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SENATE

REPORT
No. 97-143

ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

together with

MINORITY VIEWS

TO ACCOMPANY

S. 114

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97TH CONGRESS, *1st Session* } SENATE { REPORT No. 97-143

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ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT

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Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with MINORITY VIEWS

[To accompany S. 114]

The Committee on the Judiciary, to which was referred the bill (S. 114) to establish rational criteria for the imposition of the sentence of death, and for other purposes, having considered the same, reports favorably thereon, with amendments and an amendment to the title, and recommends that the bill, as amended, pass.

AMENDMENTS

(1) On page 2, following line 2, insert the following new subsection:

(b) NOTICE BY THE GOVERNMENT.—Whenever the government intends to seek the death penalty for an offense for which one of the sentences provided is death, the attorney for the government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice (1) that the government in the event of conviction will seek the sentence of death, and (2) setting forth the aggravating factor or factors which the government will seek to prove as the basis for the death penalty. The court may permit the attorney for the government to amend this notice for good cause shown.

Beginning with line 3, strike out through the word "imposed." in line 10, and insert in lieu thereof the following:

(c) HEARING BEFORE COURT OR JURY.—When the attorney for the government has filed a notice as required under subsection (b) and the defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, the judge who presided at the trail or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separte sentencing hearing to determine the punishment to be imposed.

(2) On page 3, line 5, strike out the word "but," and insert in lieu thereof "unless,"; in line 6, strike out the word "may"; in line 9, strike out "(c)" and insert in lieu thereof "(d)"; and in line 24, strike out the word "trials." and insert in lieu thereof "trials, except that information may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury.".

(3) On page 4, line 13, strike out "(d)" and insert in lieu thereof "(e)"; in line 15, beginning with the word "hearing", strike out the line and insert in lieu thereof "hearing."; beginning with the word "any" in line 16, strike out through "exist." in line 18, and insert in lieu thereof "whether or not any mitigating factors or any aggravating factors set forth in subsection (g), (h), or (i) have been found to exist."; in line, strike out the word "majority" and insert the word "unanimous"; and further in line 19, beginning with the word "If", strike out all through line 25.

(4) On page 5, strike out lines 1 through 5 and insert in lieu thereof the following:

If, in the case of an offense of treason or espionage, no aggravating factor set forth in subsection (h) is found to exist, or, in the case of any other offense, the aggravating factor set forth in subparagraph (i)(1) is not found to exist or the aggravating factor set forth in subparagraph (i)(1) is found to exist but no other aggravating factor set forth in subsection (i) is found to exist, the court shall impose a sentence, other than death, authorized by law. If, in the case of an offense of espionage or treason, one or more of the aggravating factors set forth in subsection (h) is found to exist, or, in the case of any other offense, the aggravating factors set forth in subparagraph (i)(1) and one or more of the other aggravating factors set forth in subsection (i) are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified.

In line 6, strike out "(e)" and insert in lieu thereof "(f)"; in line 8, strike out "Upon a contrary finding," and insert in lieu thereof "Otherwise"; in line 10, strike out "(f)" and insert in lieu thereof "(g)"; in line 14, strike out the word "youthful" and insert "less than eighteen years of age"; and beginning with the word "or" in line 24, strike out through the end of line 25 and insert in lieu thereof the following: "(as defined in section 2(a) of this title) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to the charge;".

On page 6, line 6, strike out "(g)" and insert in lieu thereof "(h)"; in line 20, strike out "(h)" and insert in lieu thereof "(i)"; following line 23 insert the following:

(1) the defendant—

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally participated in an act which he knew or reasonably should have known would create a grave risk of death to a person, other than one of the participants in the offense, and the victim did die as a direct result of the act; or

(D) attempted to kill the President of the United States under the circumstances provided in section 1751(c) of this title;

In line 24, strike out "(1)" and insert in lieu thereof "(2)".

(5) On page 7, lines 14 and 19, strike out "(2)" and "(3)" and insert in lieu thereof "(3)" and "(4)", respectively; and in line 22, strike out the word "of" and insert in lieu thereof "of, or attempted infliction of,".

(6) On page 8, lines 1, 4, 6, 9, 12, and 15, strike out "(4)"; "(5)", "(6)", "(7)", "(8)", and "(9)" and insert in lieu thereof "(5)", "(6)", "(7)", "(8)", "(9)", and "(10)", respectively; and in line 3, insert before the semicolon: "in addition to the victim of the offense".

(7) On page 9, following line 14, insert the following new subsection:

(j) INSTRUCTION TO JURY ON RIGHT OF THE DEFENDANT TO JUSTICE WITHOUT DISCRIMINATION.—In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, national origin, creed, or sex of the defendant. The jury shall return to the court a certificate signed by each juror that consideration of race, color, national origin, creed, or sex of the defendant was not involved in reaching his or her individual decision.

(8) On page 11, following line 4, insert the following new section:

SEC. 11. Subsection (c) of section 1751 of title 18 of the United States Code is amended to read as follows:

"Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of

years or for life, if the conduct constitutes an attempt to kill the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President."

Renumber sections 11 through 19 as section 12 through 20.

(9) On page 12, at the end of line 22, insert the word "and"; and in line 25, strike out "3562A;".

(10) On page 13, beginning with line 1, strike out through the word "defendant." in line 2 and insert in lieu thereof "3562A.".

(11) Amend the title to read:

A bill to establish constitutional procedures for the imposition of the sentence of death, and for other purposes

Purpose of Amendments

Amendment No. 1 specifies that the government shall give the defendant in a capital case pretrial notice that the government intends, in the event of conviction, to seek the death penalty and set forth the aggravating factor or factors which the government will rely on as the basis for the imposition of the death penalty. A pretrial notice given under the provisions of the amendment can be amended at a later time for good cause shown. The amendment would assure that the defense is given adequate notice and time to prepare for the post-conviction penalty hearing and would ensure that an appropriate *voir dire* would be conducted of the jury that comports with applicable Supreme Court cases. The amendment also makes clear that the procedures adopted in this bill to impose the death penalty are only to be extended to the expensive and time-consuming sentencing hearing stage where the government in fact intends to seek the death penalty and to affirmatively carry the burden of proving the aggravating factors alleged to be applicable to the case. While it can be argued that the defendant is always on notice in a capital case with respect to the possibility of a death penalty sentencing hearing, fairness and orderly pursuit of the death penalty in appropriate instances would be facilitated by pretrial notice as provided in this amendment without in any way prejudicing the government.

The primary thrust of amendment No. 2 is to permit a judge to exclude information that is offered in a sentencing hearing to impose the death penalty if the probative value of the information is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. This parallels similar limitations under Rule 403 of the Federal Rules of Evidence and is adopted here for similar policy reasons. Other clarifying amendments are also made.

Amendment No. 3 combines one of the Committee group amendments requiring a unanimous jury verdict with respect to an aggravating factor with the amendment offered by Senator Hatch to permit imposition of the death penalty where the jury was unanimous as to the existence of some aggravating factor even though not unanimous with respect to any single aggravating factor. The combination of these amendments is a compromise from the bill as introduced, which permitted the finding of any single aggravating factor by a majority

vote. The amendment also would delete language which seemed to require the introduction of the complete trial transcript, regardless of its relevancy to the sentencing proceeding, in the event a new jury is impaneled.

Amendment No. 4, except for several clarifying or technical amendments, in essence does only two things.

First, it sets forth in subsection (i), dealing with aggravating factors for homicide and related offenses, a threshold set of four criteria to be found by the jury or judge before proceeding further to inquire into whether any of the other aggravating factors exist. These criteria relate to the culpable involvement of the defendant in a homicide or an attempt to kill the President of the United States under circumstances in which he may not have intended to kill another person or may not have been the person who actually caused a death. Under an amendment to subsection (d), only when the jury has found that the defendant fits one of the criteria establishing a high level of culpable involvement in the homicide or attempted homicide (of the President) is the jury to proceed to consider the existence of one of the other aggravating factors. It is only upon a further finding of one of the other aggravating factors that the jury may proceed to the ultimate weighing of the record to determine if the death penalty is justified. This amendment is designed to meet constitutional difficulties under *Coker* v. *Georgia* [1] that held imposition of the death penalty for the nonfatal rape of an adult woman unconstitutional.

Second, this amendment substitutes the more precise language of "less than eighteen years of age" for the term "youthful" in the mitigating factor concerning age. While any designation of age is somewhat arbitrary, under current law less than eighteen years of age is the line drawn by Congress to distinguish between juvenile and adult and has traditionally been the transition point for application of more serious consequences for crime. It should be noted that the jury may still consider "youthfulness" as a nonstatutory mitigating factor, but it would not rise to the level of an express mitigating factor.

Amendment No. 5 amends the aggravating factor dealing with previous felony convictions for crimes involving the infliction of serious bodily injury on another person to make it clear that the factor includes convictions for crimes involving the attempt to inflict serious bodily injury on another person.

Amendment No. 6 is a clarifying amendment.

Amendment No. 7 was proposed by Senator Heflin to require the court to instruct the jury not to consider race, color, national origin, creed, or sex of the defendant in its consideration of the sentence of death. This language was added to insure that discrimination is not a factor in the application of the death penalty. The additional part of the amendment requiring each juror to certify that such factors played no part in his or her decision is intended to assist the judge in early identification of possible discriminatory sentencing attitudes and to assist the appellate courts in reviewing this issue.

