Department of Justice

STATEMENT OF

CHARLES J. COOPER
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

THE STATUTORY AUTHORITY OF THE SENTENCING COMMISSION TO PROMULGATE CAPITAL SENTENCING GUIDELINES

ON

FEBRUARY 17, 1987

Mr. Chairman and Members of the Commission:

The Sentencing Reform Act establishes a comprehensive scheme. Subsection (a) of 18 U.S.C. 3551 provides that, "[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this [Act] . . . ." Subsection (b) specifically addresses the sentencing of individuals, authorizing the imposition of probation, fine, or imprisonment, as well as providing for forfeiture, notice to victims, and restitution. Absent from this list is capital punishment, although numerous provisions of the United States Code authorize judicial imposition of this sanction. Thus, the threshold question is whether the death penalty is still an authorized sanction for certain crimes under federal law. We believe that this question must be answered in the affirmative, as our January 8, 1987 opinion on this question reflects. I will not here undertake to restate that analysis in detail, but simply draw your attention to several salient points.

The history of congressional efforts to enact sentencing reform legislation establishes that capital punishment is an authorized sanction under the Sentencing Reform Act of 1984. The provisions of the Act expressly apply to all federal offenses "except as otherwise specifically provided." Prior congressional attempts at sentencing reform reveal that this exception in section 3551(a) was intended to mean just what it says: an offense is within the scope of the Sentencing Reform Act unless the statute defining the offense specifically states

that the provisions of the Act are inapplicable. Because existing federal death penalty provisions, save one (air piracy when death results, 49 U.S.C. 1472), do not specifically provide that the provisions of the Sentencing Reform Act are inapplicable, the Act requires that defendants convicted of capital offenses be sentenced in accordance with the Act. And, while section 3551(b)'s omission of the death penalty from its list of authorized sanctions raises the inference that the Act was intended to effect an implied repeal of existing federal death penalty provisions, this inference is overcome by positive and indisputable evidence in the Act's legislative history that existing death penalty statutes were intended not to be affected in any way, let alone repealed, by the Act.

The omission of the death penalty from section 3551(b) can be traced to a proposed bill -- S. 1437 -- that indeed would have expressly repealed existing death penalty provisions (save two, which S. 1437 would have amended to render sentencing provisions of the bill specifically inapplicable). After similar measures had been attempted unsuccessfully, Senators Thurmond and Laxalt introduced S. 829, which incorporated without significant change the sentencing provisions of S. 1437, including the omission from section 3551(b) of the death penalty, and which also supplied post-Furman procedures to implement existing, but inoperative, federal death penalty provisions. Had S. 829 been enacted, therefore, it could not have been reasonably maintained that the Sentencing Reform Act had implicitly repealed existing death penalty provisions because another part of the same bill explic-

itly relied on their continued existence and enacted procedures designed to ensure their implementation.

These two aspects of S. 829 were subsequently reported separately out of the Senate Judiciary Committee as S. 1762 and S. 1765, respectively. The Senate passed both bills in 1983, thus precluding the contention that existing death penalty provisions were intended to be repealed by virtue of the omission of the death penalty from the list of authorized sanctions in S. 1762, the bill that contained the Sentencing Reform Act as enacted. When the sentencing provisions of the earlier bill, S. 1437, were carried over into what was to become the 1984 Act, they simply were not revised, evidently through oversight, to conform to the congressional intention to leave the federal death penalty where it was -- an authorized sentence.

An additional argument may be made, however, that in leaving the federal death penalty where it was, Congress intended it to be authorized but inoperative. The difficulty with this position is that Congress failed to take any steps to ensure this result. Because existing death penalty provisions were not amended explicitly to exempt them from the Act, the Act applies. Thus, defendants convicted of capital offenses must be sentenced according to section 3551(b) and that provision must be interpreted either to permit imposition of, or to repeal, the death penalty. As we have seen, the latter construction is at war with the conclusive evidence that Congress did not intend to repeal the death penalty. Moreover, it is more accurate to say that Congress assumed, rather than intended, the federal death

penalty to be inoperative. The legislative history shows that this assumption was due solely to the Supreme Court's 1973 decision in Furman v. Georgia. Given this understanding, Congress must also have known that if Furman were subsequently overruled, the constitutional impediment to the enforcement of federal death penalty provisions would be removed. Similarly, should the Supreme Court hold that imposition of the death penalty for narrowly drawn offenses such as treason or espionage is constitutional, then current statutes would be adequate to the task. Thus, any argument that the death penalty statutes were not repealed by the Act, but rather were suspended in their operation until (and unless) Congress provided statutory procedures is in truth tantamount to an argument that the death penalty statutes were repealed.

Having concluded that the death penalty is a permissible sanction under the Sentencing Reform Act, section 994 of the Act appears to authorize the Commission to promulgate capital sentencing guidelines. The Commission's mandate under section 994(a) -- to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case" -- is plainly broad enough to encompass capital sentencing guidelines. Subsections (c) and (d) of section 994 provide additional support for the Commission's authority to promulgate capital sentencing guidelines. Both provisions refer to Commission "guidelines . . . governing the imposition of sentences of probation, a fine, or imprisonment, [and] governing the imposition of other authorized sanctions." 28 U.S.C. 994(c),

(d) (emphasis added). Numerous provisions of title 18 authorize sanctions other than probation, fine, or imprisonment. For example, the Sentencing Reform Act itself authorizes the imposition of orders of criminal forfeiture, notice to victims, and restitution, see 18 U.S.C. 3554, 3555, 3556, and, as already discussed, several federal statutes authorize the death penalty.

This conclusion is not altered by the fact that the Act does not make express reference to capital sentencing guidelines. As the Supreme Court's opinion in United States v. Southwestern Cable Co. (392 U.S. 157 (1968)) illustrates, an administrative agency may exercise a power within the terms of its delegated authority even if Congress did not expressly mention -- or, indeed, contemplate -- a specific exercise of delegated power or if Congress subsequently contemplated and failed to confer such power. This principle applies to the Sentencing Commission's statutory authority to issue capital sentencing guidelines.

This leaves only the question of the binding quality of any capital sentencing guidelines promulgated by the Commission. Section 3553(b) of the Sentencing Reform Act provides that sentencing courts are required to "impose a sentence of the kind, and within the range," established by the guidelines promulgated pursuant to 28 U.S.C. 994, absent mitigating or aggravating circumstances not taken into account by the Commission. 18 U.S.C. 3553(b). Thus, it seems clear that sentencing courts would be obligated generally to abide by capital sentencing guidelines promulgated by the Commission.