[i]f [a] statute be a valid exercise of [fed-

19 Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 537 (2000).

20 *Id.*

21 See, e.g., Roger Hood, *Capital Punishment: A Global Perspective*, 3 PUNISHMENT & SOC'Y 331 (2001).

22 See, e.g., *United States v. Fell*, 571 F.3d 264, 284 (2d Cir. 2009) (Calabresi, J., dissenting from the denial of rehearing en banc) ("For a federalism like ours—made up as it is of states whose populations hold widely different moral viewpoints—to work, perhaps even to survive, it is at least arguable that the values of the citizens of the state in question—not just a minority of them—be reflected in trial juries, even in federal cases."); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 357 (1999) ("Significant federalism and state sovereignty issues lurk beneath the surface of a nationally uniform federal death penalty.").

23 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

24 Rory K. Little, *Good Enough for Government Work?: The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty*, 14 FED. SENT'G REP. 7, 8 (2001).

eral] power, how it may affect persons or states is not material to be considered. It is the supreme law of the land and persons and states are subject to it.”²⁵ However, two of the most acclaimed values of federalism are that it enhances democratic rule by providing government that is closer to the people and that it protects the autonomy of one State to chart for itself a different course than that chosen by its sister States.²⁶ Those two values are inherently entwined, and both suggest that uniformity may not be a desired consequence of federalism. As Justice Brandeis wrote, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁷

With regard to capital punishment, Michigan was that “single courageous State” when, in 1846, it became the first English-speaking jurisdiction in the world to abolish the death penalty.²⁸ Michigan was followed by Rhode Island in 1852 and then by Wisconsin in 1853.²⁹ The trend towards abolition continued slowly and was most recently manifested in New Mexico’s decision to repeal its death penalty statute earlier this year.³⁰ In the United States today, fifteen states and the District of Columbia have abolished the death penalty, whereas the remaining thirty-five States, the federal government, and the military have retained it.³¹

Criticizing the traditional understanding of federalism’s benefits, one scholar has suggested that “the greatest beauty of federalism is its redundancy: multiple levels of government over the same territory and population, each with the ability to act.”³² This argument finds relief in that, if the federal government fails to act, appropriate action by the state and local governments remains possible (and vice versa).

25 *Hoke v. United States*, 227 U.S. 308, 320 (1913).

26 See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525 (1995); see also *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990) (“One of the by-products of our nation’s federal system is the doctrine of ‘dual sovereignty’ This doctrine rests upon the basic structure of our polity. The states and the national government are distinct political communities, drawing their separate sovereign power from different sources, each from the organic law that established it. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses.”).

27 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

28 Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 76 (1987).

29 STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 134 (2002).

30 *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16.

31 DEATH PENALTY INFO. CTR., *supra* note 12, at 1.

32 Chemerinsky, *supra* note 26, at 538.

In that vein, proponents of capital punishment contend that it is not merely acceptable, but desirable, for the federal government to seek the death penalty in States that do not have it.³³ Others, however, including some death penalty opponents, contend that the federal government should not be able to perform “an end-run” around state laws prohibiting capital punishment.³⁴

The federal government’s pursuit of the death penalty in non-death penalty states is a very recent phenomenon. Nine years ago, each of the twenty-one defendants then on federal death row had been convicted in states where the death penalty was available.³⁵ Each defendant had been convicted of an offense prohibited by both state law and federal law and punishable by death in either jurisdiction.³⁶ Indeed, “not only could the conduct at issue in each case have been prosecuted under existing state statutes, but the same penalty could have been obtained.”³⁷ However, given the Department of Justice’s expansion of the death penalty into non-death penalty states, that is no longer true. On March 16, 2002, Marvin Gabrion became the first person sentenced to death in a non-death penalty state under the federal system since the federal death penalty was reintroduced twenty-one years ago.³⁸ Since then, eight other defendants from six other non-death penalty states have been condemned to death.³⁹

It should be noted that the federal government’s incursion into the arena of criminal law raises serious states’ rights questions regardless of whether the death penalty is at issue. The enforcement of

³³ See Anthony M. DeStefano, *2003 Slaying of Undercover Cops; Charges Keep Death Penalty in Play*, NEWSDAY (N.Y.), Nov. 23, 2004, at A17 (describing how the district attorney transferred prosecution to federal government so that federal death penalty could be sought after state courts ruled that New York’s death penalty statute was unconstitutional); Ed White, *Death Penalty Case Is a First; The Father of a Woman Whose Body Was Found in a National Forest Lake Praises the Federal Government’s Pursuit of Capital Punishment*, GRAND RAPIDS PRESS, Feb. 27, 2001, at A1 (giving an example of the death penalty sought in federal court in Michigan).

³⁴ Corey Dade, *Execution Foes Spin Sampson Verdict; Critics Say Case Doesn’t Reflect State Opinion*, BOSTON GLOBE, Dec. 25, 2003, at B1.

³⁵ Little, *supra* note 19, at 542–44.

³⁶ *Id.*; see also *id.* at 541–42 (“Virtually every federal offense for which death is an available penalty is duplicative of some common state criminal offense. Murder is, of course, a crime in every American jurisdiction . . .”).

³⁷ *Id.* at 542.

³⁸ Ed White, *Gabrion’s Lawyer: Sentence Not Justifiable; Rachel Timmerman’s Family, However, Is Relieved After the Jury Decides Her Killer Should Die*, GRAND RAPIDS PRESS, Mar. 17, 2002, at A1.

³⁹ FED. DEATH PENALTY RES. COUNSEL, FEDERAL CAPITAL CASES RESULTING IN A SENTENCE OF DEATH 6–14, http://www.capdefnet.org/pdf_library/6-2-08%20Death%20Row.pdf.

criminal law has traditionally been an area of state concern.⁴⁰ As the Supreme Court has acknowledged, the “States possess primary authority for defining and enforcing the criminal law.”⁴¹ The creation of federal crimes and federal penalties has been “opposed and lamented as unwarranted intrusions into the states’ domain.”⁴² However, the federal government has become increasingly involved in criminal justice; federal criminal law now reaches

virtually all robberies, most schemes to defraud, many firearms offenses, all loan sharking, most illegal gambling operations, most bribes, . . . every drug deal, no matter how small . . . anti-abortion violence, carjacking, failure to pay child support, . . . ‘animal rights terrorism.’ . . . domestic violence, providing material support to terrorists, telemarketing fraud, interstate computer hacking, misuse of credit cards and ATM cards, possession of handguns by juveniles, art theft, and obstructing a lawful hunt.⁴³

Though the federalization of crime implicates a myriad of issues that deserve thoughtful examination quite apart from how it relates to capital punishment, the aim of this Article is decidedly narrower.⁴⁴

Our main focus here is to explore how, under the direction of former Attorneys General John Ashcroft, Alberto Gonzales, and Michael Mukasey, the Department of Justice pursued capital prosecutions in jurisdictions that had abolished or not provided for the death penalty.⁴⁵ The Department’s position was that it pursued such cases

⁴⁰ See Sean M. Morton, Comment, *Death Isn’t Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1445 (2001).

⁴¹ *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

⁴² John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095 (1995).

⁴³ *Id.* at 1095–97 (footnotes omitted).

⁴⁴ Other commentators have addressed some of these matters. See, e.g., Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); Barbara S. Jones et al., *Panel Discussion: The Prosecutor’s Role in Light of Expanding Federal Criminal Jurisdiction*, 26 FORDHAM URB. L.J. 657 (1999); Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905 (1998).

⁴⁵ We refer to these fifteen states and the Commonwealth of Puerto Rico collectively as “non-death penalty states,” but their respective paths to abolition are different. Four of these states (Michigan, Rhode Island, Wisconsin, and Maine) abolished the death penalty statutorily in the nineteenth century. See *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 9 (Hugo Adam Bedau ed., 1997). Minnesota and North Dakota did the same in the early twentieth century. *Id.* Five states (Alaska, Hawaii, Iowa, Vermont, and West Virginia) abolished the death penalty decades later in the 1950s and 1960s, and Massachusetts abolished the death penalty in 1984. *Id.* Puerto Rico’s Constitution was ratified by Congress in 1952 and proclaims that “[t]he death penalty shall not exist.” P.R. CONST. art. II, § 7. New Jersey repealed its death penalty in 2007, see Jeremy W. Peters,

in order “to ensure consistency and fairness” in the application of the federal death penalty.⁴⁶ To be sure, the endeavor for a national standard is nothing new. Addressing the Second Annual Conference of United States Attorneys in 1940, then-Attorney General Robert Jackson declared that “uniformity of policy” was “necessary to the prestige of federal law”⁴⁷:

The federal government could not enforce one kind of law in one place and another kind elsewhere. It could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. . . . [T]he only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. . . . [T]here should be no permitting of local considerations to stop federal enforcement⁴⁸

Jackson’s remarks focused on the need for political consistency and procedural centralization to cabin prosecutorial discretion, but uniformity has remained a concern in other areas of criminal justice, particularly sentencing. Judge Marvin Frankel inspired the creation of the United States Sentencing Commission when he pronounced that unguided discretion in sentencing had produced “a wasteland in the law.”⁴⁹ About a decade later, Congress responded by enacting the

Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8, N.Y. TIMES, Dec. 18, 2007, at B3, and New Mexico repealed its death penalty earlier this year. *See supra* note 30. The death penalty remains on the books in New York where the Court of Appeals held it to be unconstitutional. *See People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). In 2007, the Court of Appeals upheld *LaValle* and ordered the last prisoner on New York’s death row to be resentenced. *See People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007). Accordingly, New York is included in our count of non-death penalty states.

46 Two different Department of Justice spokeswomen invoked the “consistency and fairness” defense more than a dozen times over the course of a year. *See, e.g.*, Matt Burgard, *2 Suspects in Killing Could Face Execution: Prosecutors Pressured to Seek Death Penalty*, HARTFORD COURANT, Feb. 7, 2003, at B7 (“A process exists . . . to ensure consistency and fairness in the application of the death penalty in all U.S. attorney districts across the country,” Barbara Comstock, the department’s director of public affairs, said in a statement.); William Glaberson, *Unlikely Symbol in Death Debate: The Last Don; U.S. Is Weighing Charges Against Old-Style Mafia Boss*, N.Y. TIMES, Feb. 13, 2004, at B1 (“Monica Goodling, a spokeswoman for Mr. Ashcroft, . . . said the Justice Department’s ‘process for evaluating death-eligible cases is designed to ensure consistency and fairness in the application of the death penalty nationwide.’”).

47 Robert H. Jackson, Att’y Gen. of the United States, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 4 (1940).

48 *Id.* at 6.

49 Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1972); *see* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1702 n.17 (2003) (“Judge Frankel’s call for a national sentencing commission was a driving force in the creation of the United States Sentencing Commission . . .”).

Sentencing Reform Act of 1984.⁵⁰ The law sought to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”⁵¹ The Act not only established the Sentencing Commission, but it also directed the Commission to promulgate guidelines that would be uniform in application without regard to geography.⁵² Because the Act predates the 1988 restoration of the federal death penalty,⁵³ it does not address death sentencing. However, “[n]othing in the more recent congressional death penalty legislation suggests that Congress has changed its intention to have federal criminal punishment administered uniformly for similar violations and violators of identical federal statutes.”⁵⁴ Such silence is golden for the Department of Justice, which has said that its “decisions are governed by a desire to see that the federal death penalty is applied uniformly around the country.”⁵⁵

The pursuit of uniformity in the administration of the federal death penalty is part of a larger centralization effort at the Department of Justice spearheaded by former Attorney General John Ashcroft. In 2003, then Attorney General Ashcroft circulated a directive to all federal prosecutors requiring them to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.”⁵⁶ Under Attorney General Janet Reno and before the issuance of the 2003 Ashcroft Memorandum, federal prosecutors were instructed to make an “individualized assessment of the extent to which particular charges fit the specific circumstances of the case” and to consider a number of factors, including the sentencing guideline range yielded by the charge, whether the range is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves the purposes of retribution, isolation, deterrence,

50 Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

51 28 U.S.C. § 991(b)(1)(B) (2006).

52 *Id.* § 991.

53 *See* discussion *infra* Part III.