Amendment No. 8 would make the death penalty available for the offense of an attempt to kill the President of the United States if the

[1] 433 U.S. 584 (1977).

attempt results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President. The constitutionality of the application of an attempt to kill the President is discussed in detail in the body of the report dealing with the bill as reported.

Amendments 9, 10, and 11, except for some technical amendments and amending the title of the bill, delete from the appellate review provisions consideration of the excessiveness of the sentence of death considering both the crime and the defendant. To some, this review criteria was an open invitation to the judiciary to invalidate the imposition of the death penalty on vague bases and unpredictable facts. While it is recognized that there may be some constitutional boundaries involving considerations of excessive penalty as applied to a particular defendant for a particular crime, the purpose of this amendment is to insure that the standard to be applied is a constitutional standard and not a vague statutory one to be filled in by the judiciary on a case-by-case basis.

General Statement and History of the Bill

S. 114 was introduced by Senators DeConcini and Thurmond on January 15, 1981. The bill is drafted to establish a procedure which will meet the constitutional requirements enunciated by the Supreme Court for the imposition of capital punishment. In introducing the measure, Senator DeConcini stated: [2]

> Ultimately, the conclusion in favor of the retention of capital punishment has its basis in the belief that the primary responsibility of society is the protection of its members so that they might live out their lives in peace and safety. Where the safety of its citizenry can no longer be guaranteed, society's basic reason for being disappears. In providing its members protection, society must do what is necessary to deter those who would break the laws and punish those who do so in an appropriate manner.

The issue, of course, is not new. The Subcommittee on Criminal Laws and Procedures of this Committee held hearings in March and July 1968 on a bill to abolish the death penalty for Federal offenses.[3] In 1972, the United States Supreme Court in *Furman* v. *Georgia*,[4] in effect, made the death penalty provisions in Federal and States law inoperative by holding that because of the unlimited discretion given to the judge and jury under the then existing statutes the death penalty had come to be imposed so arbitrarily and capriciously as to constitute cruel and unusual punishment in violation of the Eighth Amendment. At the time of the *Furman* decision, Federal law authorized the death penalty for six categories of offenses: espionage, treason, first degree murder, felony-murder, rape, and kidnapping (when the victim was not liberated unharmed and when the kidnapping was committed during a bank robbery).[5]

[2] Statement of Senator Dennis DeConcini on the Floor of the Senate, Congressional Record, p. S161, January 15, 1981 (daily ed.).
[3] "To Abolish the Death Penalty," hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 90th Congress, 2d session (1968).
[4] 408 U.S. 238 (1972).

The challenge set by the Court for the United States Congress (and the State legislatures) was not so much one of specifying those offenses for which the death penalty should be authorized—Federal law, as noted above, already did this—but one of designing a procedure and establishing criteria for imposition of the death penalty that would bring the "arbitrary and capricious" result flowing from unfettered discretion within constitutionally tolerable bounds.

In response to the *Furman* decision, 35 State legislatures enacted new laws attempting to meet the objections of the Supreme Court by removing the imposition of the death penalty from the unguided discretion of the judge and jury. The United States Congress enacted anti-hijacking legislation providing for procedures for imposition of the death penalty for aircraft hijacking where death results, but failed to act on general legislation to cover Federal murder, treason, and espionage. This measure passed the Senate on March 13, 1974, by a vote of 54 yeas to 33 nays.

As a result of the *Furman* decision, Senator Hruska, joined by the late Senator McClellan, introduced S. 1401 in the 93d Congress on March 27, 1973, to provide constitutional procedures and criteria for imposition of the death penalty for most of the Federal offenses then authorizing the death penalty.[6] Hearings were held on the legislation in April, June, and July of 1973.[7] On March 1, 1974, the Senate Committee on the Judiciary reported S. 1401 with amendments [8] and the Senate passed the measure on March 13, 1974, by a vote of 54 to 33.[9] The House did not act on the bill.

While a number of bills providing for capital punishment were introduced in the 94th Congress, action on these measures was deferred until the decisions were rendered in a group of post-*Furman* cases pending in the Supreme Court. In 1976, the Supreme Court decided this group of landmark death penalty cases—*Gregg* v. *Georgia*,[10]

[5] See 18 U.S.C. 32–34 (destruction of aircraft or aircraft facilities and motor vehicles or motor vehicle facilities where death results); 18 U.S.C. 351(a) (murder of a Member of Congress or a Member of Congress elect); 18 U.S.C. 351(b) (kidnapping a Member of Congress or Member of Congress-elect where death results); 18 U.S.C. 794 (espionage); 18 U.S.C. 844 (d), (f), and (i) (explosive offenses where death results); 18 U.S.C. 1111 (murder in the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 1114 (murder of specified Federal officials and employees); 18 U.S.C. 1201 (kidnaping where the victim was not liberated unharmed); 18 U.S.C. 1716 (injurious articles as nonmailable where death results); 18 U.S.C. 1751(a) (murder of the President, President-elect, Vice President, or the officer next in the order of succession to the President); 18 U.S.C. 1751(b) (kidnapping of President, Vice President, or the officer next in order of succession to the Presidency, where death results); 18 U.S.C. 2031 (rape in the maritime and special jurisdiction of the United States); 18 U.S.C. 2381 (treason); 18 U.S.C. 1992 (destruction of trains or train facilities where death results); 18 U.S.C. 2113(e) (murder or kidnapping in the course of a bank robbery); and 49 U.S.C. 1472 (aircraft hijacking where death results). When the kidnapping section was revised in other respects in 1972 (Public Law 92–539), the death penalty language was dropped as superfluous in light of the *Furman* decision.
[6] The bill eliminated the death penalty for rape and limited the penalty in kidnapping to situations in which death resulted. It should also be noted that both of the massive bills to reform the Federal criminal laws (S. 1 and S. 1400 in the 93d Congress) contained provisions to meet the constitutional problems raised by *Furman*.
[7] "Imposition of Capital Punishment," hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 93d Congress, 1st session (1973).
[8] Senate Report No. 93–721.
[9] Congressional Record, p. S3721 (Mar. 13, 1974 (daily ed.)).
[10] 428 U.S. 153 (1976).

Proffitt v. *Florida*,[11] *Jurek* v. *Texas*,[12] *Woodson* v. *North Carolina*,[13] and *Roberts* v. *Louisiana*[14]—in which the death penalty was held constitutional when imposed under certain procedures and criteria which guarded against unfettered discretion condemned in *Furman*, but which retained the important flexibility to consider the aggravating and mitigating factors of each case. Mandatory death penalty statutes were struck down.[15]

In 1977, a bill (S. 1382), that reflected the latest decisions by the Supreme Court, was introduced by the late Senator McClellan and nineteen cosponsors. The Subcommittee on Criminal Laws and Procedures, following hearings,[16] reported the bill with minor amendments to the full Committee. The Committee held additional hearings in April and May 1978 [17] primarily to explore the implications with respect to the application of the death penalty to treason and espionage posed by a June 1977 Supreme Court case holding unconstitutional the application of the death penalty to the non-fatal rape of an adult woman.[18] The Committee failed to report the measure to the Senate.

S. 114 of the 96th Congress was drafted to meet constitutional requirements of guided discretion based on rational criteria and was similar to the predecessor bills. The Committee ordered the bill favorably reported to the Senate by a vote of 7 yeas to 4 nays on December 4, 1979. The Senate did not take action on the measure.

S. 114, 97TH CONGRESS, AS REPORTED

S. 114 in this Congress, as was the predecessor bill, is designed to meet the constitutional requirements of guided discretion based on rational criteria. The bill would provide that, after a conviction for an offense for which a penalty of death is authorized, the court must hold a separate hearing on whether to impose the death penalty. The bill would largely leave unchanged the current law offenses that authorize the imposition of the death penalty, except that the Committee adopted an amendment to provide the death penalty for the first time for an attempt to assassinate the President that results in bodily injury to the President or comes dangerously close to success.[19] The hearing would normally be before the same jury which sat for trial, or, if both parties agree, before the judge. After both sides have an opportunity to present all relevant information, the jury would be asked to make special findings as to whether any of a list of mitigating or aggravating factors exist. The statutory mitigating factors

[11] 428 U.S. 242 (1976).
[12] 428 U.S. 262 (1976).
[13] 428 U.S. 280 (1976).
[14] 428 U.S. 325 (1976).
[15] *Roberts* v. *Louisiana, supra* note 14.
[16] See "To Establish Constitutional Procedures for the Imposition of Capital Punishment," hearing before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 95th Congress, 1st session (1977).
[17] See "To Establish Rational Criteria for the Imposition of Capital Punishment," hearings before the Committee on the Judiciary, U.S. Senate, 95th Congress, 2d session (1978).
[18] *Coker* v. *Georgia, supra* note 1, decided on June 29, 1977, after the subcommittee hearings.
[19] See *supra* note 5. Unlike current law, the bill would authorize the death penalty for murder of a foreign official, official guest, or internationally protected person, and kidnaping where death to any person results but would not authorize the death penalty for rape not involving death and kidnapping in the course of a bank robbery. The amendment to provide the death penalty for an attempt to assassinate the President is discussed in more detail *infra*.

include such things as the fact that the defendant was less than eighteen years of age, the extent of his involvement in the offense, mental problems or pressures, substantial duress, and the unforeseen nature of a resulting death.[20] The aggravating factors would vary depending on whether the offense is one relating to espionage or treason, or to murder. Aggravating factors relating to espionage and treason include a past conviction for an offense involving espionage or treason, whether the offense created a grave risk of substantial danger to the national security, and whether the offense created a grave risk of death to another person.

With respect to imposition of the death penalty for a homicide, i.e., murder, felony-murder, or accomplice liability, or an attempt to kill the President, the bill provides in subsection (i) (1) a threshold factor that must be found as follows:

> (1) the defendant—
> (A) intentionally killed the victim;
> (B) intentionally inflicted serious bodily injury which resulted in the death of the victim;
> (C) intentionally participated in an act which he knew or reasonably should have known would create a grave risk of death to a person, other than one of the participants in the offense, and the victim did die as a result of the act; or
> (D) attempted to kill the President of the United States under the circumstances provided in section 1751(c) of this title.

Unless one of the four categories in this factor is found by the jury or judge to exist, the death penalty cannot be imposed for homicide or an attempt to kill the President. Once the threshold factor is found to exist, the remaining statutory factors for homicide are relevant as to whether the death penalty may be imposed. These factors include existence of repeated serious violent crimes by the defendant, commission of the offense in an especially heinous, cruel, or depraved manner, or for hire, or against United States or foreign officials most likely to be the targets of assassination, kidnapping, and terrorism. Language similar to one of these factors—that the defendant committed the homicide "in an especially heinous, cruel, or depraved manner"—has been attacked as unconstitutional for vagueness. In *Godfrey* v. *Georgia*,[21] the Supreme Court noted that such an aggravating circumstance was held not to be unconstitutional on its face in *Gregg*, but a majority concluded that the Georgia Supreme Court had adopted such a broad and vague construction of the language as to violate the Eighth and Fourteenth Amendments. In reaching this conclusion, the plurality option observed that the crimes involved in the case "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder", indicating that torture, aggravated battery, the deliberate prolonging of suffering, or serious

[20] It should be noted that S. 114, as introduced and reported in this Congress, makes it clear that the jury or judge may consider non-statutory mitigating factors in the ultimate decision on whether to impose the death penalty. This was one of the characteristics of the statute upheld in *Gregg* and later constitutionally mandated in *Lockett* v. *Ohio*, 438 U.S. 586 (1978).
[21] 446 U.S. 420 (1980).

physical abuse of the victim before inflicting death would suffice to narrow the concept to within constitutional bounds.[22]

The Committee adopts the language "especially heinous, cruel, or depraved manner" with these limitations in mind. This aggravating factor is not intended to be a catch-all concept to be used to impose the death penalty on any person found guilty of murder. On the other hand, to the extent that an unusual extraordinary depravity is evidenced by the circumstances, such as the execution style killing of a stranger for the thrill of it or the extended terrorizing of a victim before execution, the Committee has concluded that it would be constitutional to view the concept of "depravity" as broader than a "novel physical torture requirement" [23] and intends for it to be so construed in this measure.

For the offense of treason or espionage, the jury would be required to determine by unanimous vote whether any aggravating factors exist. If no aggravating factors are found to exist, the court would impose a sentence, other than death, authorized by law. If the jury unanimously agrees that at least one aggravating factor exists, the jury by unanimous verdict would then determine, in light of all the evidence, whether the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist, or, in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. If the jury finds that the death penalty is justified, the court is directed to impose a sentence of death.

For homicide offenses, as noted above, subsection (d) requires that the jury first find by unanimous verdict that one of the four circumstances in subsection (i)(1) existed. This subsection is designed to insure a certain culpability level on the part of the defendant with respect to homicide or the attempt on the life of the President of the United States. If this requirement is not satisfied, the court would impose a sentence, other than death, authorized by law. However, if this requirement is satisfied, the jury must then determine by unanimous vote whether any of the other aggravating factors exist. Upon the failure to find at least one of the other aggravating factors, the court would impose a sentence, other than death, authorized by law. On the other hand, if the jury finds that at least one of the other aggravating factors exists, it must by unanimous verdict determine, in light of all the evidence, whether the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. If the jury finds that the death penalty is justified, the court is directed to impose a sentence of death.

The bill further provides that the defendant shall have a right to appeal the sentence and that such review shall have priority over all other cases. In order to affirm the sentence, the appellate court must determine that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor and that the evidence supports the special findings.

[22] *Godfrey* v. *Georgia, supra* note 21, at 429–433.
[23] *Godfrey* v. *Georgia, supra* note 21, at 443 (Chief Justice Burger, dissenting).

The Committee is convinced that the procedures proposed in S. 114 for the imposition of the death penalty successfully meet the constitutional requirements of the Supreme Court cases. Primarily the witnesses who appeared in opposition to the bill did so on moral or religious grounds and did not challenge the constitutionality of the basic procedures. The representative of the American Civil Liberties Union, while criticizing the bill as clearly unconstitutional in a limited number of the specifics, generally maintained that the death penalty under all circumstances is cruel and unusual punishment prohibited by the Eighth Amendment and therefore opposed the enactment of a Federal death penalty statute.[24]

The Committee has carefully considered the constitutional implications for application of the death penalty to treason and espionage not resulting in the death of another raised by the Supreme Court in *Coker* v. *Georgia* [25] holding that imposition of the death penalty for rape of an adult women *where death did not result* was "grossly disproportionate and excessive punishment" forbidden by the Eighth Amendment as cruel and unusual punishment. These two important national defense offenses are generally considered uniquely Federal in nature; however, such offenses are a part of the laws of most countries and commonly, as in current United States law, carry the death penalty as an authorized sentence. The most troublesome problem is the treatment of peacetime espionage. To meet the concerns that underpin *Coker*, the Committee limits the death penalty for peacetime espionage to situations where the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy. The Committee has concluded that it would be constitutional to impose the death penalty for treason and espionage offenses, and it is warranted under the narrow circumstances provided in S. 114.

A representative of the Department of Justice, appearing in support of the legislation, made the following observation: [26]

> * * * Both the President and the Attorney General have repeatedly indicated in public statements that they support the imposition of the death penalty in carefully circumscribed conditions for the most serious crimes. In our view, the death penalty is warranted for two principal reasons. First, while sociological studies have reached differing conclusions, common sense tells us that the death penalty does operate as an effective deterrent for some crimes involving premeditation and calculation, and that it thus will save the lives of persons who would otherwise become the permanent

[24] See "Capital Punishment," hearings before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess., Apr. 10, 27, and May 1, 1981 (hereinafter cited as "Hearings"), testimony of John F. Donohue.
[25] *Supra* note 1.
[26] Hearings, testimony of D. Lowell Jensen, Assistant Attorney General, Criminal Division, Department of Justice.

and irretrievable victims of criminal misconduct. Second, society does have a right—and the Supreme Court has confirmed that right—to exact a just and proportionate punishment on those individuals who deliberately flout its laws; and there are some offenses which are so harmful and so reprehensible that no other penalty, not even life imprisonment without the possibility of parole, would represent an adequate response to the defendant's conduct. Like the authors of S. 114, therefore, Mr. Chairman, this administration supports the death penalty in certain instances involving violation of federal criminal statutes, * * *

* * * Our initial examination of this bill indicates that it too would likely pass constitutional muster and is of such a scope and nature as to constitute an appropriate framework for the restoration of the death penalty into the federal criminal justice system—an event which we agree with the sponsors of this legislation is overdue. * * *

The Committee also carefully considered the constitutionality of Senator Thurmond's amendment to provide the death penalty for an unsuccessful attempt to kill the President of the United States if the attempt results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President. As with nonfatal treason and espionage, application of the death penalty to an attempt to kill the President raises issues of grossly disproportionate and excessive punishment under *Coker*. A number of witnesses in the hearings, including Professor David Robinson with the George Washington University School of Law,[27] testified that an attempt upon the life of the President as the Head of State could in their judgment be constitutionally punishable by death. The Department of Justice, Office of Legal Counsel, provided an opinion on the issue in which the Office concluded: [28]

* * * We believe that such a statute, if drafted narrowly and with extreme care, might well be upheld by the Supreme Court.

* * * * *

As the most powerful and visible of the nation's leaders, the President maintains a unique position within the federal government. As Commander-in-Chief of the armed forces, he discharges unique responsibilities for the security of the country. As head of the Executive Branch, he is entrusted with the authority of coordinating and executing all laws of the United States. For these reasons, an assault on the President threatens the national security in a distinctive fashion. Even if the attempt is unsuccessful, it may produce a national sense of embarrassment, fear, or trauma. An attempt on the life of the President is, as a result, different in kind, not merely in degree, from an attempt on the life of any other public or private citizen.

* * * * *

[27] Hearings, testimony of David Robinson, Jr.
[28] Hearings, Memorandum from the Office of Legal Counsel, Department of Justice, Apr. 30, 1981.

We believe that the unique nature of the office of the President of the United States furnishes support for the view that an attempted assassination of the President can be subjected to the death penalty.

* * * * *

* * * Any such statute should be narrowly drafted to include cases in which the defendant's intent was unambiguous and the crime was almost completed. Such a statute would be more likely to be upheld if an element of the crime was the actual commission of some bodily injury to the President.