54 Little, *supra* note 22, at 536.

55 William Glaberson, *Capital Cases and Agendas*, N.Y. TIMES, Feb. 8, 2003, at B1.

56 Memorandum from John Ashcroft, Att’y Gen. of the United States, to All U.S. Att’y’s 1 (Sept. 22, 2003), *reprinted in* 16 FED. SENT. R. 134 (2003), *available at* http://txw.fd.org/pdf_lib/memoagcds.pdf [hereinafter Ashcroft Memorandum]. For a more thorough discussion of the Ashcroft Memorandum’s effect on prosecutorial discretion, see HARRY I. SUBIN, BARRY BERKE, & ERIC TIRSCHWELL, *THE PRACTICE OF FEDERAL CRIMINAL LAW: PROSECUTION AND DEFENSE* § 11.1(d) (2006).

and rehabilitation.⁵⁷ However, the Ashcroft Memorandum eliminated the “discretion of federal prosecutors to inform their charging decisions by consideration of [such] factors,”⁵⁸ and made clear that “[m]ajor decisions about prosecutorial priorities at the local and regional level [would] be dictated by the central command in Washington, not by local U.S. Attorneys.”⁵⁹ Other commentators have similarly linked the Ashcroft Memorandum to the Department of Justice’s pursuit of the federal death penalty, opining that “Ashcroft loves to centralize power” and noting that the former Attorney General’s “practice” was to “override the decisions of local U.S. Attorneys whether to seek the death penalty in individual cases.”⁶⁰

In the form of an introduction, Part I of this Article outlined the issue by giving a snapshot of the current federal death penalty climate and by discussing the implications of federalism and the value of uniformity in sentencing. Part II of this Article will provide a brief history of the federal death penalty, starting with the enactment of first capital federal statutes in 1790. Part III will discuss the Supreme Court’s 1972 ruling in *Furman v. Georgia*,⁶¹ the post-*Furman* restoration of the federal death penalty in 1988, and the dramatic expansion of the federal death penalty in 1994. Part IV will compare the Department of Justice’s administration of the federal death penalty under former Attorneys General Janet Reno, John Ashcroft, Alberto Gonzales, and Michael Mukasey. Part V will describe how communities in non-death penalty states reacted to the federal government’s pursuit of capital sentences in their respective jurisdictions and discuss how the Department of Justice has overruled and replaced U.S. Attorneys who were reluctant to extend the federal death penalty into non-death penalty states. Finally, Part VI will explore the potential impact of the appointment of Eric Holder as Attorney General on the administration of the federal death penalty in non-death penalty states.

57 Memorandum from Janet Reno, Att’y Gen. of the United States, to Holders of U.S. Att’y’s Manual, Title 9 (Oct. 12, 1993), reprinted in 6 FED. SENT. R. 352, 352 (1994) (describing the “appropriate” items for consideration by “the attorney for the government”).

58 SUBIN ET AL., *supra* note 56, at § 11.1(d).

59 Edward Lazarus, *Attorney General Ashcroft’s New Charging, Plea Bargaining, and Sentencing Policies: Though Consideration Is Needed, Criticism Has Been Overstated*, FINDLAW, Oct. 2, 2003, <http://writ.news.findlaw.com/lazarus/20031002.html> (last visited Oct. 3, 2009).

60 *Id.*

61 408 U.S. 238 (1972) (holding that the death penalty as then-administered ran afoul of the Eighth Amendment’s protection against the infliction of cruel and unusual punishments).

II. BRIEF HISTORY OF THE FEDERAL DEATH PENALTY

Whatever else may be said about capital punishment in the United States, there is little uncertainty that the death penalty “is explicitly contemplated in the Constitution.”⁶² The Fifth Amendment’s Grand Jury Clause says that no person shall be held to answer for a capital crime unless first indicted by a grand jury.⁶³ The Double Jeopardy Clause of the same Amendment states that no person shall be twice “put in jeopardy of life” for the same offense.⁶⁴ The Amendment’s Due Process Clause expressly prohibits the Federal Government from depriving a person of life without due process of law.⁶⁵ Furthermore, other parts of the Constitution imply the existence of the death penalty. For example, Article II gives the President the power to “Grant Reprieves and Pardons for Offenses against the United States.”⁶⁶ The pardon power broadly authorizes the President to grant clemency for all sorts of criminal matters,⁶⁷ but the reprieve power is understood as relating specifically to the postponement of executions and commutation of death sentences.⁶⁸ To be sure, “parts of the Constitution indicate that those who drafted and ratified it contemplated the continued existence of the death penalty.”⁶⁹

Shortly after it convened in 1789, the First Congress provided that all capital trials were to take place in “the county where the offence was committed.”⁷⁰ However, Congress did not specify any capital crimes until April 1790 when it enacted a mandatory death penalty for treason, murder, piracy, forgery, and the rescue of a person convicted of a capital crime.⁷¹ Benefit of clergy, a common law mechanism by which a first-time offender could receive a more lenient sentence,⁷² was denied to the condemned,⁷³ and the statutorily prescribed

62 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46 (Amy Gutmann ed., 1997) (emphasis omitted).

63 U.S. CONST. amend. V.

64 *Id.*

65 *Id.*

66 U.S. CONST. art II, § 2, cl. 1.

67 BANNER, *supra* note 29, at 234.

68 *See* *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)

69 BANNER, *supra* note 29, at 234.

70 Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88.

71 Act of April 30, 1790, ch. 9, §§ 1, 3, 8–10, 14, 23, 1 Stat. 112–19 [hereinafter 1790 Crime Bill].

72 *See* BANNER, *supra* note 29, at 62–64.

73 1790 Crime Bill, *supra* note 71, § 31.

method of execution was “hanging the person convicted by the neck until dead.”⁷⁴

In 1829, days before leaving office, President John Quincy Adams transmitted to Congress a report on how the federal death penalty had been employed from 1790 through 1826.⁷⁵ The report revealed that, in the federal death penalty’s first thirty-six years, 138 defendants had been tried for capital offenses and 118 were convicted.⁷⁶ Of the forty-five defendants tried for capital murder, thirty-seven of them (82%) were convicted.⁷⁷ Twenty-four were executed (65%), six were pardoned (16%), and each of the remaining seven either committed suicide, died, escaped, or was otherwise “unaccounted for.”⁷⁸

Congress published a similar report towards the end of the nineteenth century to examine how things had changed since the federal death penalty’s earlier years. To support his legislation calling for “the total abolition of the [federal] punishment of death,”⁷⁹ Congressman Newton M. Curtis assembled the data that made its way into the congressional report. In passing a bill to reduce the number of capital crimes, the House Judiciary Committee did indeed rely on Curtis’s report, which Congressman Simon Peter Wolverton hailed as “probably the most thorough and exhaustive ever made” regarding the federal death penalty.⁸⁰ Curtis’s research revealed that of the 271 defendants indicted on federal murder charges from 1890 through 1892, sixty-three were convicted (23%), and only thirteen of those sixty-three were executed (21%).⁸¹ Going beyond the numbers above, Curtis calculated that “[i]n former times in proper cases, about 85 per cent of those tried [for capital crimes] were convicted, while in recent years the average is less than 20 per cent in the Federal courts, and still lower in the State courts.”⁸²

The Curtis report and the conclusions drawn therefrom were influential in the ultimate success of a bill entitled “An Act To reduce the cases in which the penalty of death may be inflicted,”⁸³ which abolished the federal death penalty for all but five categories of crime:

74 *Id.* § 33.

75 H.R. EXEC. DOC. NO. 20-146 (1829).

76 H.R. REP. NO. 54-108, at 4–5 (1896) (analyzing data from the 1829 report on federal death penalty).

77 *Id.* at 5.

78 *Id.*

79 *See* Little, *supra* note 22, at 367 & n.93 (alteration in the original).

80 H.R. REP. NO. 53-545, at 2 (1894).

81 H.R. REP. NO. 54-108, at 5 (1896).

82 *Id.* at 3.

83 Act of Jan. 15, 1897, ch. 29, §§ 1–5, 29 Stat. 487.

murder, rape, treason, crimes subject to Army justice, and crimes subject to Navy justice.⁸⁴ Additionally, the new law made the death penalty discretionary, rather than mandatory.⁸⁵ In upholding that 1897 law, the Supreme Court explained that providing for a discretionary death penalty was a prudent consideration of “the reluctance of jurors to concur in a capital conviction.”⁸⁶ Forced to condemn to death defendants found guilty of *any* capital offense, juries had engaged in a striking pattern of nullification, as demonstrated by the statistics calculated by Curtis.⁸⁷ Some legislatures responded by decreeing that only certain degrees of murder could be punished by death, whereas other legislatures, such as Congress, allowed juries to “qualify their verdict[s] by adding thereto ‘without capital punishment.’”⁸⁸

With the number of civilian capital offenses reduced from sixty to three,⁸⁹ and with federal juries empowered to sentence defendants to life imprisonment instead of death, it is unsurprising that federal executions in the twentieth century were rare. From 1900 through 1963, when the last federal execution of the twentieth century was carried out,⁹⁰ only thirty-nine individuals were put to death as a result of a federal conviction.⁹¹ Throughout the twentieth century, only eight death penalty states executed fewer defendants,⁹² and five states that are currently non-death penalty states executed more.⁹³ Though five of the thirty-nine twentieth century federal executions were car-

84 *Id.* §§ 2–3.

85 *Id.* § 1.

86 *Winston v. United States*, 172 U.S. 303, 310 (1899).

87 See Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32, 32 (1974) (evaluating the claim that the mandatory death penalty in the mid-nineteenth century “made securing convictions more difficult and often resulted in the acquittal of obviously guilty defendants”).

88 *Winston*, 172 U.S. at 310–12.

89 See H.R. REP. NO. 53-545, at 1 (1894) (introduction to House report accompanying an earlier version of the capital crimes reduction legislation, noting that “[a]t this time there are sixty offenses for which Federal laws prescribe the death penalty, positively or conditionally”).

90 Little, *supra* note 22, at 355–57.

91 Federal, Territorial and Indian Tribunal List, <http://users.bestweb.net/~rg/execution/DATA%20FEDERAL.htm> (last visited Oct. 3, 2009).

92 *Id.* The nine death penalty states to have executed fewer than thirty-nine people in the twentieth century are Delaware, Idaho, Kansas, Nebraska, New Hampshire, South Dakota, Utah, and Wyoming.

93 *Id.* The five non-death penalty states to have executed more people in the twentieth century than the federal government had executed over the same period are New York (641 executions), New Jersey (187 executions), West Virginia (91 executions), Massachusetts (65 executions), and Hawaii (42 executions). All of Hawaii’s executions were carried out before it obtained statehood in 1950, and all of the other executions were performed before the pre-*Furman* death penalty moratorium began in 1967.

ried out in three states that do not authorize capital punishment today (Iowa, Michigan, and New York), Michigan was the only state of the three that was a non-death penalty jurisdiction at the time of the federal execution.⁹⁴ It is useful to briefly examine that episode because the anger and confusion that was produced by the prospect of a federal execution in a non-death penalty state is the same engendered today under similar circumstances.

On July 8, 1938, Anthony Chebatoris was executed at the federal detention farm in Milan, Michigan for a bank robbery in which a bystander was killed.⁹⁵ Nearly a century prior, Michigan had abolished its death penalty statutorily,⁹⁶ and it had never seen an execution in all of its time as a state.⁹⁷ Then, as now, the people of Michigan were strongly opposed to capital punishment and—just seven years before Chebatoris’s execution—had soundly defeated a statewide referendum calling for the restoration of the death penalty.⁹⁸ Perhaps the most abolitionist of any state, Michigan is the only state in the Union to prohibit capital punishment in its state constitution.⁹⁹ Of over sixty legislative attempts and four petition drives to revive capital punishment in Michigan, none has proven successful.¹⁰⁰

When the federal government brought a capital charge against Chebatoris, many Michiganders made their objections known, including the widow of Chebatoris’s victim and the victim’s sister-in-law who claimed that her dying brother-in-law told her that he wanted Chebatoris to be spared in the event of his death.¹⁰¹ Nonetheless, the prosecution proceeded, and a federal jury found Chebatoris guilty and sentenced him to death after less than a day of deliberation.¹⁰² Trou-

94 See DEATH PENALTY INFO. CTR., *supra* note 15. Anthony Chebatoris was executed in Michigan in 1938 although Michigan had abolished the death penalty in 1846. See *supra* note 28 and accompanying text. The Rosenbergs and Gerhard Puff were electrocuted in New York in 1953 and 1954, respectively, but New York was a death penalty state from its inception until the Supreme Court’s 1972 *Furman* decision and then again from 1995 until the New York Court of Appeals’ 2004 *LaValle* decision. See *supra* note 45. Victor Feguer was executed in Iowa in 1963, but Iowa did not abolish the death penalty until 1965. *Id.*

95 Aaron J. Veselenak, *The Execution of Anthony Chebatoris*, MICH. HIST., May/June 1998, at 35.

96 See *supra* note 28 and accompanying text.

97 Veselenak, *supra* note 95 (noting that, before Chebatoris’s, the last execution in Michigan was in 1830—more than six years before Michigan entered the Union).

98 Eugene G. Wanger, *Historical Reflections on Michigan’s Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 769 n.86 (1996) (noting that the popular vote was 269,538 for the death penalty and 352,594 against it—a difference of fourteen percentage points).

99 See MICH. CONST. art IV, § 46.

100 Scott Davis & Jack Tucker, *Michigan History Reveals Similar Tale*, SAGINAW NEWS (Mich.), June 10, 2001, at 1A.

101 Veselenak, *supra* note 95.

102 *Id.*

bled that federal law demanded that the execution take place in Michigan, Governor Frank Murphy appealed to President Franklin D. Roosevelt to move the execution to another state, noting that there had not been an execution in Michigan in more than 100 years and suggesting that hanging Chebatoris in Michigan would be “like turning back the clock of civilization.”¹⁰³ Roosevelt referred the matter to the Attorney General who, in turn, asked U.S. District Judge Arthur J. Tuttle to determine whether the execution could be moved. For Judge Tuttle, the issues of federalism and supremacy discussed above informed his decision to deny the Governor’s request:

I have neither the power nor the inclination to change the sentence. If I did have the power to do so, I think it would be unfair to suggest that the people of a neighboring state are less humane than are the people of our own state of Michigan. This federal court is enforcing a federal law in Michigan¹⁰⁴ for an offense against the United States, committed in Michigan.¹⁰⁵

Governor Murphy was less hesitant to impugn the humanity of “the people of a neighboring state.” Outraged at Judge Tuttle’s decision, Murphy declared:

I deplore the fact that this execution is taking place within our state, where for more than a century there hasn’t been a legal execution. It has always seemed to me that Michigan could take pride in being the first commonwealth on this earth to abolish capital punishment. I don’t think it against the interests of the people of this state to oppose its revival by having the federal government come in here, erect a scaffold and hang a man by the neck until he is dead. . . . I think the federal government should have arranged for the execution elsewhere—if it was to take place anywhere.¹⁰⁵

Murphy then compared Illinois to a “neighbor [who] was in the habit of chloroforming dogs in his backyard” and suggested that it would be more appropriate for Chebatoris to be executed by such a neighbor because “one more or less probably wouldn’t disturb him.”¹⁰⁶

It is significant that Murphy accepted the federal government’s authority to try, convict, and punish Chebatoris; his objection was reserved for the venue of the execution. Today, federal law addresses this matter by pronouncing that when a federal death sentence is to be implemented, the execution should be done “in the manner prescribed by the law of the State in which the sentence is imposed” unless that State “does not provide for implementation of a sentence of

103 *Id.*

104 *Id.*

105 *Id.* (alteration in original).

106 *Id.*

death,” in which case the sentencing judge must designate a death penalty state in which the execution is to be carried out.¹⁰⁷ This provision makes clear that which both Judge Tuttle and Governor Murphy recognized: the federal government may enforce the federal laws, including those laws that make certain federal offenses punishable by death, notwithstanding local opposition. At the same time, insofar as it eliminates the possibility that a federal execution could be carried out in a non-death penalty state, that law, 18 U.S.C. § 3596, demonstrates Congress’s respectful recognition that certain communities may be opposed to capital punishment and avoids situations similar to that of Chebatoris’s execution in an abolitionist state.

The Chebatoris episode is also significant for the purposes of this paper because it demonstrates how federal officials may enforce unpopular capital statutes in order to service a particular political agenda. Chebatoris was prosecuted under the Federal Bank Robbery Act of 1934,¹⁰⁸ a relatively new federal law that was enacted in response to nationwide requests for “Federal relief” from “organized gangsters” who were considered “sufficiently powerful and well equipped to defy local police.”¹⁰⁹ Though the local police had no trouble catching Chebatoris—he was arrested by the county sheriff and held at the county jail—the federal government made him the test case for the Bank Robbery Act.¹¹⁰ This can be better understood taking into account the fact that the U.S. Attorney who prosecuted Chebatoris was a former congressman who had served on the committee that drafted the Federal Bank Robbery Act of 1934,¹¹¹ as well as the fact that, though the Act explicitly granted states concurrent jurisdiction to prosecute bank robbers in state court,¹¹² the death penalty could be obtained only in federal court.

In the twentieth century, Chebatoris was the only person executed by the federal government in a non-death penalty state. Since Chebatoris’s hanging, no other federal inmate from a non-death penalty state has been executed, however, seven of the fifty-five defendants currently awaiting federal execution are from non-penalty states.¹¹³

107 18 U.S.C. § 3596(a) (2006).

108 Act of May 18, 1934, Pub. L. No. 73-235, 48 Stat. 783.

109 H.R. REP. NO. 73-1461, at 2 (1934).

110 Veselenak, *supra* note 95.

111 *Id.*

112 Act of May 18, 1934, Pub. L. No. 73-235, § 4, 48 Stat. 783, 783.

113 See Death Penalty Information Center, *supra* note 13; FED. DEATH PENALTY RES. COUNSEL, *supra* note 39 (listing nine condemned inmates from non-death penalty states but failing to account for the fact that a new trial was ordered earlier this year for defendants George Lecco and Valerie Friend in *United States v. Lecco*, No. 2:05-00107, 2009 WL 1249287 (S.D.

III. THE MODERN FEDERAL DEATH PENALTY—POST-*FURMAN* / PRE-ASHCROFT

A few months after the federal government executed Victor Feguer in 1963,¹¹⁴ Supreme Court Justice Arthur Goldberg wrote an opinion in which he questioned the constitutionality of the death penalty.¹¹⁵ Taking a cue from Justice Goldberg's opinion and in an effort to create "death row logjam,"¹¹⁶ the Legal Defense and Educational Fund of the National Association for the Advancement of Colored People ("NAACP") began to attack the constitutionality of the death penalty in a series of lawsuits, eventually halting all executions in the United States by 1967.¹¹⁷ In 1972, the Supreme Court held in *Furman v. Georgia* that the death penalty as then-administered violated the Eighth and Fourteenth Amendments to the Constitution, effectively eliminating capital punishment nationwide.¹¹⁸ In particular, the Supreme Court took issue with the "untrammelled discretion" possessed by juries "to let an accused live or insist that he die."¹¹⁹

Though the precise ramifications of the *Furman* decision on the federal death penalty were debatable given that certain federal procedures were different than those spelled out in the Georgia statute invalidated by the Supreme Court, insofar as a federal capital statute granted juries unguided discretion to return death verdicts, *Furman* was an insuperable barrier.¹²⁰ As Congress recognized in 1974, "the practical effect of the *Furman* case is that the death penalty is not presently available for the enforcement of . . . Federal crimes."¹²¹

In an effort to address the problem outlined in *Furman* regarding untrammelled discretion, Congress enacted an air piracy law two years after the Supreme Court's decision that indicated that the death penalty was to be mandatory if the jury found any one of a number of statutorily-defined aggravating factors.¹²² However, in 1976, the Su-

W. Va. May 4, 2009)). Coincidentally, the first of the nine federal defendants to be sentenced to death in a non-death penalty state was a Michigander, Marvin Gabrion.

114 DEATH PENALTY INFO. CTR., *supra* note 15.

115 *Rudolph v. Alabama*, 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

116 Christopher Q. Cutler, Comment, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U. L. REV. 1189, 1195–96 (2000).

117 See THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 45, at 184–85.

118 408 U.S. 238 (1972).

119 *Id.* at 247–48 (Douglas, J., concurring).

120 *Id.*

121 H.R. REP. NO. 93-885 (1974), as reprinted in 1974 U.S.C.C.A.N. 3975, 3981.

122 See Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409; see also H.R. REP. NO. 93-885 (1974), as reprinted in 1974 U.S.C.C.A.N. 3975, 3981 ("The death penalty must be im-

preme Court held that mandatory death sentencing schemes were no less offensive to the Constitution than fully discretionary schemes.¹²³ The air piracy statute was therefore likely unconstitutional, but, because the federal government never prosecuted anyone under the 1974 version of the law, its validity was never tested in the courts. Similarly, when Congress sought to make the murder of a witness a capital offense in 1986 by cross-referencing it with the federal murder statute that retained a pre-*Furman*, “open discretion” death penalty procedure, that attempt also yielded a product of dubious legality and one that also was never tested.¹²⁴

In 1988, in the midst of the so-called “War on Drugs,” Congress added a death penalty provision to the continuing criminal enterprise (“CCE”) statute and enacted detailed death penalty procedures designed to respond directly to the Supreme Court’s constitutional rulings since *Furman*.¹²⁵ Congress’s attempt to craft a death penalty

posed if any one of the aggravating factors set forth in the reported bill is found to exist and none of the mitigating factors is found.”)

123 See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that adoption of mandatory death penalty does not eliminate constitutional deficiencies arising from unbridled jury discretion in the imposition of capital punishment); see also *Roberts v. Louisiana*, 428 U.S. 325 (1976) (same).

124 See Little, *supra* note 22, at 379.

125 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387. The following table shows how the CCE statute addressed the Supreme Court’s death penalty precedents:

| Death Penalty Procedure | Section of CCE Statute | Supreme Court Precedent |
|--|-----------------------------------|---|
| Bifurcated guilt/penalty proceedings | § 848(i)(1) | <i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) |
| Eligibility for death penalty limited to offenders who intentionally kill or cause an intentional killing | § 848(n)(1) | <i>Tison v. Arizona</i> , 481 U.S. 137 (1987) |
| Eligibility for death penalty limited to offenders against whom at least one statutorily specified aggravating factor is unanimously found | § 848(j); § 848(n)(2)– (12) | <i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) |
| Jury must consider mitigating factors without limit to specified list | § 848(j); § 848(m) | <i>Lockett v. Ohio</i> , 438 U.S. 586 (1978) |
| Mitigating factors do not need to be found unanimously | § 848(k) | <i>Mills v. Maryland</i> , 486 U.S. 367 (1988) |
| Jury must be instructed that a death sentence is never required | § 848(k) | <i>Woodson v. North Carolina</i> , 7 428 U.S. 280 (1976) |
| Mentally insane offenders may not be executed | § 848(l) | <i>Ford v. Wainwright</i> , 477 U.S. 399 (1986) |
| Offenders younger than 18 may not be executed | § 848(l) | <i>Thompson v. Oklahoma</i> , 487 U.S. 815 (1988) |

statute that would meet constitutional muster was successful, and, within three years, David Ronald Chandler became the first person sentenced to death in a federal court in nearly forty years.¹²⁶ Since then, the CCE statute and its death penalty procedures have withstood numerous constitutional challenges.¹²⁷

On September 13, 1994, President Bill Clinton signed the Violent Crime Control and Law Enforcement Act of 1994,¹²⁸ which contained twenty-six death penalty-related sections that collectively made up the Federal Death Penalty Act of 1994 (“FDPA”).¹²⁹ In addition to providing possible death penalties for more than a dozen preexisting federal offenses and nearly a dozen new federal offenses,¹³⁰ FDPA breathed new life into fifteen so-called “zombie statutes” that contained pre-*Furman* death penalty authorizations that were likely unconstitutional by prescribing new “constitutional procedures for the imposition of the sentence of death.”¹³¹ Though “the exact number of federal offenses made death-eligible by [FDPA] is ‘open to interpretation’” because some provisions of the United States Code contain more than one death-eligible offense, there is no doubt that “FDPA substantially increased the availability of the death penalty for federal offenders.”¹³²

The citations to the United States Code in the table above correspond to the 1994 edition, thus they are no longer current. The special CCE death penalty procedures provisions were eliminated from the statutory language of 28 U.S.C. § 848 in 2006, *see* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 221, 120 Stat. 192, 231 (2006), but they are detailed above to show at what lengths Congress sought to resurrect the federal death penalty with a statute that could pass constitutional muster.

126 *See* United States v. Chandler, 996 F.2d 1073 (11th Cir. 1993) (upholding Chandler’s 1991 conviction and the constitutionality of the CCE death penalty procedures).

127 *See* Little, *supra* note 22, at 384 n.205.

128 Pub. L. No. 103-322, 108 Stat. 1796.

129 *Id.* §§ 60001–60026, 108 Stat. 1959–82.

130 *See id.* §§ 60005–60024; Little, *supra* note 22, at 389 n.232.

131 *Id.* § 60002. Among these procedures is the provision discussed above that authorizes district courts to transfer the venue of a federal execution from a non-death penalty state to a death penalty state. That provision makes clear Congress’s intent for the federal criminal laws to be enforceable in all states—even if a defendant would need to be punished for violating those laws in a district other than the one in which he was convicted. *See supra* note 107 and accompanying text.