We believe that, if a capital punishment statute were drafted to include such injury as part of the offense, or possibly even if it were otherwise narrowly confined to nearly successful attempts, the statute might well be found constitutional. The fact that England and a number of other countries have historically applied the death penalty to an attempted murder of the head of State, together with the distinctive responsibilities of the President in our constitutional scheme do, in our view, provide support for a conclusion that the death penalty for an attempt on the life of the President is not disproportionate within the meaning of *Coker*. * * *

Senator Thurmond proposed an amendment, based upon the opinion of the Office of Legal Counsel and adopted by the Committee, to provide for the death penalty for attempted assassination of the President—a deliberate, premeditated act intending murder—only in the limited circumstances where the attempt results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President. Admittedly, the "dangerously close" language does not track a precise line. The Committee concluded, however, that the death penalty would be constitutional not only for situations resulting in bodily injury to the President, but to exceptional "core" cases not resulting in actual injury where the defendant's unambiguous purpose is to kill the President and the effort fortuitously fails after the deadly force is set in motion in close proximity to the President.

Capital Punishment as a Matter of Legislative Policy

Despite the explicit approval by the Supreme Court for the death penalty as an appropriate sanction under the Eighth Amendment of the Constitution, the basic issue of the use of the death penalty is so important that the Committee feels compelled to reiterate here the justifications for its use in the heinous crimes under the particular circumstances provided in S. 114.

The conclusion in favor of the retention of capital punishment for these crimes has its basis in two underlying beliefs: First, the belief that the primary responsibility of society is the protection of its members so that they may live out their lives in peace and safety. Indeed, this is one of the main reasons why any society exists. Where the safety of its citizenry can no longer be guaranteed, society's basic reason for being disappears. In providing its members protection, society

must do what is necessary to deter those who would break its laws and punish those who do so in an appropriate manner. Second, that a purpose of our criminal law is to promote respect for the lives and property of others. As noted by Senator Thurmond last Congress: [29]

> The death penalty must be restored if our criminal justice system is to effectively control the increasing number of violent crimes of terror. The confidence of the American people in our criminal justice system must also be reclaimed and the imposition of the death penalty can restore such confidence.
>
> Mr. President, people who commit violent crimes have forfeited their own right to life. Justice demands that such inhuman action cannot be tolerated. This bill would permit the death penalty in certain instances and, I hope, provide protection for the innocent victims of violent crimes.

The Committee also subscribes to the statement of Walter Berns [30] that—

> * * * The purpose of the criminal law is not merely to control behavior—a tyrant can do that—but also to promote respect for that which should be respected, especially the lives, the moral integrity, and even the property of others. In a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement and, thereby, hope to promote this respect. To be successful, what it says—and it makes this moral statement when it punishes—must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made to be awful or awe inspiring is to entitle it to inflict the penalty of death. * * *

It is the Committee's conclusion that the sentence of capital punishment applied to the more serious offenses fulfills these functions.

Deterrence

The question of the deterrent effect of capital punishment has probably been the one point most debated by those favoring the abolition of the penalty and those desiring its retention. Several studies have been conducted purporting to show the absence of any correlation between the existence of the penalty and the number of capital crimes committed in a particular jurisdiction. The argument then follows that, since there exists no such relationship, the penalty serves no legitimate social purpose and should not be imposed.

If the absence of any correlation between the existence of the penalty and the frequency of capital crimes could actually be proved by these studies, the argument for abolition would be much stronger. Although

[29] Statement of Senator Strom Thurmond on the Floor of the Senate, Cong. Rec., p. S419, January 23, 1979 (daily ed.).
[30] Walter Berns, Resident Scholar, The American Enterprise Institute for Foreign Policy Research, "Defending the Death Penalty," Crime and Delinquency, October 1980, reprinted in Hearings, *supra* note 19, testimony of Walden Berns.

entitled to consideration, however, the value of these studies is seriously diminished by the unreliability of the statistical evidence used, the contrary experience of those in the field of law enforcement, and the inherent logic of the deterrent power of the threat of death.

With regard to the statistical evidence, the first and most obvious point is that those who are, in fact, deterred by the threat of the death penalty and do not commit murder are not included in the statistical data. There is no way to determine the number of such people. Secondly, even those favoring abolition agree that the available evidence on the subject of deterrence is, at best, inadequate.

Possibly the greatest difficulty with the available statistical data is that the only figure available to judge the effectiveness of capital punishment is the "murder and nonnegligent manslaughter" figure reported annually by the Federal Bureau of Investigation; and this figure does not provide sufficient evidence from which to draw a conclusion.

In short, the available data on this question is at best inconclusive.

In the absence of reliable statistical evidence, great weight must be placed on the experience of those who are most frequently called upon to deal with murderers and potential murderers and who are thus in the best position to judge the effectiveness of the remedy—our law enforcement officials. The vast majority of these officials continue to favor the retention of the death penalty as a deterrent to violent crime.

As Norman Darwick, Executive Director, International Association of Chiefs of Police, expressing the views of the Association, testified before the Committee; [31]

> The Association favors the imposition of the death penalty for premeditated murder, murder committed during the perpetration of felonies and the killing of law enforcement officers and correctional officials while performing their duties. We strongly believe that capital punishment is a deterrent to the commission of certain crimes, particularly premeditated murder, murder committed during the perpetration of felonies and the killing of law enforcement officers and prison guards. * * * Further, there is no evidence that shows that the death penalty is not a deterrent. Rational men fear death more than anything else. The use of the death penalty, therefore, has a potentially greater general deterrent effect than any other punishment.

The issue, for our purposes here, has been definitely resolved by the Supreme Court in *Gregg* where it concluded that it is appropriate for a legislature to consider deterrence as a justification for the imposition of the death penalty: [32]

> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deter-

[31] Hearings, *supra* note 24, testimony of Norman Darwick.
[32] *Gregg* v. *Georgia*, *supra* note 10, at 185–86 (footnote omitted).

> rent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

But the death penalty ought not be thought of solely in terms of individual deterrence. It also has value in terms of social or general deterrence as well. By associating the penalty with the crimes for which it is inflicted, society is made more aware of the horror of those crimes, and there is instilled in its members the desire to avoid such conduct.

Incapacitation

The incapacitating effect of capital punishment is clear. Obviously those who suffer this penalty are unable to commit similar crimes in the future. The question, then, becomes one of necessity. Is the death penalty necessary to adequately protect society in the future from the possible actions of those who have already committed capital crimes? The Committee is of the opinion that, in certain circumstances, it is.

In some cases, imprisonment is simply not a sufficient safeguard against the future actions of criminals. Some criminals are incorrigibly anti-social and will remain potentially dangerous to society for the rest of their lives. Mere imprisonment offers these people the possibility of escape or, in some cases, release on parole. Even if they are successfully imprisoned for life, prison itself is an environment presenting dangers to guards, inmates, and others. In each of these cases, society is the victim. Basically, there is no satisfactory alternative sentence for these individuals. Life imprisonment without parole, although at first appearing to be a reasonable answer, is in reality highly unsatisfactory. Such a sentence greatly increases the danger to guards and to other prisoners who come into contact with those who have been so sentenced.

It cannot be overemphasized that it is not the Committee's desire to see capital punishment utilized as an alternative to efforts at rehabilitation. This simply is not the case. The members of the Committee recognize that still greater attempts must be made to enable our prison system to achieve its goal of restoring productive and useful individuals to society. We here discuss only a minute class of extremely dangerous persons.

Retribution

The Committee finds also that capital punishment serves the legitimate function of retribution. This is distinct from the concept of revenge in the sense of the "eye for an eye" mentality; [33] rather, it is

[33] It is appropriate to note at this point that the Judaic concept of an "eye for an eye" was not, in fact, intended as an approval of revenge or even expressive of a vindicative system of justice. Quite the contrary, this concept was intended as a mitigating element designed to prevent excessiveness to ensure that the punishment fit the crime. Thus, if any offender took out another's eye, he was to lose his own. But he was not to suffer any greater loss than that such as his life. As with the other objectives of the criminal justice system, the retributive objective must be imposed in such a manner as to fit the crime. For more Biblical commentary on punishment and its purposes, see also Romans 12:19; 13:14; Numbers 35:16–18; Genesis 9:4–6; Exodus 20:13; 21:12–14; Leviticus 24:17; Numbers 35:30–4; Deuteronomy 17:6–7; 19:11–13; 19:4–6, 10; Isaiah 59:14–18; Matthew 5:17–22; Romans 12:19–21; 13:1, Matthew 5:7; 6:12; 10:28; Psalms 18:25–6.

through retribution that society expresses its outrage and sense of revulsion toward those who undermine the foundations of civilized society by contravening its laws. It reflects the fact that criminals have not simply inflicted injury upon discrete individuals; they have also weakened the often tenuous bonds that hold communities together.

The retributive function of punishment in general was discussed by Walter Berns; [34]

> * * * [W]e in the United States have always recognized the legitimacy of retribution. We have schedules of punishment in every criminal code according to which punishments are designed to fit the crime, and not simply to fit what social science tells us about deterrence and rehabilitation: the worse the crime, the more severe the punishment. Justice requires criminals (as well as the rest of us) to get what they (and we) deserve, and what criminals deserve depends on what they have done to us.

Similarly, Justice Holmes wrote in "The Common Law:"

> The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.

It is the view of the committee that these feelings rightly and justly warrant the imposition of capital punishment under some circumstances.

That men who take the lives of others in an unjustified manner may sometimes be subject to the extreme sanction of capital punishment reflects a social consensus that places great sanctity on the value of human life. It is a consensus that holds that individual offenders are responsible and accountable beings; having it within themselves to conduct themselves in a civilized manner. It is also a consensus that holds that there is no offense more repugnant and more heinous than the deprivation of an innocent person's life.