132 Little, *supra* note 22, at 389–91 (quoting Charles Kenneth Eldred, *Recent Developments, The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293, 293 n.2 (1994)). Additionally, in 1996, Congress expanded the availability of the death penalty to four terrorism-related crimes. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. As of the printing of the 2000 Department of Justice statistical survey, *see supra* note 3 and accompanying text, there were nearly sixty capital crimes under federal law: Murder of officials enforcing laws relating to transportation, sale, and handling of certain an-

The Federal Death Penalty Act was a Democratic initiative, introduced by then-Senator, now-Vice President Joseph Biden.¹³³ FDPA, and the omnibus crime bill of which it was a part, was designed to dispel the belief that Democrats generally (and President Clinton

imals, 7 U.S.C. § 2146 (1994); Bringing in and harboring certain aliens, 8 U.S.C. § 1324 (1994); Murder of officials enforcing laws relating to the protection of horses, 15 U.S.C. § 1825 (1994); Destruction of aircraft or aircraft facilities, 18 U.S.C. § 32 (1994); Destruction of motor vehicles or motor vehicle facilities, 18 U.S.C. § 33 (1994); Drive-by shooting, 18 U.S.C. § 36 (1994); Violence at international airports, 18 U.S.C. § 37 (1994); Influencing, impeding, or retaliating against a Federal official by a family member, 18 U.S.C. § 115 (1994); Chemical weapons, 18 U.S.C. § 229A (Supp. IV 1998); Conspiracy against rights, 18 U.S.C. § 241 (1994); Deprivation of rights under color of law, 18 U.S.C. § 242 (1994); Federally protected activities, 18 U.S.C. § 245 (1994); Damage to religious property; obstruction of the free exercise of religious rights, 18 U.S.C. § 247 (1994); Congressional, Cabinet, and Supreme Court assassination, 18 U.S.C. § 351 (1994); Gathering or delivering defense information to aid foreign government, 18 U.S.C. § 794 (1994); Explosive materials, 18 U.S.C. § 844 (1994); Firearms, 18 U.S.C. § 924 (1994); Possession of firearms and dangerous weapons in Federal facilities, 18 U.S.C. § 930 (1994); Genocide, 18 U.S.C. § 1091 (1994); Murder, 18 U.S.C. § 1111 (1994); Protection of officers and employees of the United States, 18 U.S.C. § 1114 (1994); Murder of foreign officials, official guests, or internationally protected persons, 18 U.S.C. § 1116 (1994); Murder by a Federal prisoner, 18 U.S.C. § 1118 (1994); Foreign murder of United States nationals, 18 U.S.C. § 1119 (1994); Murder by escaped prisoners, 18 U.S.C. § 1120 (1994); Killing persons aiding Federal investigations or State correctional officers, 18 U.S.C. § 1121 (1994); Kidnapping, 18 U.S.C. § 1201 (1994); Hostage taking, 18 U.S.C. § 1203 (1994); Influencing or injuring officer or juror generally, 18 U.S.C. § 1503 (1994); Tampering with a witness, victim, or an informant, 18 U.S.C. § 1512 (1994); Retaliating against a witness, victim, or an informant, 18 U.S.C. § 1513 (1994); Injurious articles as nonmailable, 18 U.S.C. § 1716 (1994); Presidential and Presidential staff assassination, 18 U.S.C. § 1751 (1994); Use of interstate commerce facilities in the commission of murder-for-hire, 18 U.S.C. § 1958 (1994); Violent crimes in aid of racketeering activity, 18 U.S.C. § 1959 (1994); Wrecking trains, 18 U.S.C. § 1992 (1994); Bank robbery and incidental crimes, 18 U.S.C. § 2113 (1994); Motor vehicles (carjacking), 18 U.S.C. § 2119 (1994); Aggravated sexual abuse, 18 U.S.C. § 2241 (1994); Sexual abuse, 18 U.S.C. § 2242 (1994); Sexual abuse of a minor or ward, 18 U.S.C. § 2243 (1994); Abusive sexual contact, 18 U.S.C. § 2244 (1994); Sexual exploitation of children, 18 U.S.C. § 2251 (1994); Violence against maritime navigation, 18 U.S.C. § 2280 (1994); Violence against maritime fixed platforms, 18 U.S.C. § 2281 (1994); Homicide, 18 U.S.C. § 2332 (1994); Use of weapons of mass destruction, 18 U.S.C. § 2332a (1994); Acts of terrorism transcending national boundaries, 18 U.S.C. § 2332b (Supp. II 1996); Use of chemical weapons, 18 U.S.C. § 2332c (Supp. II 1996); Torture, 18 U.S.C. § 2340A (1994); Treason, 18 U.S.C. § 2381 (1994); War crimes, 18 U.S.C. § 2441 (Supp. II 1996); Murder of officials enforcing laws relating to poultry inspection, 21 U.S.C. § 461 (1994); Murder of officials enforcing laws relating to meat inspection, 21 U.S.C. § 675 (1994); Continuing criminal enterprise, 21 U.S.C. § 848 (1994); Murder of officials enforcing laws relating to inspection of egg products, 21 U.S.C. § 1041 (1994); Murder of nuclear inspectors, 42 U.S.C. § 2283 (1994); Aircraft piracy, 49 U.S.C. § 46502 (1994).

¹³³ Violent Crime Control and Law Enforcement Act of 1993, S. 1607, 103d Cong. tit. II (1993). Indeed, the Violent Crime Control and Law Enforcement Act, of which FDPA was a part, was known popularly as the “Biden Crime Bill.” See Joseph R. Biden, Jr., Press Conference (Mar. 11, 2009) (“I wrote what used to be called the Biden Crime Bill back in the ‘90s . . . it had my name on it . . .”).

particularly) were soft on crime.¹³⁴ On the Senate Floor, Senator John Kerry of Massachusetts boasted that the Democratic crime bill was “overwhelmingly tougher” than past Republican efforts, noting that the bill added “60 new death penalties . . . the largest expansion of the Federal death penalty in the history of the U.S. Congress.”¹³⁵ Similarly, during his reelection campaign, President Clinton stated, “[m]y 1994 crime bill expanded the death penalty for drug kingpins, murderers of federal law enforcement officers, and nearly 60 additional categories of violent felons.”¹³⁶ On August 25, 1994, all but two Democratic senators voted in favor of the crime bill,¹³⁷ clearing FDPA’s path to the White House and breathing new life into the federal death penalty that had been dormant for more than three decades.

IV. THE DEPARTMENT OF JUSTICE’S ADMINISTRATION OF THE FEDERAL DEATH PENALTY

Shortly after the passage of FDPA and with more than fifty capital offenses suddenly in the Department of Justice’s arsenal, Attorney General Janet Reno took on the task of establishing internal Department procedures to govern the selection and prosecution of capital cases. On January 27, 1995, Reno amended the U.S. Attorneys’ Manual to add a nine-part section regarding “Federal Prosecutions in Which the Death Penalty May Be Sought.”¹³⁸ Collectively, these amendments came to be known as the “Death Penalty Protocol.”¹³⁹ The Protocol made clear that, unlike most prosecutorial decisions, the decision of whether to seek the death penalty was to be centralized in Washington, declaring that “[t]he death penalty shall not be sought without the prior written authorization of the Attorney Gen-

134 See Eldred, *supra* note 132, at 294–96 (stating that Congress members did not clearly express their intent in passing the Act, but that they did “make broad arguments to the effect that it [was] self-evident that the death penalty [was] tough on crime”).

135 140 CONG. REC. 23,929, 23,961–62 (1994) (statement of Sen. Kerry).

136 *On the Issues: Death Penalty*, CHARLOTTE OBSERVER, Oct. 8, 1996, at 4A.

137 140 CONG. REC. 24,114, 24,114–15 (1994). The two Democratic senators to oppose the crime bill were Senator Richard Shelby of Alabama, who joined the Republican Party two months after the vote, see *Alabama Senator Makes Switch to Republican Party*, ATLANTA J. & CONST., Nov. 9, 1994, at A1, and Senator Russell Feingold of Wisconsin who felt “compelled” to vote against the bill “because of the absurd extension of the death penalty with no real gain coming from it, and because of the greatly increased dangerous trend for federalization of law enforcement.” 140 CONG. REC. 23,802 (1994).

138 U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-10.000 (1995), available at http://www.capdefnet.org/fdprc/contents/shared_files/docs/01a_doj_manual.htm (last visited Oct. 3, 2009) [hereinafter 1995 DOJ Protocol].

139 Little, *supra* note 22, at 407.

eral.”¹⁴⁰ A U.S. Attorney who intended to charge a defendant with a capital offense was directed to prepare a “Death Penalty Evaluation” form and prosecution memorandum to be reviewed by a committee at Main Justice.¹⁴¹ These procedures were established to “promote consistency and fairness” in the administration of the federal death penalty.¹⁴²

The Capital Case Review Committee at Main Justice was charged with considering “all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the federal death penalty.”¹⁴³ To the extent feasible, submissions received from the local prosecutor were required to be devoid of information that could potentially identify the races of either defendants or victims.¹⁴⁴ Defendants whose cases were being considered were not limited in what sort of information they could submit to the Committee, and the Protocol required that defense counsel “be provided an opportunity to present to the Committee, orally or in writing, the reasons why the death penalty should not be sought.”¹⁴⁵ After considering all of the information submitted, the Committee would make a recommendation to the Attorney General, who would make the ultimate decision whether to file a notice of intention to seek the death penalty,¹⁴⁶ pursuant to the new FDPA procedures.¹⁴⁷

In determining whether the government should seek the death penalty, all relevant parties in the Department were directed to perform the same function that a capital jury would ultimately be asked to perform, namely determining “whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death.”¹⁴⁸ The weighing of factors was to be “qualitative, not quantitative,” and “any mitigating factor reasona-

140 1995 DOJ Protocol, *supra* note 138, § 9-10.000(A).

141 *Id.* § 9-10.000(C). The Department of Justice’s headquarters in Washington, D.C. is known as “Main Justice.” Little, *supra* note 22, at 351 n.13.

142 1995 DOJ Protocol, *supra* note 138, § 9-10.000(G).

143 *Id.* § 9-10.000(D).

144 Little, *supra* note 22, at 411–12 & n.348.

145 1995 DOJ Protocol, *supra* note 138, § 9-10.000(D).

146 *Id.*

147 18 U.S.C. § 3593(a) (2006).

148 1995 DOJ Protocol, *supra* note 138, § 9-10.000(G).

bly raised by the evidence [would] be considered in the light most favorable to the defendant” due to the likelihood that little or no evidence of mitigating factors would be available at the time of the Department’s review.¹⁴⁹

Most significant to this Article is the part of the Protocol requiring the Department to evaluate whether a “substantial federal interest” justified federal, rather than stateside, prosecution in cases where the defendant could be prosecuted by either the Department of Justice or by local officials.¹⁵⁰ Among the factors to be considered were: (1) the relative strength of the State’s interest in prosecution; (2) the extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction; and (3) the relative likelihood of effective stateside prosecution.¹⁵¹ The Protocol explicitly directed that “[i]n states where the imposition of the death penalty is not authorized by law the fact that the maximum federal penalty is death is insufficient, standing alone, to show a more substantial interest in federal prosecution.”¹⁵² Accordingly, the Protocol recognized that the federal death penalty could apply in a non-death penalty state, but declared that the mere availability of the death penalty should not dictate whether a case should be prosecuted federally.

Under the 1995 Protocol, Attorney General Reno considered whether to bring capital charges against 588 defendants.¹⁵³ Authorization was granted for 159 defendants (27%), but only twelve (2%) were to be tried in a federal district located in a non-death penalty state.¹⁵⁴ For three of those twelve defendants, the U.S. Attorney submitted a recommendation against seeking the death penalty, but both the Review Committee and the Attorney General disagreed and granted authorization despite the U.S. Attorney’s negative recommendation.¹⁵⁵ However, under the 1995 Protocol, a U.S. Attorney could avoid a contrary decision from the Attorney General by enter-

149 *Id.*

150 *Id.* § 9-10.000(F).

151 *Id.*

152 *Id.*

153 U.S. DEP’T OF JUSTICE, *supra* note 3, at T-200–T-203.

154 *Id.* Additionally, authorizations were granted for three defendants in Washington, D.C. and thirteen defendants in Puerto Rico, both of which are non-death penalty jurisdictions.

155 *Id.* at T-332–T-335. Of the three defendants for whom Attorney General Reno required a death penalty prosecution, two were indicted in the Southern District of Iowa and one was indicted in the District of Vermont. After Reno made the decision to authorize the death penalty in those cases, all three defendants engaged in plea bargaining with the U.S. Attorney and pled guilty in exchange for life sentences. *See infra* notes 156–59 and accompanying text.

ing into a plea agreement with the defendant that would dispose of the case even *after* the Attorney General had made her decision.¹⁵⁶ Indeed, due to the availability of plea bargaining under the 1995 Protocol, most of the federal capital cases authorized in non-death penalty states never went to trial. Out of twelve defendants, five pled guilty in exchange for life sentences,¹⁵⁷ and charges against five others were dismissed.¹⁵⁸ Only two defendants went to trial in non-death penalty states, and both were sentenced to life imprisonment after the juries declined to return death verdicts.¹⁵⁹

Despite the fact that each of the Department's attempts to obtain a death sentence in a non-death penalty state under the 1995 Protocol had proven futile, members of Congress from non-death penalty states realized that federal law could introduce capital punishment in jurisdictions that had chosen to abolish it. In the 106th Congress, Congressman William Delahunt of Massachusetts introduced the Innocence Protection Act of 2000—legislation that, in most circumstances, would have prohibited the Federal Government from seeking the death penalty in a non-death penalty state.¹⁶⁰ Though Congress-

156 See 1995 DOJ Protocol, *supra* note 138, at § 9-10.000(I); see also Little, *supra* note 22, at 419 (“[A]lthough the protocols appear to seek to bring within the purview of Main Justice all cases from all U.S. Attorneys’ offices across the country ‘in which the death penalty may be sought,’ even if the U.S. Attorney does not wish to seek it, they do not prevent the U.S. Attorney from unilaterally dispensing with the penalty by plea once the case is filed.”).

157 FED. DEATH PENALTY RES. COUNSEL, FEDERAL CAPITAL CASES ENDING IN A GUILTY PLEA 1–22, http://www.capdefnet.org/pdf_library/Guilty_Plea.pdf.

158 In four of the five cases, the district judge held that the prosecution could not seek the death penalty for legal reasons. FED. DEATH PENALTY RES. COUNSEL, FEDERAL CAPITAL DEFENDANTS WHO WERE DISMISSED BY THE JUDGE FOR LEGAL REASONS 1–3, http://www.capdefnet.org/pdf_library/6-2-08%20Dismissals%20by%20Judge.pdf. In one case, the government moved to dismiss the indictment after additional evidence was uncovered exculpating the defendant and inculcating two individuals who were charged subsequently. FED. DEATH PENALTY RES. COUNSEL, FEDERAL CAPITAL PROSECUTIONS WHO WERE NOT FOUND GUILTY OF THE CAPITAL CHARGE OR WERE INNOCENT 2, http://www.capdefnet.org/pdf_library/6-2-08%20Acquittal%20Innocent.pdf.

159 FED. DEATH PENALTY RES. COUNSEL, FEDERAL CAPITAL CASES ENDING IN A LIFE SENTENCE 2–17, http://www.capdefnet.org/pdf_library/Life_Sentences.pdf.

160 H.R. 4167, 106th Cong. § 401(a) (2000). The bill would have added a § 3599 to Title 18 of the United States Code:

“Sec. 3599. Accommodation of State interests; certification requirement

(a) IN GENERAL.—Notwithstanding any other provision of law, the Government shall not seek the death penalty in any case initially brought before a district court of the United States that sits in a State that does not prescribe, authorize, or permit the imposition of such penalty for the alleged conduct, except upon the certification in writing of the Attorney General or the designee of the Attorney General that—

(1) the State does not have jurisdiction or refuses to assume jurisdiction over the defendant with respect to the alleged conduct;

(2) the State has requested that the Federal Government assume jurisdiction; or

man Delahunt's bill never made it out of committee, it was cosponsored by congressmen from all but two non-death penalty states. Senator Patrick Leahy of Vermont introduced a companion bill in the Senate that contained a similar provision, and though it too enjoyed support from the representatives of other non-death penalty states, it also failed to make it out of committee.¹⁶¹ Delahunt and Leahy tried again, unsuccessfully, in the 107th Congress.¹⁶² In fact, although Leahy's bill made it out of committee in 2002, the language limiting the reach of the federal death penalty was struck by the Senate Judiciary Committee before the bill reached the Senate floor.¹⁶³ There is little doubt that Delahunt and Leahy took a particular interest in this matter as a result of the Attorney General's 1999 decision to authorize capital prosecutions in both Massachusetts¹⁶⁴ and Vermont.¹⁶⁵

Attorney General Reno's tenure at the Department of Justice ended in January 2001 with the inauguration of President George W. Bush. Bush appointed John Ashcroft, a staunchly conservative death penalty proponent, to lead the Department of Justice.¹⁶⁶ Shortly after taking office, Ashcroft decided to revise the 1995 Protocol in order to have "greater consistency in all aspects of the application of the federal death penalty."¹⁶⁷ Three changes were particularly significant regarding the operation of the federal death penalty in non-death penalty states: (1) all potential capital cases had to be submitted to Main Justice, even if the U.S. Attorney did not intend to seek the death

(3) the offense charged is an offense described in section 32, 229, 351, 794, 1091, 1114, 1118, 1203, 1751, 1992, 2340A, or 2381, or chapter 113B.

(b) STATE DEFINED.—In this section, the term 'State' means each of the several States of the United States, the District of Columbia, and the territories and possessions of the United States."

161 Innocence Protection Act of 2000, S. 2690, 106th Cong. § 401(a) (2000).

162 Innocence Protection Act of 2001, H.R. 912, 107th Cong. (2001); Innocence Protection Act of 2001, S. 486, 107th Cong. (2001).

163 S. 486, 107th Cong. (as reported by S. Comm. on the Judiciary, Oct. 16, 2002).

164 See Shelley Murphy & B.J. Roche, *Former Nurse May Face Death Penalty in Hospital Slayings*, BOSTON GLOBE, May 15, 1999, at A1 (noting that it was the nurse's "alleged cruelty and cunning that persuaded US Attorney General Janet Reno to recommend a death sentence for the first time in a federal case in Massachusetts").

165 See Thomas Farragher, *Vt. Debates Life-or-Death Row Matter*, BOSTON GLOBE, at B1 ("Thirty-four years after Vermont banned capital punishment, the federal government announced last month that it would seek the death penalty against [a defendant in a pipe-bombing trial].").

166 See Nick Anderson, *Conservative Ashcroft Respected in Senate*, CHI. SUN-TIMES, Dec. 24, 2000, at 27 (noting that Ashcroft "ardently supports" the death penalty).

167 *Racial and Geographic Disparities in the Federal Death Penalty System*, *supra* note 6, at 16 (statement of Larry Thompson, Deputy Att'y Gen. of the United States).

penalty;¹⁶⁸ (2) U.S. Attorneys were stripped of the ability to dispose of potentially capital cases by plea bargain without approval from the Attorney General;¹⁶⁹ and (3) the section of the Protocol stating that the absence of a stateside death penalty would not, by itself, justify a federal capital prosecution was stricken.¹⁷⁰ In fact, the new Protocol declared that “[t]he decision whether there is a more substantial interest in Federal, as opposed to State, prosecution of the offense may take into account *any factor* that reasonably bears on the relative interests of the State and Federal Government” and noted that the “relative likelihood of . . . appropriate *punishment* upon conviction in the State and Federal jurisdictions *should be considered*.”¹⁷¹

When the Protocol was amended six years later by Attorney General Alberto Gonzales, the Department was even more explicit in its abandonment of the 1995 guidance against considering the non-availability of a stateside death penalty during the review process. At the outset, the new Protocol explained that each decision to seek or not to seek the death penalty “must be based upon the facts and law applicable to the case *and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws*,”¹⁷² and all determinations were to be made with an eye towards “national consistency”:

National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice. For this reason, the multi-tier process used to make determinations . . . is carefully designed to pro-

168 U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-10.040 (2001), *available at* http://www.capdefnet.org/htm_library/protocols_new.htm (last visited Oct. 3, 2009) [hereinafter 2001 DOJ Protocol] (requiring submissions “[i]n all cases in which the United States Attorney intends to recommend filing a notice of intention to seek the death penalty” and also “[i]n every case in which a United States Attorney has obtained an indictment charging an offense that is punishable by death or conduct that could be charged as an offense punishable by death, but in which the United States Attorney does not intend to request authorization to seek the death penalty”).

169 *Id.* § 9-10.100 (“Once the Attorney General has authorized the United States Attorney to seek the death penalty, the United States Attorney may not enter into a plea agreement that requires withdrawal of the notice of intention to seek the death penalty without the prior approval of the Attorney General.”).

170 *See id.* § 9-10.070; *cf.* 1995 DOJ Protocol, *supra* note 138, § 9-10.000(F).

171 2001 DOJ Protocol, *supra* note 168, § 9-10.070 (emphases added).

172 U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-10.030 (2007) (emphasis added), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrim.htm (last visited Oct. 3, 2009) [hereinafter 2007 DOJ Protocol].

vide reviewers with access to the national decision-making context, and thereby, to *reduce disparities across districts*.¹⁷³

Furthermore, in December 2007, the Department told Congress that the goal of its death penalty review and decision-making process was “nationwide consistency in the fair and even-handed application of federal capital sentencing laws in appropriate cases, *irrespective of geography or local predisposition for or against the death penalty*.”¹⁷⁴

The emphasis on nationwide consistency marked a significant change in the guiding tenets of the Department’s review process. Attorney General Reno accepted the possibility of incongruous application of the federal death penalty when she forbade capital prosecutions in non-death penalty states merely because the death penalty would not have been available under state law. Even during Attorney General Ashcroft’s tenure, the Department declared that “geographic ‘disparities’ are neither avoidable nor undesirable.”¹⁷⁵ In fact, the Department stated that regional and local considerations *should* be considered by U.S. Attorneys, even if uniformity would suffer:

There is nothing illegitimate about a district focusing on the actual needs of the geographic area for which it is responsible in decisions about the exercise of federal jurisdiction. Rather, a U.S. Attorney who failed to do so would be derelict in his or her basic responsibilities. To the extent that this results in varying numbers of federal capital cases among the districts, it is no different than, nor any more objectionable than, the ‘disparities’ among the districts which occur equally in non-capital cases.¹⁷⁶

Nonetheless, the cumulative effect of Ashcroft and Gonzales’s changes to the Protocol was to increase the number of cases being submitted to Main Justice for review, further concentrate decision-making power in Washington, and reverse the Department’s policy of general deference to non-death penalty states. As the 2001 revision also made clear, United States Attorneys could no longer expect deference with regard to their recommendations to seek or to not seek the death penalty; the official commentary to the amended Protocol noted that “[t]he Attorney General will, of course, retain legal authority as head of the Justice Department to determine . . . that the

173 *Id.* § 9-10.130 (emphasis added).

174 Letter from Brian A. Benzckowski, Principal Deputy Assistant Attorney General, U.S. Department of Justice, to Senator Russell D. Feingold, Chairman, Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Committee on the Judiciary 15–16 (December 17, 2007) (on file with author) (emphasis added).

175 U.S. DEP’T OF JUSTICE, *supra* note 9.

176 *Id.*

death penalty is an appropriate punishment, notwithstanding the United States Attorney's view that it should not be pursued."¹⁷⁷

As a consequence of the new protocols, the rate of disagreement between the Attorney General and the U.S. Attorneys swelled. In 562 cases out of 588, Attorney General Reno either agreed with the U.S. Attorney's recommendation not to seek the death penalty or independently declined to grant authorization to seek the death penalty, thereby requiring a capital prosecution for only twenty-six defendants (4.4%).¹⁷⁸ As the following table demonstrates, that rate of disagreement was significantly higher under Attorneys General Ashcroft and Gonzales in four of the six years following implementation of the 2001 Protocol¹⁷⁹:

| Year(s) | Attorney General | Total Defendants | Capital Prosecution Required | Disagreement Rate |
|-----------|-----------------------|------------------|------------------------------|-------------------|
| 1995–2000 | Reno | 588 | 26 | 4.4% |
| 2001 | Ashcroft | 183 | 15 | 8.2% |
| 2002 | Ashcroft | 201 | 17 | 8.5% |
| 2003 | Ashcroft | 181 | 13 | 7.2% |
| 2004 | Ashcroft | 210 | 4 | 1.9% |
| 2005 | Gonzales | 191 | 3 | 1.6% |
| 2006 | Gonzales | 274 | 21 | 7.7% |
| 2001–2006 | Ashcroft/ Gonzales | 1240 | 73 | 5.9% |

Despite the fact that 2004 and 2005 were outlier years in which “the number of ‘overrule’ decisions were unusually low,”¹⁸⁰ the aver-

¹⁷⁷ *Id.*

¹⁷⁸ U.S. DEP'T OF JUSTICE, *supra* note 3, at T-200–T-203, T-332–T-335.