Murder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought to also differ in kind. It must acknowledge the inviolability and dignity of innocent human life. It must, in short, be proportionate. The committee has concluded that, in the relatively narrow range of circumstances outlined in this bill, the penalty of death satisfies that standard.

Apart from its legitimacy as one of the purposes of punishment, questions have arisen with respect to the constitutional validity of retribution as a basis for punishment, specifically capital punishment. This question was addressed by the Supreme Court in the *Gregg* case; [35]

> In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

[34] Hearings, *supra* note 24, testimony of Walter Berns.
[35] *Gregg* v. *Georgia*, *supra* note 10 at 183–4 (footnotes omitted).

"The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a free society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law," *Furman* v. *Georgia*, *supra* at 308 (Stewart, J., concurring).

"Retribution is no longer the dominant objective of the criminal law", *Williams* v. *New York* 337 U.S. 241, 248 (1949), but neither is it a forbiden objective nor one inconsistent with our respect for the dignity of men. *Furman* v. *Georgia*, 408 U.S. at 394–5 (Burger, J., dissenting): *id.* at 452–4 (Powell, J., dissenting); *Powell* v. *Texas* 392 U.S. at 531, 535–6. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

It is the conclusion of this committee that it is not enough to proclaim the sanctity and importance of innocent life. Innocent life must be, and can only be, secured by a society that is willing to impose its highest penalty upon those who threaten such life. As observed by Professor Walter Berns: [36]

> We think that some criminals must be made to pay for their crimes with their lives, and we think that we, the survivors of the world they violated, may legitimately extract that payment because we, too, are their victims. By punishing them, we demonstrate that there are laws that bind men across generations as well as across (and within) nations, that we are not simply isolated individuals, each pursuing his selfish interests * * *.

Possibility of Error

An argument that is often asserted in favor of abolition of capital punishment concerns the dangers of executing the innocent. It is pointed out that if such an error occurs, it is irremediable. The argument is then made that, since the cost of such a mistake is so great, the risk of permitting the death penalty to be imposed at all is unacceptable.

The Committee finds this argument to be without great weight, particularly in light of the procedural safeguards for criminal defendants mandated by the Supreme Court in recent years. The Court's decision with respect to the rights of the individual, particularly those expanding the right to counsel, together with the precautions taken by any court in a capital case, have all but reduced the danger of error in these cases to that of a mere theoretical possibility. Indeed, the Committee is aware of no case where an innocent man has been put to death. Admittedly, however, due to the fallible nature of man, this possibility

[36] Walter Berns, "For Capital Punishment," Harper's Magazine, p. 15, April 1979.

does continue to exist. Insofar as it does, it is the opinion of the Committee that this minimal risk is justified by the protection afforded to society by the death penalty. As stated in the minority report of the Massachusetts Special Commission: [37]

> We do not feel, however, that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the state to inflict the death penalty can be questioned in principle. * * * All that can be expected of [human authorities] is that they take every reasonable precaution against the danger of error. When this is done by those who are charged with the application of the law, the likelihood that errors will be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies.

Public Opinion

In arriving at a decision to support the death penalty, considerable weight was given to public opinion on the acceptability of the death penalty. Contrary to the frequently asserted statement that there is growing public opposition to capital punishment, examination of public opinion polls over the last ten years shows a remarkable rise in the number of Americans in favor of the death penalty. A March 1981 Gallup opinion poll revealed that public support for the death penalty for murder has reached its highest point in 28 years—and this poll was taken before the attempt on the President's life. Sixty-six percent—two in every three Americans—favor the death penalty for persons convicted of murder. In 1971, forty-nine percent of the public approved of capital punishment for murder. It appears from the polls, and from a flood of recent correspondence that a demand for the death penalty coincides with a greater public awareness of the crime problem.

Section-by-Section Analysis

Section 1 of the bill, as amended, provides for the addition of a new section 3562A to chapter 227 of title 18 of the United States Code, as follows:

§ 3562A. Sentencing for capital offenses.

Subsection (a) provides that a person shall be subject to the penalty of death for an offense against the United States only if a hearing is held in accordance with this section.

Subsection (b) was an amendment to S. 114, as introduced, adopted by the Committee to require the government to give pretrial notice to a defendant in a capital cases as to whether the government intends to seek the death penalty and what aggravating factors the government

[37] McClellan, Grant S. ed., "Capital Punishment," p. 81 (1961).

would seek to prove as the basis for the death penalty. The provision recognizes that unforeseen information may become available after notice is given by permitting the notice to be subsequently amended for good cause shown.

Subsection (c) states that when an attorney for the government has filed a notice as required under subsection (b) and a defendant is found guilty of or pleads guilty to an offense punishable by death, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted; (1) before the jury which determined the defendant's guilt; (2) before a new jury impaneled for the purpose of the hearing, in certain instances where the original jury is not available; or (3) upon motion of the defendant and with the approval of the court and the government, before the court alone.

Subsection (d) provides that no presentence report shall be prepared when a defendant is convicted of an offense where a death penalty sentencing hearing is to be held. Under the procedures set out in this bill, the jury, or if there is no jury, the judge, must decide the issue presented—the existence of aggravating and mitigating factors and the justifiability of imposition of the death penalty—based solely upon the information presented at the hearing. Therefore the use of a presentence report is not necessary.

The burden of establishing the existence of aggravating factors beyond a reasonable doubt is placed on the Government and may be met with any relevant information regardless of its admissibility under the rules of evidence applicable in a criminal trial. On the other hand, subsection (d) places the burden of establishing mitigating factors on the defendant. The burden may be met by the presentation of any relevant information without reference to the normal rules of evidence and only requires that the existence of a mitigating factor be established by a preponderance of the information. Information may be excluded from the hearing if the court finds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Information presented may include the trial transcript and exhibits, or relevant parts thereof, if the hearing is before a new judge or jury. Both the Government and the defendant are permitted to present rebuttal information and to present arguments as to the adequacy of the information and as to the appropriateness of a sentence of death in the case.

Subsection (e) provides that the sentencing decision shall be made on the basis of the information received during the sentencing hearing pursuant to subsection (c). The factfinder is required to return special findings identifying whether any mitigating factors or aggravating factors have been found to exist. The language changes made by the Committee amendments in the second and third sentences of the subsection were intended to have the effect of requiring the jury to unanimously agree that there existed at least one statutory aggravating factor set forth in subsections (h) or (i) (2) through (10), but not requiring unanimity with respect to any single factor. If there is no agreement that an aggravating factor exists, the court must impose a sentence, other than death, authorized by law.

The lengthy amendment adopted by the Committee at the end of subsection (e) in essence provides that, for treason and espionage offenses, if the jury agrees that at least one of the aggravating factors in subsection (h) exists, it must then by unanimous vote determine, in light of all the information, whether the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient so as to justify a sentence of death.

However, for homicide and related offenses, the jury must first unanimously agree that one of the four criteria set forth in subsection (i) (1) exist, i.e., that the defendant (1) intentionally killed the victim, (2) intentionally inflicted serious bodily injury which resulted in the death of the victim, (3) intentionally participated in an act which he knew or reasonably should have known would create a grave risk of death to a person, other than an accomplice, and the victim did die as a result of the act, or (4) attempted to kill the President of the United States, if the attempt actually caused bodily injury to the President or came dangerously close to killing the President. If the jury cannot unanimously agree that one of the four criteria of this factor is present, the court must impose a sentence, other than death, authorized by law.

If one of the four criteria for homicide in subsection (i) (1) is found to exist, the jury must find that at least one of the other aggravating factors in subsection (i) exists. If the jury agrees that at least one of the other aggravating factors exists, it must then by unanimous vote determine, in light of all the information, whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient so as to justify a sentence of death.

This complete subsection in effect instructs the jury and judge on the procedure to be followed, and then requires the return of a finding as to whether or not a sentence of death is justified.

This key subsection, in which the jury is asked to weigh the aggravating factors against the mitigating factors in light of all the information, is similar in concept to the Florida statute upheld in *Proffitt*. Some may argue, as did the petitioner in *Proffitt*, that "it is not possible to make a rational determination whether there are 'sufficient' aggravating circumstances . . .". But the Committee concurs in the Supreme Court response to that argument: [38]

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring

[38] *Proffitt* v. *Florida*, *supra* note 11, at 257–58.

examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given the judge and jury by this bill are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the jury's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual offense and individual defendant in deciding whether the death penalty is to be imposed, the essential constitutional elements set out in *Gregg* and its companion cases.[39]

Subsection (f) provides that if the jury, or the judge, returns a finding that the death penalty is justified, the court is then to impose a sentence of death, and that in all other cases the court shall impose a sentence, other than death, authorized by law. While, by virtue of this provision, the jury finding in effect determines whether the sentence shall be death, it remains the province of the court to impose sentence. The obligation of the judge here to rely upon the unanimous finding of the jury is similar to the Georgia procedure upheld in the *Gregg* case. After careful consideration the Committee chose this procedure over the Florida approach which would permit the judge to overrule the jury finding either in favor of or against a sentence of death.