¹⁷⁹ Official data for the Ashcroft, Gonzales, and Mukasey years have not yet been publicly released. The numbers above for 2001 through 2006 were provided in the Department's responses to certain Congressional oversight questions two years ago. See *Oversight of the Federal Death Penalty: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 110th Cong. 50–51 (2007) [hereinafter *Oversight of the Federal Death Penalty*] (Department of Justice responses to pre-hearing questions); see also Letter from Brian A. Benzckowski, *supra* note 174, at 8–9, 54–56.

¹⁸⁰ Letter from Brian A. Benzckowski, *supra* note 174, at 22–23. The Department did not offer any explanation for why the number of overrules was “unusually low” in 2004 and 2005, but it suggested that these statistics may be “misleading if not viewed in context.”

age disagreement rate during the six years that the Department of Justice was led by Attorneys General Ashcroft and Gonzales was 33.1% higher than that during the six post-FDPA years that the Department was led by Attorney General Reno.

Furthermore, the number of federal capital prosecutions in non-death penalty states more than doubled under the 2001 Protocol. In the six years that the 1995 Protocol was in effect, Attorney General Reno authorized twelve capital prosecutions in non-death penalty states.¹⁸¹ In the six years between 2001 and 2006, the Department of Justice sought the death penalty for twenty-six defendants in non-death penalty states—an increase of 117%.¹⁸² However, under the 2001 Protocol, U.S. Attorneys in non-death penalty states were no longer able to dispose of any of those twenty-six cases through plea bargaining the way that their predecessors had disposed of nearly half of the pre-2001 caseload.¹⁸³ Accordingly, more of these cases went to trial, and death sentences were returned for eight defendants.¹⁸⁴ When the first defendant of the eight was sentenced in 2002,¹⁸⁵ it became possible—for the first time since Anthony Chebatoris's 1938 hanging—that a defendant convicted of a crime in a non-death penalty state would be executed by the federal government.

V. COMMUNITY RESPONSE TO FEDERAL INTRUSION

The federal government's introduction of the death penalty into non-death penalty jurisdictions and the Department of Justice's explicit disregard for local opposition to capital punishment have provoked significant resentment in non-death penalty jurisdictions. With the exception of Massachusetts and New York where the death penalty was struck down by the courts,¹⁸⁶ every other non-death penalty

The number of overrules in 2004 may have been impacted by Attorney General Ashcroft having to relinquish his duties for most of March 2004 due to illness, and the numbers in 2005 may have been affected by the transition of power from Attorney General Ashcroft to Attorney General Gonzales in February of that year. See Press Release, U.S. Dep't of Justice, Attorney General John Ashcroft Resumes Duties (Mar. 31, 2004), *available at* http://www.justice.gov/opa/pr/2004/March/04_ag_201.htm; Media Advisory, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales to Begin First Day at Department of Justice (Feb. 3, 2005), *available at* http://www.justice.gov/opa/pr/2005/February/05_ag_044.htm.

181 U.S. DEP'T OF JUSTICE, *supra* note 3, at T-200–T-203.

182 See Letter from Brian A. Benczkowski, *supra* note 174, at 20.

183 See 2001 DOJ Protocol, *supra* note 168, § 9-10.100.

184 See Letter from Brian A. Benczkowski, *supra* note 174, at 20.

185 See White, *supra* note 38 (describing the sentencing of Marvin Gabrion).

186 See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984); *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

jurisdiction in the United States has affirmatively declared itself a death penalty-free zone. However, the federalization of capital punishment and the supremacy of federal law make it impossible to stop capital prosecutions in non-death penalty states; the most that the states can do is force the federal government to transfer condemned defendants to a death penalty state for execution.¹⁸⁷

The prevalence of capital punishment in the United States is strongly correlated with geography. For the most part, the death penalty is a regional phenomenon. The two multi-district federal circuits in which the death penalty is most common are the Fifth Circuit and the Eleventh Circuit, both of which are located in the southeast.¹⁸⁸ The six states that make up the two circuits—Alabama, Georgia, Florida, Louisiana, Mississippi, and Texas—have collectively executed 633 people since 1976, thereby accounting for more than half of the executions nationwide in the post-*Furman* era.¹⁸⁹ Each of the

¹⁸⁷ 18 U.S.C. § 3596(a) (2006) (“When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.”). Courts have recognized that § 3596 “does not set forth specific factors for a court to consider in designating a state for the implementation of a death sentence.” *See, e.g.,* *United States v. Fell*, No. 2:01-CR-12-1, 2006 U.S. Dist. LEXIS 40578, at *5 (D. Vt. June 16, 2006). However, in coming to the conclusion that New York would be the most appropriate venue for defendant *Fell*’s execution with Indiana as the second-most appropriate venue, the *Fell* court relied on considerations expressed in an earlier decision from the District in Massachusetts in which New Hampshire was designated as the state of execution. *See United States v. Sampson*, 300 F. Supp. 2d 278 (D. Mass. 2004). In both cases, the Federal Government had requested that Indiana be selected as the execution state because the Bureau of Prisons has established a death row at the U.S. Penitentiary in Terre Haute. However, though the Attorney General may imprison convicts at whatever facility he or she chooses, § 3596 leaves it to the court to decide where the execution shall take place. *See Sampson*, 300 F. Supp. 2d at 280. The prevailing considerations in *Sampson* and *Fell* were: (1) the interest in ensuring that to the extent possible, all litigation relating to the defendant be consolidated in a single circuit; (2) the closeness of the connection of the designated state to the defendant’s crimes; and (3) the convenience and accessibility of the designated state for counsel, friends and family of both the defendant and the defendant’s victims, and the media. *Id.* at 281–82. Furthermore, in rejecting the Government’s request to order that defendant *Sampson*’s execution take place in Terre Haute, the court considered that “the execution of a human being by the state is perhaps the most solemn and significant act a government can perform” and, therefore, “should not be reduced to an invisible, bureaucratic function” in “the remote Midwest.” *Id.* at 280, 283.

¹⁸⁸ *See* U.S. Admin. Office of the U.S. Courts, Geographic Boundaries of United States Courts of Appeals and United States District Courts, <http://www.uscourts.gov/images/CircuitMap.pdf>.

¹⁸⁹ DEATH PENALTY INFO. CTR., *supra* note 12, at 3.

six states authorizes the death penalty. On the other hand, the two multi-district federal circuits in which capital punishment is least prevalent are the First and Second Circuits, both of which are located in the northeast. The seven states that make up those two circuits—Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont—have collectively executed *one* person since 1976.¹⁹⁰ Among the States in the First and Second Circuits, only Connecticut and New Hampshire authorize the death penalty. However, as of last summer, there were almost as many federal capital cases pending in the Eastern District of New York *alone* as there were in the eighteen federal districts of the Fifth and Eleventh Circuits *combined*.¹⁹¹

This imbalance has not escaped notice in the non-death penalty jurisdictions that have been seemingly targeted by the Department of Justice. New York is such a jurisdiction. Since 1988, the federal prosecutors have pursued nearly two dozen capital cases in New York but obtained only one death sentence.¹⁹² In one year alone, Attorney General Ashcroft ordered the U.S. Attorneys in Manhattan and Brooklyn to pursue the death penalty in ten cases in which the U.S. Attorneys had recommended against seeking death.¹⁹³

The forcefulness with which the Department of Justice has pursued the death penalty in New York has recently led some federal judges to be uncharacteristically vocal about the Department's actions. Last year, Judge Jack Weinstein told a federal prosecutor that the prosecutor's chances of convincing a jury to order a death sentence were "virtually nil."¹⁹⁴ Judge Weinstein's comments echoed those made roughly eleven months prior by Judge Frederic Block, who told federal prosecutors to "kindly advise Washington that . . . there is no chance in the world there would be a death pen-

190 *Id.*; see also Brigham, *supra* note 16, at 218 ("[New England] is decidedly less death-prone than the nation as a whole.").

191 FED. DEATH PENALTY RES. COUNSEL, FEDERAL CAPITAL CASES PENDING TRIAL, http://www.capdefnet.org/pdf_library/6-2-08%20Pending%20Trial.pdf (listing six cases pending in the Eastern District of New York and eight cases pending in Florida, Louisiana, and Texas as of June 2, 2008).

192 See Alan Feuer, *An Aversion to the Death Penalty, But No Shortage of Cases*, N.Y. TIMES, Mar. 10, 2008, at B1 (nothing that "[i]n the 20 years since the federal death penalty statute was revived, no federal juries have been more reluctant to sentence federal defendants to death than those in New York").

193 *Id.*

194 United States v. Taveras, No. 04-156 (JBW), 2008 WL 565495, at *2 (E.D.N.Y. Feb. 29, 2008).

alty verdict” in the case then-pending before him.¹⁹⁵ Shortly thereafter, a Brooklyn jury returned the first federal death sentence in New York in more than fifty years,¹⁹⁶ but Judge Block cautioned that the Department’s lone success should not encourage federal prosecutors to bring more capital cases:

In convicting Mr. Wilson and rejecting the death penalty in all of the other 16 death penalty cases, New Yorkers have sent a clear signal to the attorney general: He should be more circumspect and realistic in authorizing death penalty prosecutions, lest the judicial system be overwhelmed, the community’s will ignored and taxpayer dollars improvidently spent.¹⁹⁷

Expense was also a concern articulated by Judge Weinstein, who estimated that the capital case currently before him has already cost both parties more than \$1.5 million and would probably cost twice that should the case proceed to trial.¹⁹⁸ Judge Block also noted that the social cost of funneling money into capital prosecutions where success is unlikely is potentially great: “[A] death penalty prosecution depletes the resources of the prosecutor’s office, making it more difficult to attend to the backlog of cases that don’t involve the death penalty.”¹⁹⁹

Three other Brooklyn judges have also criticized the federal government’s push for capital verdicts in New York. Judge Nicholas Garaufis has asked the Justice Department to reconsider its authorizations to seek the death penalty in at least two different cases.²⁰⁰ In another case, after a jury convicted a defendant of capital charges but before it began the penalty phase, Chief Judge Raymond Dearie asked prosecutors to reassess their request for the death penalty.²⁰¹ Finally, Judge John Gleeson has decried the Department’s attempt to “iron out” regional differences as “a bad idea,” prophesying that “it will be a long time before Georgia becomes just like Vermont, or New York City just like Houston.”²⁰²

Uneasiness with the Department of Justice’s incursions into abolitionist enclaves has not been limited to the bench. In 2003, a defense

195 William K. Rashbaum, *Judge Urges U.S. to Drop Plan to Seek Death Penalty in Case*, N.Y. TIMES, Jan. 26, 2007, at B2.

196 Michael Brick, *Jury Agrees on Death Sentence for the Killer of Two Detectives*, N.Y. TIMES, Jan. 31, 2007, at A1.

197 Frederic Block, Op-Ed., *A Slow Death*, N.Y. TIMES, Mar. 15, 2007, at A27.

198 *Taveras*, 2008 WL 565495, at *1.

199 Block, *supra* note 197.

200 Feuer, *supra* note 192.

201 Joseph Goldstein, *Judges Revolt over Death Penalty*, N.Y. SUN, Mar. 4, 2008, <http://www2.nysun.com/article/72219>.

202 Gleeson, *supra* note 49, at 1728.

attorney successfully convinced a Brooklyn jury not to impose a death sentence on a gang leader convicted of multiple murders by emphasizing the role that Attorney General Ashcroft personally played in requiring prosecutors to seek the death penalty over the objections of the U.S. Attorney and the Review Committee.²⁰³ At the beginning of the penalty phase, defense attorney Richard Levitt told the jury that “John Ashcroft is asking you to kill Emile Dixon,”²⁰⁴ and in his closing, Levitt reminded the jury that Dixon’s “death penalty prosecution was ordered by John Ashcroft, that’s who it was ordered by. He’s not your boss or conscious [sic]. . . . [Y]ou don’t have to listen to John Ashcroft.”²⁰⁵

Prosecutors too have had qualms about the Department’s death penalty initiative in non-death penalty states, but expressing such concerns to the Department has proven to be an occupational hazard. Of the nine U.S. Attorneys dismissed by the Bush administration in 2006,²⁰⁶ three of them quarreled with Main Justice over the administration of the federal death penalty.²⁰⁷ One of the fired prosecutors, Margaret Chiara, was the U.S. Attorney for the Western District of Michigan—a federal district in the longest-standing non-death penalty state.²⁰⁸ In 2003, Chiara flew to Washington in an unsuccessful attempt to persuade Attorney General Ashcroft not to authorize the death penalty against two defendants, and she was publicly outspoken about her opposition to capital punishment.²⁰⁹ Defending Chiara’s dismissal, the Department of Justice said that she was fired because it had “no assurance that DOJ priorities/policies [were] being carried

203 William Glaberson, *Jury Rejects Death Penalty in 2 Killings*, N.Y. TIMES, Dec. 23, 2003, at B1 (noting that, in Dixon’s case, Attorney General Ashcroft “overruled the federal prosecutors to direct that they seek execution”).