Subsection (g) sets forth five statutory mitigating factors which are to be considered in determining whether to impose a sentence of death: The defendant was less than eighteen years of age at the time of the offense; the fact that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was significantly impaired, but not so impaired as to constitute a defense; the fact that he was under unusual and substantial duress, although not such duress as to constitute a defense; the fact that while he was an aider and abettor, or otherwise liable for the offense, his participation was relatively minor, although not so minor as to constitute a defense to the charge; or the fact that the defendant could not reasonably have foreseen that his conduct in the course of the commission of murder, or other offense resulting in death, would cause, or create a grave risk of causing, death to a person.

Subsection (h) states that if the defendant is found guilty of or pleads guilty to an offense under sections 794 (espionage) or 2381 (treason) of title 18, United States Code, the following statutory aggravating factors are to be considered in determining whether to impose a sentence of death: The defendant has been convicted of another offense involving espionage or treason for which a sentence of life imprisonment or death was authorized by statute; he knowingly created a grave risk of substantial danger to the national security; or he knowingly created a grave risk of death to another person.

The statutory aggravating factors set forth here and in the following subsection, (i), do not define the instances in which the death penalty is authorized. This authorization already exists in current law in the penalty provisions of the various capital offenses set out in the Code.

[39] See *Gregg* v. *Georgia, supra* note 10, at 188–96; *Proffitt* v. *Florida, supra* note 11 at 251–52, 257–58.

These factors simply specify those aggravated instance of capital offenses where the statute will permit a jury to determine whether the death penalty is justified. These factors only affect the statutory availability of the death penalty in that they provide a second minimum requirement (in addition to conviction for a capital offense) before the jury may even consider whether the death penalty is justified (see subsection (e)).

Subsection (i) lists the statutory aggravating factors to be considered where the defendant is found guilty of or pleads guilty to any other offense for which the death penalty is authorized, that is, murder, certain other serious offenses during the commission of which a death results, and an attempt to kill the President of the United States.

As noted in the discussion of subsection (e), the homicide aggravating factor subsection contains a threshold determination designed to prevent application of the death penalty to those defendants with slight culpable involvement in the resulting death. Thus, before the trier-of-fact may proceed to the next step toward the death penalty determination, it must conclude that one of the four criteria delineated in subsection (i)(1), discussed *supra*, exists. Only then would it proceed to consider the existence of the other aggravating factors listed in subsection (i)(2) through (10). The other aggravating circumstances are those where: (1) the death, or the injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission or the attempted commission of, one of several exceptionally serious dangerous crimes, i.e., escape from penal custody, espionage, serious explosive offenses, kidnapping, treason, and aircraft hijacking; (2) the defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute; (3) the defendant has previously been convicted of two or more offenses with a penalty of more than one year imprisonment, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person; (4) the defendant knowingly created a grave risk of death to one or more persons in addition to the victim of the offense; (5) he committed the offense in an especially heinous, cruel, or depraved manner; (6) he procured the commission of the offense by payment or promise of payment of anything of pecuniary value; (7) he committed the offense for pay; (8) he committed the offense after substantial planning and premeditation to cause the death of another person or commit an act of terrorism; or (9) he committed the offense against one of certain designated public officials.

Except for the requirement that at least one aggravating factor exist with respect to treason and espionage and at least the threshold factor in subsection (i)(1) and one other aggravating factor exist with respect to homicide offenses, these statutory aggravating and mitigating factors in subsections (g), (h), and (i) are not mechanically determinative of the sentence to be imposed, as such factors are under some statutory schemes. Their purpose here is to focus the jury's consideration on the circumstances of the crime and the char-

acter of the individual defendant; to give the jury guidance as to which factors are particularly relevant to the sentencing decision; to offer the jury some procedural structure for their deliberations; to give the trial judge some basis for determining the relevance of evidence sought to be presented at trial; and to provide the appellate court, through the requirement of special findings, some additional basis on which to review the legality of the sentence.

Subsection (j) provides that, in any sentencing hearing before a jury to impose the death penalty, the jury shall be instructed to not consider the race, color, national origin, creed, or sex of the defendant in determining whether the sentence of death is justified. The provision also requires each juror to certify that none of these factors were considered in reaching his or her decision. The Committee emphasizes that the delineation of these particular factors as inappropriate to be considered in determining an appropriate sentence does imply that the list is exhaustive. Obviously, for example, the race, color, and national origin, among other factors, of the victim would also constitute inappropriate bases for imposing a particular sentence.

Section 2 makes the bill's sentencing procedure applicable to violations of Chapter 2 of title 18 of the United States Code, dealing with aircraft and motor vehicles, where death results.

Section 3 reduces the scope of the availability of the death penalty for espionage. It retains death as an authorized sentence for peacetime espionage only where it concerns certain major military matters which directly affect the national defense.

Section 4 applies the bill's new sentencing procedure to section 844(d) of title 18 of the United States Code, dealing with the transportation of explosives in interstate commerce with the knowledge or intent that such explosives will be used to injure persons or property, where death results.

Section 5 applies the new sentencing procedure to section 844(f) of title 18 of the United States Code, dealing with the destruction of government or government-related property by use of explosives, where death results.

Section 6 applies the sentencing provision to section 844(i) of title 18, United States Code, dealing with the malicious destruction by explosives of property used in interstate commerce, where death results.

Section 7 applies the new sentencing procedure to the offense of murder in the first degree committed in the special maritime and territorial jurisdiction of the United States.

Section 8 would amend 18 U.S.C. 1116(a), which carries punishment as provided under 18 U.S.C. 1111, 1112, and 1113, to increase the maximum penalty for first degree murder of a foreign official or official guest while in the United States to include death, in order to make the penalty similar to the maximum penalty for the murder of a citizen, and makes applicable the bill's new sentencing procedure. This offense was created by the same post-*Furman* legislation discussed below.

Section 9 provides for the imposition of the death penalty where death results from an offense of kidnapping. The bill's sentencing procedure will apply in these cases. This is a change consistent with other felony-murder provisions in title 18. This offense had originally

contained a death penalty provision, but when the section was revised in other respects in 1972 (Public Law 92–539) the death penalty provision was dropped as superfluous, since the *Furman* decision had invalidated such provisions just a few months before.

Section 10 applies the new sentencing provisions to section 1716 of title 18, United States Code, dealing with the mailing of injurious articles, where death results.

Section 11 would for the first time provide the death penalty for an attempt to kill the President of the United States if the attempt results in bodily injury to the President or otherwise comes dangerously close to killing the President and applies the new sentencing provisions to this offense.

Section 12 applies the new sentencing provisions to section 1992 of title 18, United States Code, dealing with the wrecking of trains, where death results.

Section 13 eliminates the death penalty as an authorized punishment for rape within the special maritime and territorial jurisdiction of the United States.

Section 14 restricts the application of the penalty of death for violations of section 2113 of title 18, United States Code, concerning bank robbery and incidental crimes, to those cases where death results, and provides life imprisonment as the alternative penalty in such cases.

Section 15 applies the new sentencing procedure to aircraft piracy where death results from the commission or attempted commission of the offense.

Section 16 amends the analysis of chapter 227 of title 18 of the United States Code to include the new sentencing procedure for capital offenses.

Section 17 amends section 3566 of title 18, United States Code, dealing with the execution of the death sentence, to prohibit execution of the sentence upon a pregnant woman.

Section 18 provides for the addition of a new section 3742 to chapter 235 of title 18, United States Code, setting out the rules applicable to appeals from the imposition of the sentence of death. Under this section, a sentence of death imposed in accordance with section 3562A shall be subject to review by the court of appeals upon an appeal of the sentence by the defendant. Notice of appeal must be filed within the time prescribed under 28 U.S.C. 2107. This is done to permit the court of appeals to easily consolidate the sentence appeal and the appeal of the conviction. Explicit approval of such consolidation is provided. The review in capital cases is given priority over all other cases. In its review, the court of appeals must consider the entire record of the cases, the procedures employed in the sentencing hearing, and the findings as to the existence of the aggravating and mitigating factors. The court of appeals must affirm the sentence where it finds that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) the information supports the jury's or court's special findings. In all other cases the court is directed to remand the case for reconsideration under the provisions of section 3562A. Finally, the section requires a written statement by the court of appeals of the reasons for its disposition of the review of the sentence.

The standard of review on appeal is substantially similar to that used in the Georgia statute upheld in the *Gregg* case. It is considerably more rigorous than that upheld in *Proffitt*. It differs from the Georgia statute in that it does not contain a statutory requirement that the court of appeals compare this case to similar cases to determine whether the sentence under review is disproportionate. Such comparisons may not always be possible or meaningful. Disproportionality, however, is not excluded as an appropriate concern of the appellate court.

Section 19 amends the analysis of chapter 235 of title 18, United States Code, to include the new section providing for appeal from the sentence of death.

Section 20 provides that the special procedures for imposition of the death penalty, and for appellate review of that sentence, shall not apply to prosecutions under the Uniform Code of Military Justice.

The title of the introduced bill is amended to read: "A bill to establish constitutional procedures for the imposition of the sentence of death, and for other purposes."

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

* * * * * * *

Chapter 2.—AIRCRAFT AND MOTOR VEHICLES

* * * * * * *

§ 34. Penalty when death results

Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life [, if the jury shall in the discretion so direct, or, in the case of a plea of guilty, or a plea of a not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order].