204 Transcript of Capital Hearing at 3420, *United States v. Dixon*, No. CR-01-389 (E.D.N.Y. Dec. 19, 2003).

205 *Id.* at 3970.

206 See David Johnston & Eric Lipton, ‘Loyalty’ to Bush and Gonzales Was Factor in Prosecutors’ Firings, *E-Mail Shows*, N.Y. TIMES, Mar. 14, 2007, at A18. For more information about the allegedly politicized firings of U.S. Attorneys, see U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L. RESPONSIBILITY, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>.

207 Richard A. Serrano et al., *At Justice, Life-and-Death Frictions: Fired U.S. Attorneys in California, Michigan and Arizona Shared a Reluctance to Pursue Capital Punishment*, L.A. TIMES, Mar. 26, 2007, at 10.

208 See Peter Slevin, *Eyebrows are Raised in Mich. over Reasons for Prosecutor’s Firing*, WASH. POST., Mar. 25, 2007, at A04 (“Some defense lawyers speculate that Chiara, who once trained to be a nun, fell out of favor with the Bush administration over her personal opposition to the death penalty.”).

209 Serrano et al., *supra* note 207.

out” under her leadership²¹⁰—an ambiguous statement that may well have referred to Main Justice’s sense that Chiara could not be trusted to assist with the Administration’s project of federalizing the death penalty.²¹¹

Less ambiguous was the joint report of the Department of Justice’s Inspector General and the Office of Professional Responsibility, which concluded that “the most significant factor in [U.S. Attorney for the District of Arizona Paul] Charlton’s removal was his actions in a death penalty case.”²¹² Though Arizona is a death penalty state, Charlton “persistently opposed the Department’s decision to seek the death penalty in a homicide case, and he irritated Department leaders by seeking a meeting with the Attorney General” in an attempt to get Attorney General Gonzales to reverse his decision to authorize a capital prosecution.²¹³ The report details Charlton’s contacts with numerous officials at Main Justice and the consequent email traffic among those officials by whom Charlton was described as “disrespectful to the Attorney General.” In that email traffic, a counselor in the Deputy Attorney General’s office wrote that she found “it very difficult to believe that [Charlton] was doing anything but trying to circumvent the AG’s [decision to authorize the death penalty].”²¹⁴ With-

210 *Id.* See also Johnston & Lipton, *supra* note 206 (noting that, in a document sent from the Department of Justice to White House Counsel Harriet Miers ranking federal prosecutors, Chiara was listed as someone who “chafed against administration initiatives”). Several months later, during the Senate Judiciary Committee’s hearings on Michael Mukasey’s nomination to become Attorney General, Congress probed the connection between the U.S. Attorney firings and the administration of the federal death penalty. In response to a question from Senator Russell Feingold, an outspoken critic of the administration of the federal death penalty, Mukasey indicated his support for geographic uniformity, noting that “the system that was created in the Department is supposed to treat [defendants] the same way” without regard to whether a particular jurisdiction is “more accustomed to or inured to or favorable to the death penalty.” *Confirmation Hearing on the Nomination of Michael B. Mukasey to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 173–74 (2007).

211 See Liliana Segura, *Attorney General, Capital Punishment*, NATION, Mar. 29, 2007, <http://www.thenation.com/doc/20070409/segura> (“Both Paul Charlton of Arizona and Margaret Chiara of Michigan have been criticized for failing to seek death sentences with significant gusto. Both US Attorneys were pressured to participate in an aggressive campaign begun by former Attorney General John Ashcroft and continued by Gonzales to extend the federal death penalty—particularly into jurisdictions without death-penalty statutes of their own.”).

212 U.S. DEP’T OF JUSTICE, *supra* note 206, at 335.

213 *Id.*

214 *Id.* at 230–31. These comments and accusations were the result of Charlton’s decision to ask the district court to extend the time to file a notice of intent to seek the death penalty even after Attorney General Gonzales signed the notice and delivered it to Charlton. According to the report, this situation prompted a change in the wording of the Attorney General’s missives to U.S. Attorneys in death penalty cases, which now states, “You are au-

in a month of Charlton's failed attempt to meet with Gonzales, Gonzales's Chief of Staff Kyle Sampson added Charlton's name to a list entitled "USAs We Now Should Consider Pushing Out," and Charlton was ordered to resign fewer than three months thereafter.²¹⁵ The Charlton episode is significant because it further demonstrates how the Department of Justice under Attorney General Gonzales zealously pursued federal capital prosecutions.²¹⁶

Perhaps the most significant response to the Department's imposition of the federal death penalty in a non-death penalty jurisdiction has been seen in Puerto Rico. Testifying before Congress in 2007, Roberto Sánchez Ramos, the Puerto Rican Secretary of Justice, stated that "the Puerto Rican people strongly disagree with the use of death as a form of punishment."²¹⁷ That disagreement, he said, is grounded in "the religious convictions of the majority of Puerto Ricans, their strict adherence to the guarantee of the equal protection of the law, the grounding of [Puerto Rico's] legal system on the principles of a continental European model which has moved away from the death penalty, [and] a very particular understanding of the powers that may be safely, wisely, legitimately and justly ascribed to the State."²¹⁸ Puerto Rico's deep-seated opposition to capital punishment is reflected in its Constitution, which declares bluntly that "[t]he death penalty shall not exist."²¹⁹ Nonetheless, Puerto Rico has been a virtual repository for the Department of Justice's capital prosecution efforts and once had the greatest number of pending death penalty cases in the entire federal system.²²⁰ However, Puerto Ricans did not believe that statistic to be worth bragging about, noting instead that:

thorized *and directed* to seek the death penalty." *Id.* at 233 n.150 (internal quotation marks omitted).

215 *Id.* at 220.

216 Further evidence of the Department's attitude towards the federal death penalty can be found in a March 15, 2004 email from Deputy Assistant Attorney General Bradley Schlozman to Deputy Assistant Attorney General Wan Kim discussing the hiring of attorneys for the Civil Rights Division in which Schlozman wrote that "any candidate must profess his/her willingness to zealously prosecute both death penalty and [partial-birth abortion] cases." U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L. RESPONSIBILITY, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION 24 (2008), available at <http://www.usdoj.gov/oig/special/s0901/final.pdf>.

217 *Oversight of the Federal Death Penalty*, *supra* note 179, at 303 (testimony of Roberto J. Sánchez Ramos, Sec'y of Justice, Commonwealth of Puerto Rico, on behalf of Aníbal Acevedo Vilá, Governor of the Commonwealth of Puerto Rico).

218 *Id.*

219 P.R. CONST. art. II, § 7.

220 *See Oversight of the Federal Death Penalty*, *supra* note 179, at 313–14; *see also* United States v. Acosta Martinez (*Acosta Martinez I*), 106 F. Supp. 2d 311, 311 & n.1 (D.P.R. 2000) ("The

The pursuit of the federal death penalty in Puerto Rico stands against the highest social, cultural, political, moral and religious values of the members of our community, and violates the balance of power and comity that the people of Puerto Rico envision as transcendental to their relationship with the United States.²²¹

In 2000, a federal district court judge held that FDPA did not apply in Puerto Rico because the Puerto Rican Federal Relations Act mandated that federal laws that were “locally inapplicable” would not affect the commonwealth.²²² The judge cited the Commonwealth Constitution and declared the imposition of capital punishment for “crimes committed wholly within the boundaries of the Commonwealth” to be “unconscionable and against the most basic notion of justice.”²²³ Accordingly, the judge struck the death penalty certification in the case and ordered the Department of Justice to proceed with the prosecution “as an ordinary felony case.”²²⁴

However, less than a year later, the First Circuit Court of Appeals reversed the district court.²²⁵ The court concluded that “[t]he death penalty is intended to apply to Puerto Rico [sic] federal defendants just as it applies to such defendants in the various states,” and that, reflecting the supremacy of federal law, Acts of Congress “trump” provisions in state and commonwealth constitutions.²²⁶ Furthermore, the court said that, notwithstanding “Puerto Rico’s interest and its moral and cultural sentiment against the death penalty,” Congress “retains federal power over federal crimes.”²²⁷

Puerto Rico U.S. Attorney’s Office has submitted the largest number of potential death penalty cases (59) of any of the 94 federal districts since the Capital Case Review protocol was issued in 1995.”).

221 *Oversight of the Federal Death Penalty*, *supra* note 179, at 314.

222 48 U.S.C. § 734 (1994) (“The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States” (internal quotation marks omitted)); *Acosta Martinez I*, 106 F. Supp. 2d at 321–27. For more information on the locally inapplicable standard, see Elizabeth Vincens, *Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350 (2005).

223 *Acosta Martinez I*, 106 F. Supp. 2d at 327.

224 *Id.*

225 *See* *United States v. Acosta-Martinez (Acosta Martinez II)*, 252 F.3d 13 (1st Cir. 2001).

226 *Id.* at 20.

227 *Id.* at 19–20. Federal courts in non-death penalty states have reached the same conclusion. *See, e.g.*, *United States v. O’Reilly*, No. 05-80025, 2007 WL 2421378, at *4 (E.D. Mich. Aug. 23, 2007) (“While Michigan is free to prohibit the death penalty for state-charged crimes, this federal Court cannot prohibit imposition of the death penalty when authorized by federal law for federally-charged crimes”); *United States v. Tuck Chong*, 123 F. Supp. 2d 563, 567 (D. Haw. 1999) (“The federal government has jurisdiction to prosecute Defendant, charged with a crime against the United States, in federal court. Moreover, the federal government has jurisdiction to determine the appropriate sentence under federal law.”).

After the First Circuit's ruling, Attorney General Ashcroft proceeded with the capital cases against Acosta Martinez and his co-defendant. On July 31, 2003, both men were acquitted of capital murder and cleared of all charges.²²⁸ Commentators believed that the acquittals were designed to show Washington that the Federal Government would not succeed in exporting the death penalty to Puerto Rico.²²⁹ Responding to the verdict, Secretary Sánchez Ramos cautioned, "when the federal government seeks death in jurisdictions such as Puerto Rico, it disregards the possibility of jury nullification at its own risk . . . and at the risk of future potential victims of crime."²³⁰

Federalization of the death penalty has also engendered hostility in other non-death penalty jurisdictions. In 2003, after federal prosecutors secured a death sentence against Gary Lee Sampson in Massachusetts, the chairman of Massachusetts Citizens Against the Death Penalty credited the trial with increasing his organization's membership.²³¹ In 2005, after a federal jury in Burlington, Vermont convicted Donald Fell of a fatal carjacking, the local mayor called the federal death penalty "an affront to state's [sic] rights[,] . . . not consistent with the values of a majority of Vermonters."²³² The mayor also singled out the former Attorney General for blame: "Many of us resent

228 Abby Goodnough, *Acquittal in Puerto Rico Averts Fight over Government's Right to Seek Death Penalty*, N.Y. TIMES, Aug. 1, 2003, at A14.

229 Leonard Post, *Puerto Rican Prosecutors Weigh Retrial; Acquittals Ended a Fight over the Death Penalty*, NAT'L L.J., Aug. 11, 2003, at 4.

230 *Oversight of the Federal Death Penalty*, *supra* note 179, at 311. This phenomenon mirrors that seen in the United States before juries were permitted to return non-death verdicts in capital cases. *See supra* notes 86–88 and accompanying text. Using an acquittal in a capital case as a means of sending a message to the prosecutors is nothing new; as the Supreme Court observed in 1976, "[a]merican jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict" since the late 1700s. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

231 Dade, *supra* note 34 ("What we've seen is that this case has really drawn people toward the abolition movement." (internal quotation marks omitted)).