* * * * * * *

Chapter 37.—ESPIONAGE AND CENSORSHIP

* * * * * * *

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval forces within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, *except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.*

* * * * * * *

Chapter 40.—IMPORTATION, MANUFACTURE, DISTRIBUTION AND STORAGE OF EXPLOSIVE MATERIALS

* * * * * * *

§ 844. Penalties

* * * * * * *

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

* * * * * * *

(f) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both; and if death results shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

* * * * * * *

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

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Chapter 51.—HOMICIDE

§ 1111. Murder

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(b) Within the special maritime and territorial jurisdiction of the United States,

[Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life] *Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;*

* * * * * * *

§ 1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title except that [any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and] any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

* * * * * * *

Chapter 55.—KIDNAPING

§ 1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101 (32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (32); or

(4) the person is a foreign official as defined in section 1116(b) or an official guest as defined in section 1116(c)(4) of this title,

shall be punished by imprisonment for any term of years or for life *and, if the death of any person results, shall be punished by death or life imprisonment.*

* * * * * * *

Chapter 84—PRESIDENTIAL ASSASSINATION, KIDNAPING, AND ASSAULT

§ 1751. Presidential assassination, kidnaping, and assault; penalties

[(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.]

(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if the conduct constitutes an attempt to kill the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President.

Chapter 83.—POSTAL SERVICE

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§ 1716. Injurious articles as nonmailable

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Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life [, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion, shall so order].

* * * * * * *

Chapter 97.—RAILROADS

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§ 1992. Wrecking trains

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Whoever is convicted of any such crime, which has resulted in the death of any person, shall be subject also to the death penalty or for imprisonment for life [, if the jury shall in its discretion so direct, as in the case of a plea of guilty, if the court in its discretion shall so order].

* * * * * * *

Chapter 99.—RAPE

§ 2031. Special maritime and territorial jurisdiction

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Whoever, within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer [death, or] imprisonment for any term of years or for life.

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Chapter 103.—ROBBERY AND BURGLARY

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§ 2113. Bank robbery and incidental crimes

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(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person shall be imprisoned not less than ten years, [or punished by death if the verdict of the jury shall so direct] *or if death results shall be punished by death or life imprisonment.*

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Chapter 227.—SENTENCE, JUDGMENT, AND EXECUTION

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Sec.

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3562A. Sentencing for capital offenses.

* * * * * * *

§ *3562A. Sentencing for capital offenses*

(a) HEARING REQUIRED.—A person shall be subject to the penalty of death for any offense against the United States only if a hearing is held in accordance with this section.

(b) NOTICE BY THE GOVERNMENT.—Whenever the government intends to seek the death penalty for an offense for which one of the sentences provided is death, the attorney for the government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice (1) that the government in the event of conviction will seek the sentence of death, and (2) setting forth the aggravating factor or factors which the government will seek to prove as the basis for the death penalty. The court may permit the attorney for the government to amend this notice for good cause shown.

(c) HEARING BEFORE COURT OR JURY.—When the attorney for the government has filed a notice as required under subsection (b) and the defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a seaprate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

(1) before the jury which determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if—

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury which determined the defendant's guilt has been discharged for good cause; or

(D) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the government.

A jury impaneled pursuant to paragraph (2) of this subsection shall consist of twelve members, unless at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than twelve.

(d) PROOF OF AGGRAVATING AND MITIGATING FACTORS.—Notwithstanding Rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to any matter relevant to the sentence and shall include matters relating to any of the aggravating or mitigating factors set forth in subsections (g), (h), and (i), or any other mitigating factor. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial. Any other information relevant to such mitigating or aggravating factors may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors, and as to the appropriateness in that case of imposing a sentence of death. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the information.

(e) RETURN OF FINDINGS.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying whether or not any mitigation factors or any aggravating factors set forth in subsection (g), (h), or (i) have been found to exist. A finding of such a factor by a jury shall be made by unanimous vote. If, in the case of an offense of treason or espionage, no aggravating factor set forth in subsection (h) is found to exist, or, in the case of any other offense, the aggravating factor set forth in subparagraph (i) (1) is not found to exist or the aggravating

factor set forth in subparagraph (i)(1) is found to exist but no other aggravating factor set forth in subsection (i) is found to exist, the court shall impose a sentence, other than death, authorized by law. If, in the case of an offense of espionage or treason, one or more of the aggravating factors set forth in subsection (h) is found to exist, or in the case of any other offense, the aggravating factor set forth in subparagraph (i)(1) and one or more of the other aggravating factors set forth in subsection (i) are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified.

(f) IMPOSITION OF SENTENCE.—Upon a finding that a sentence of death is justified, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law.

(g) MITIGATING FACTORS.—In determining whether a sentence of death is to be imposed on a defendant, the following mitigating factors shall be considered but are not exclusive:

(1) the defendant was less than eighteen years of age at the time of the crime;

(2) the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to the charge;

(3) the defendant was under unusual and substantial duress, although not such duress as constitutes a defense to the charge;

(4) the defendant is punishable as a principal (as defined in section 2(a) of this title) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to the charge;

(5) the defendant could not reasonably have foreseen that his conduct in the course of the commission of murder, or other offense resulting in death for which he was convicted, would cause, or would create a grave risk of causing, death to any person.

(h) AGGRAVATING FACTORS FOR TREASON AND ESPIONAGE.—If the defendant is found guilty of or pleads guilty an offense under section 794 or section 2381 of this title, the following aggravating factors shall be considered:

(1) the defendant has been convicted of another offense involving espionage or treason for which either a sentence of life imprisonment or death was authorized by statute;

(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security;

(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

(i) AGGRAVATING FACTORS FOR HOMICIDE.—If the defendant is found guilty of or pleads guilty to any other offense for which one of

the sentences provided is death, the following aggravating factors shall be considered:

(1) the defendant—

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally participated in an act which he knew or reasonably should have known would create a grave risk of death to a person, other than one of the participants in the offense, and the victim did die as a direct result of the act; or

(D) attempted to kill the President of the United States under circumstances provided in section 1751(c) of this title;

(2) the death or injury resulting in death occurred during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of government property by explosives), section 844(i) (destruction of property in interstate commerce by explosives), section 1201 (kidnaping), or section 2381 (treason) of this title, or section 902(i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(i), (n)) (aircraft piracy);

(3) the defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

(4) the defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committeed on different occasions, involveing the infliction of, or attempted infliction of, serious bodily injury upon another person;

(5) in the commission of the offense the defendant knowingly created a grave risk of death to one or more persons in addition to the victim of the offense;

(6) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

(7) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

(8) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;

(9) the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism;

(10) the defendant committeed the offense against—

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice-President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President

of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A) of this title, if he is in the United States because of his official duties; or

(D) a federal judge, a federal law-enforcement officer, or an employee of a United States penal or correctional institution, while performing his official duties or because of his status as a public servant. For purposes of this subsection, a "law-enforcement officer" is a public servant authorized by law or by a government agency or Congress to conduct or engage in the prevention, investigation, or prosecution of an offense.

(j) INSTRUCTION TO JURY ON RIGHT OF THE DEFENDANT TO JUSTICE WITHOUT DISCRIMINATION.—In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, national origin, creed, or sex of the defendant. The jury shall return to the court a certificate signed by each juror that consideration of race, color, national origin, creed, or sex of the defendant was not involved in reaching his or her individual decision.

* * * * * * *

§ 3566. Execution of death sentence

The manner of inflicting the punishment of death shall be that prescribed by the laws of the place within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available local facilities and the services of an appropriate local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the place within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other place in which such sentence shall be executed in the manner prescribed by the laws thereof.

In no event shall a sentence of death be carried out upon a pregnant woman.

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Chapter 235.—APPEAL

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3742. Appeal from sentence of death.

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§ 3742 *Appeal from sentence of death*

In any case in which the sentence of death is imposed under section 3562A of this title, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of title 28 of the United States Code. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under section 3562A(e) of this title.

The court shall affirm the sentence if it determines that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) the information supports the special finding of the existence of any aggravating factor, or the failure to find any mitigating factors as set forth or allowed in section 3562A. In all other cases the court shall remand the case for reconsideration under section 3562A of this title. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

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Federal Aviation Act of 1958

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§ 903. Venue and prosecution of offenses; procedures in respect of civil and aircraft piracy penalties

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[PROCEDURE IN RESPECT OF PENALTY FOR AIRCRAFT PIRACY

[(c)(1) A person shall be subjected to the penalty of death for any offense prohibited by section 902(i) or 902(n) of this Act only if a hearing is held in accordance with this subsection.

[(2) When a defendant is found guilty of or pleads guilty to an offense under section 902(i) or 902(n) of this Act for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraph (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government s tipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists. The hearings shall be conducted—

[(A) before the jury which determined the defendant's guilt;

[(B) before a jury impaneled for the purpose of the hearing if—

[(i) the defendant was convicted upon a plea of guilty;

[(ii) the defendant was convicted after a trial before the court sitting without a jury; or

[(iii) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

[(C) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

[(3) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonexistence of the factors set forth in paragraph (6) or (7). Any information relevant to any of the mitigating factors set forth in paragraph (6) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in paragraph (7) shall be governed by the rules governing the admission of evidence at criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in paragraph (6) or (7). The burden of establishing the existence of any of the factors set forth in paragraph (7) is on the Government. The burden of establishing the existence of any of the factors set forth in paragraph (6) is on the defendant.

[(4) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in paragraphs (6) and as to the existence or nonexistence of each of the factors set forth in paragraph (7).