232 Lynne Tuohy, *Federal Case Riles Many in Vermont; Death Penalty Quest 'Wildly Unpopular'*, HARTFORD COURANT, July 4, 2005, at A1. *But see* Katie Zezima, *In Rare Case, Vermont Jury Backs Death for a Killer*, N.Y. TIMES, July 15, 2005, at A10 (quoting late Vermont Law School professor Michael Mello as explaining that "[t]he people of Vermont are much more ambivalent about the death penalty than our elites, our chattering classes"). However, questioning "the appropriateness of a federal court or jury even considering local values," Judge Reena Raggi, writing on behalf of six judges on the Second Circuit, recently rejected the proposition that the Constitution requires "a special solicitude for local values." *See United States v. Fell*, 571 F.3d 264, 270 (2d Cir. 2009) (Raggi, J., concurring in the denial of rehearing en banc) (suggesting that deference to "local values" would "appropriately be rejected out of hand if the local 'value' . . . were opposition to the sorts of civil rights, environmental, or gun trafficking requirements that are enforced through federal criminal law in ways not always mirrored in state legislation").

the imposition of a death penalty as an option in this state by John Ashcroft and his friends from Washington.”²³³ And two years ago, when Alfonso Rodriguez, Jr. was sentenced to death by a federal jury in North Dakota, even the prosecuting U.S. Attorney observed that the death penalty is “just not part of the culture up here really at all.”²³⁴

VI. WHAT’S NEXT: A NEW EXECUTIVE, BUT THE SAME EXECUTIONS?

Though the Department of Justice has yet to release fresh data that would permit us to analyze the decisions made by Attorney General Mukasey with regard to federal capital prosecutions in non-death penalty states,²³⁵ we doubt that there was any significant departure from the precedent set by Mukasey’s predecessors.²³⁶ However, it is conceivable that a shift—perhaps even a major shift—will result from President Barack Obama’s appointment of Eric Holder, a prominent opponent of capital punishment, as Attorney General. Insofar as Holder, who was Deputy Attorney General under Janet Reno,²³⁷ has experience with the 1995 procedures to which various political and legal organizations are advocating a return,²³⁸ a repeal of the 2001 and 2005 protocols is entirely possible.

233 Tuohy, *supra* note 232; *see also* *Fell*, 571 F.3d at 286 (Calabresi, J., dissenting from denial of rehearing en banc) (describing Attorney General Ashcroft’s rejection of a plea agreement whereby Fell would have pled guilty in exchange for a sentence of life imprisonment and arguing that “the draft plea agreement reflected the judgments of Vermont-based law enforcement enforcers on what was appropriate locally, and its overruling by Main Justice reflected a centralist, and in this case decidedly anti-federalist, decision”).

234 Libby Sander, *Judge Imposes Death in Killing of North Dakota Student*, N.Y. TIMES, Feb. 9, 2007, at A15.

235 During his confirmation hearing, Attorney General-nominee Eric Holder discussed his involvement in preparing the Justice Department’s 2000 survey of the federal death penalty, *see* U.S. DEP’T OF JUSTICE, *supra* note 3, at which time Holder told Senator Russ Feingold that “[i]t might be . . . an appropriate time to do another study and then share the results, as we did, in that first—in that first study.” *Confirmation Hearing on the Nomination of Eric H. Holder to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 67 (2009).

236 *See* Melanie D. Wilson, *Prosecutors “Doing Justice” Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 87 n.104 (2008) (noting that neither “former Attorney General Alberto R. Gonzales nor his successor Michael B. Mukasey” rescinded policies promulgated by Attorney General John Ashcroft designed to reduce sentencing disparities).

237 U.S. Dep’t of Justice, Office of the Attorney General, <http://www.usdoj.gov/ag/meet-ag.html> (last visited Oct. 3, 2009).

238 *See, e.g.*, 2009 CRIM. JUST. TRANSITION COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 164–65 (2008), <http://2009transition.org/criminaljustice>.

A number of interest groups have seized upon Attorney General Holder's appointment as an opportunity to push for change. Among the organizations pushing for the repudiation of the Bush administration's death penalty procedures is the NAACP Legal Defense and Educational Fund ("LDF"), which, as part of the 2009 Criminal Justice Transition Coalition, has proposed a dozen ways to reform the federal death penalty.²³⁹ The LDF's recommendations observe that the uptick in federal capital prosecutions over the past eight years was the result of "the U.S. Attorney General's affirmative agenda to seek capital sentences, often in direct contravention of local U.S. Attorneys' own recommendations not to seek the death penalty."²⁴⁰ The "overcentralization of the federal death penalty's decision-making process" is described as "cumbersome, slow, and extremely costly" and is blamed for "more frequent federal capital prosecutions in jurisdictions that have abolished the death penalty under state law."²⁴¹ Accordingly, the LDF has recommended that the Department of Justice strip out from the death penalty protocols those provisions that permit Main Justice to review death-eligible cases even where the U.S. Attorney has not requested permission to seek the death penalty.²⁴²

Similarly, a committee of the Association of the Bar of the City of New York ("City Bar") recommended that the Attorney General review only those death-eligible cases in which U.S. Attorneys request authorization to seek the death penalty.²⁴³ In cases where such a request is made, review by Main Justice should be automatic and focus on the facts of the individual case rather than on macro concerns (such as geographic uniformity).²⁴⁴ According to the City Bar, capital prosecutions should be authorized only where "a very substantial federal interest in pursuing the death penalty" exists, and prosecutors

²³⁹ During the 1960s, the NAACP Legal Defense and Education Fund waged a successful campaign to halt executions while the constitutionality of the death penalty was being challenged in the federal courts. See BANNER, *supra* note 29, at 252; THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 45, at 184–85.

²⁴⁰ 2009 CRIM. JUST. TRANSITION COAL., *supra* note 238, at 164.

²⁴¹ *Id.*

²⁴² *Id.* at 165; see 2001 DOJ PROTOCOL, *supra* note 168, § 9-10.040.

²⁴³ ASS'N OF THE BAR OF THE CITY OF N.Y., COMM. ON CAPITAL PUNISHMENT, STATEMENT TO THE JUSTICE AND CIVIL RIGHTS TRANSITION TEAM REGARDING FEDERAL CAPITAL CASES 1 (2008), http://www.nycbar.org/pdf/report/Capital_Punishment_Transition_Memo.pdf. Though the Statement is very interesting, it contains several significant errors. For example, the Statement credits "the first Bush Administration" with the 1995 Protocols even though, as discussed above, the Protocols were instituted by President Clinton's Attorney General, Janet Reno, and it recommends that "the Obama Administration adopt those protocols that were in effect prior to 1995" even though there were no federal death penalty protocols until 1995. See *supra* note 138 and accompanying text.

²⁴⁴ ASS'N OF THE BAR OF THE CITY OF N.Y., *supra* note 243, at 1–2.

should be permitted to engage in non-capital plea bargains without approval from the Attorney General.²⁴⁵

Unlike the LDF, the City Bar “urge[d] the Obama Administration not to seek the death penalty in states which do not have death penalty laws,” except in cases involving “substantial federal issues,” such as treason, terrorism, or the murder of a federal agent.²⁴⁶ The City Bar denounced the Bush administration’s attempt to achieve national uniformity as “futile,” and declared that “[m]aking one region or state just like every other region or state in criminal matters is not necessarily desirable, especially where the death penalty is concerned.”²⁴⁷

Attorney General Holder has made several statements that suggest he may not agree with the City Bar’s position on the undesirability of uniformity. Most recently, during his confirmation hearing, Holder said that the Department of Justice’s 2000 report on the death penalty “raised some very disturbing questions about not only the racial identity of people who were in the death system—in the federal death system, but also the geographic distribution of those people.”²⁴⁸ And even before the 2000 report was published, Holder expressed support for greater uniformity in the application of the death penalty:

Federal cases have to be judged on a nationwide standard. We have one system, and it is appropriate for people in the federal system all to be treated in the same way. And that’s one of the things that we try to search for, especially when it comes to the death penalty. We look—we strive for uniformity in the application of federal law and in the treatment of people who are federal defendants.²⁴⁹

Additionally, though Holder’s opposition to capital punishment is well known, he has indicated that he would not allow his personal beliefs to interfere with his duty as the Justice Department’s highest official to administer the federal death penalty. For example, during his first confirmation hearing in 1997, after Holder acknowledged that he is “not a proponent of the death penalty,” he immediately assured the Senate Judiciary Committee that “even with those statutes

245 *Id.* at 2.

246 *Id.* at 2. The LDF alluded to the federalization of the death penalty in non-death penalty states by noting that “overcentralization . . . has resulted in more frequent federal capital prosecutions” during the past eight years, but, it did not target that concern specifically in its recommendations. *See* 2009 CRIM. JUST. TRANSITION COAL., *supra* note 238, at 164.

247 ASS’N OF THE BAR OF THE CITY OF N.Y., *supra* note 243, at 2.

248 *Confirmation Hearing on the Nomination of Eric H. Holder to be Attorney General of the United States*, *supra* note 235, at 67.

249 Eric Holder, Deputy Att’y Gen. of the United States, Justice Department Weekly News Conference (Feb. 10, 2000) (transcript available through CQ Transcriptions).

that have death penalty provisions, they will be fully enforced.”²⁵⁰ The fact that President Obama has endorsed capital punishment for certain heinous crimes, while at the same time leveling a number of criticisms at the manner in which the death penalty is implemented, leaves us uncertain as to whether reform of the federal death penalty will be a priority for the new administration.²⁵¹

Prosecutors, of course, have enormous discretion, and as discussed above the DOJ’s Guidelines with respect to seeking the death penalty are intended to channel that discretion to a more uniform application. While the possibility of a return to the 1995 procedures may be welcomed by opponents of the death penalty and advocates for more local control of such decision making, it does highlight just one example of the way in which politics—and in particular which party occupies the White House and the Office of the Attorney General—seems to be inextricably linked to the exercise of prosecutorial discretion. Considered alongside other flip-flops over the past several Administrations on how much discretion federal prosecutors should have in determining which charges to bring, what kinds of plea deals to offer, and how constrained such decision making should be by the Sentencing Guidelines,²⁵² the prospect of changes and reversals in federal death penalty protocols raises the question of whether such policies ought to be determined through some less political and/or more bipartisan mechanism that might avoid as many significant changes from administration to administration and thus reduce the appearance (if not the reality) of a politicized Department of Justice.²⁵³

250 *Confirmation Hearing on the Nomination of Eric H. Holder to be Deputy Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 61 (1997).

251 See BARACK OBAMA, *THE AUDACITY OF HOPE* 58 (2006) (“I believe there are some crimes—mass murder, the rape and murder of a child—so heinous, so beyond the pale, that the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment.”); see also *id.* (describing capital cases in Illinois as “rife with error, questionable police tactics, racial bias, and shoddy lawyering”); Christi Parsons, *Ryan Vetoes Expanded Death Penalty, Governor Rejects Bill to Include Gang Slayings*, CHI. TRIB., Aug. 18, 2001, at 13 (quoting then-State Senator Obama as noting “a strong overlap between gang affiliation and young men of color,” and opposing legislation that would have made gang-related murder a capital offense because “it’s problematic for [young men of color] to be singled out as more likely to receive the death penalty for carrying out certain acts than are others who do the same thing”).

252 See SUBIN ET AL., *supra* note 56.

253 As former U.S. Attorney Mary Jo White testified before Congress, one of the reasons that the politicized firings of U.S. Attorneys were so troubling was because they “undermine[d] the importance of the office of the United States Attorney, the independence of the United States Attorneys, and the public’s sense of evenhanded and impartial justice.”

VII. CONCLUSION

Since Congress resurrected the federal death penalty in 1988, the Department of Justice has pursued capital cases in non-death penalty states with increasing frequency, but the Department's endeavor under former Attorneys General Ashcroft, Gonzales, and Mukasey to expand the death penalty has proven relatively ineffective. Though the Department has authorized capital prosecutions for nearly forty defendants in non-death penalty states, only nine death sentences have been imposed. Courts have upheld the Department's actions as being constitutionally permissible given the supremacy of federal law, but the federal death penalty has been unwelcome and met with hostility in jurisdictions that have affirmatively abolished or otherwise refrained from enacting local capital sentencing laws. Citing concerns of judicial economy and allocation of prosecutorial resources, federal judges and even some federal prosecutors have argued that the Attorney General should defer to the U.S. Attorney's assessment of whether to pursue the death penalty in a particular case. Whether Attorney General Holder will heed the recommendations of several reformist organizations and herald a return to the death penalty protocols that were in place when he was Attorney General Reno's deputy—protocols that vested substantially more discretion at the local U.S. Attorney's Office level—remains to be seen.