[(5) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in paragraph (7) exists and that none of the factors set forth in paragraph (6) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in paragraph (7) exists, or finds that one or more of the mitigating factors set forth in paragraph (6) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

[(6) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that at the time of the offense—

[(A) he was under the age of eighteen;

[(B) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

[(C) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

[(D) he was a principal (as defined in section 2(a) of title 18 of the United States Code) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

[(E) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

[(7) If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that—

[(A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or

[(B) the death of another person resulted from the commission or attempted commission of the offense, and—

[(i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a sentence of life imprisonment or death was imposable;

[(ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of seriously bodily injury upon another person;

[(iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or

[(iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner.]

* * * * * * *

COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., June 17, 1981.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 114, a bill to reestablish constitutional procedures for the imposition of the sentence of death, and for other purposes, as ordered reported by the Committee on the Judiciary, June 9, 1981.

The enactment of this bill would require that when a defendant is found guilty of an offense for which one of the possible sentences is death, and the death penalty is sought by the government, the presiding judge shall conduct a separate sentencing hearing to determine the punishment to be imposed. The sentencing hearing will require the holding over of jurors, or the impaneling of a jury, which will result in the payment of additional jurors' fees by the government. However, in view of the limited number of cases affected by this provision, the total direct costs incurred by the government are not likely to be significant.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

Vote of the Committee

In Executive Session of the Committee on June 9, 1981, S. 114, with amendments and an amendment to the title, was ordered favorably reported to the Senate by a vote of 13 yeas to 5 nays, as follows:

YEAS	NAYS
Laxalt	Mathias
Hatch	Biden
Dole	Kennedy
Simpson	Metzenbaum
East	Leahy
Grassley	
Denton	
Specter	
Byrd	
DeConcini	
Baucus	
Heflin	
Thurmond	

Regulatory Impact Statement

In compliance with paragraph 5, Rule XXIX of the Standing Rules of the Senate, the Committee states that it has concluded that the bill will have no regulatory impact.

MINORITY VIEWS OF SENATOR EDWARD M. KENNEDY AND SENATOR PATRICK J. LEAHY ON S. 114, THE DEATH PENALTY BILL

The unchecked growth of violent crime in America has become a source of fear and alarm for all our people. One out of every three households in the United States is touched by serious crime. In the last three years, the rate of increase in violent crime has literally doubled, with last year's 13 percent increase the largest jump in a dozen years.

We all share a deep concern about these grim statistics for they do not tell the whole story of the suffering and anguish of the victims of violence crime. In Atlanta, we have witnessed the brutal murder of 28 black children. In Washington, we have witnessed the attempt on the life of the President of the United States. In Italy, we witnessed the attempt on the life of the Pope. And we witness daily the continuing toll of violence in every neighborhood of every city and every suburb of America.

However, we do not believe that the solution to the violent crime problem rests with the death penalty. We believe that it is wrong in principle, as a matter of public policy, and as a matter of constitutional law. Although proponents of the measure argue that it will decrease violent crime, we believe that it is a placebo which will divert public attention and resources away from those measures which have a chance of reducing the crime rate. Moreover, we believe that there is alternative legislation, such as Senator Leahy's proposal for a mandatory life sentence without parole, for certain violent crimes, that would deter crime more effectively than the death penalty.

I. THE DEATH PENALTY IS WRONG AS A MATTER OF PUBLIC POLICY

A strong case can be made against the death penalty as a matter of public policy.

First, capital punishment places incredible strains on our criminal justice system, far outweighing any marginal benefit that arguably is gained. The death penalty in our society is so controversial that it inevitably will be accompanied by the spectacle of shuffling a human being back and forth between death row and temporary reprive during months, and even years of delay while the appellate courts grapple with the enormity and irreversibility of the penalty and its implications for a nation espousing a reverence for human life. It is a divisive penalty that expends emotions and resources out of all proportion to any impact it could possibly have on the real problem of violent crime in the United States.

Second, support of capital punishment is a quick, shorthand method for appearing to be tough on crime. But an analysis of recent criminal justice statistics and crime rates demonstrates convincingly the fallacy

that capital punishment can reduce the nation's soaring violent crime rate. It is a substitute—an ineffective, impractical substitute—for the specific, modest, concrete steps that can be taken now to lower the crime rate.

There is no evidence to support the contentions of the proponents of the death penalty that it will be a deterrent to violent crime. Even the Justice Department, in its testimony to the Committee this year, admitted that "there is no clear evidence to show that the death penalty has any deterrent effect; . . . [W]hile sociological studies have reached differing conclusions, common sense tells us that the death penalty does operate as an effective deterrent for some crimes involving pre-meditation and calculation." This appeal to "common sense" obscures the real issue. No one disputes that capital punishment has some deterrent effect. Presumptively all penalties do.

That is not the question. The point is whether it has a sufficiently greater deterrent effect than life imprisonment—particularly life imprisonment without parole. If not, how do we justify imposing the ultimate penalty with its risks of irreversible injustice and its other costs to society?

With rare unanimity, the studies show no higher criminal homicide rates in states without the death penalty than in those which retain it. There is no indication that the death penalty, as imposed in various states, affects the rate of criminal homicide. It certainly does not affect the rate of violent crime, as it is targeted at only one percent of all violent crimes.

We believe that if the goal of the death penalty is deterrence, legislation imposing a mandatory life sentence without parole will more effectively accomplish that goal without imposing the social costs of the death penalty.

The other goals of the death sentence, incapacitation of the defendant and retribution, are achieved very well under Senator Leahy's proposal for a real life sentence. The prospect of life without freedom is a chilling and haunting one. It is devastating retribution.

Third, this legislation does little to alleviate the fears of the American people caused by the increase in the number of robberies, muggings, burglaries and assaults. It is these crimes that the American people fear most. Whether or not one can be electrocuted for committing treason or espionage or attempting to assassinate a President is largely irrelevant to the problem of street crime in America. Instead, we should be looking at other solutions.

A sentence of life imprisonment without the possibility of parole will be a more certain means of allaying these fears than the death penalty. Presently, most of those who might otherwise be sentenced to death are sentenced to life imprisonment because of the absence of a constitutional capital punishment statute. Since there is no distinction between these defendants and those who would never have been considered for the death penalty, they are all eligible for parole under the same rules.

The problem could be adequately dealt with if we substituted a mandatory life sentence for the death penalty in cases of murder and heinous crimes. A real life sentence which is successfully imposed and upheld by the courts will be a far more successful deterrent than

a death penalty whose effectiveness will inevitably depend on chance and circumstance.

Other steps can and must be taken to reduce the rate of violent crime. We should try to improve our sentencing system to make it fairer and less discretionary. We should reform our bail laws so that judges can take danger to the community into account. We should deal more strictly and effectively with violent juveniles. We should launch a full scale attack on the problem of drug trafficking and addiction, which is the root of so much violent crime. Finally, we should re-institute a Federal crime program to help states and localities implement programs designed to get the criminal offender off the streets.

Fourth, imposition of the death penalty leaves no room for mistakes. No matter how well qualified the trial judges and well intentioned the juries, the criminal system is run by people, and people make mistakes. No matter what procedures are used to determine the appropriate cases for the ultimate penalty of capital punishment, innocent persons will be condemned to die.

The response to this argument has been essentially that such risks are inevitable in our society. Possibly, this would be a convincing argument if the death penalty were the only option, if society's stability depended on the death penalty, as national security depends on a strong national defense. But the argument is self-serving. There has never been a demonstration that the death penalty is effective in reducing crime. Indeed, there is much evidence to the contrary. Since there are clear alternatives to the death penalty, this argument fails utterly.

Fifth, those who have been sentenced to death overwhelmingly come from the poor and minorities. Racial hostility and anxiety concerning personal safety are tragically intertwined in the United States. Other prejudices abound. As one study concluded:

> In the first five years after the *Furman* decision, racial differences in the administration of capital statutes have been extreme in magnitude, similar across states and under different statutory forms, pervasive over successive stages of the judicial process and uncorrected by appellate review . . . [D]ifferential treatment by race of offender and victim has been shown to persist post-*Furman* to a degree comparable in magnitude and pattern to the pre-*Furman* period. Bowers & Pierce, "Arbitrariness and Discrimination Under Post-Furman Statutes," *Capital Punishment in the United States*, 629 (1980).

This discriminatory impact of the death penalty has not been definitively adjudicated by the Supreme Court, although many justices have acknowledged the powerful evidence for its existence. See e.g. concurring opinions of Justice Douglas and Justice Marshall in *Furman* v. *Georgia*, 408 U.S. 238 (1972). One leading student of this problem, however, has concluded that the present evidence strongly indicates that the death penalty has been imposed with a patterned, systematic racial bias, unexplainable either by statistical chance or any statutory or other legally acceptable basis. Wolfgang and Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 Annals of the Amer. Academy of Pol. and Soc. Science 119–113

(1973). Of course, the possibility of discriminatory application increases with the amount of discretion given the court or jury to impose or withhold the death penalty. But under any save a completely mandatory law, the requirement of jury findings on specific factual issues gives substantial scope to the possibilities of discrimination.

During the debate on the death penalty, several Senators conceded the disproportionate impact of the death penalty on minorities. An amendment, suggested by Senator Heflin, requires judges to instruct juries not to consider race, color, national origin, creed or sex as a ground for imposing the death penalty. While this amendment serves the important purpose of sensitizing juries, we do not feel it is sufficient to deal with the discrimination problem.

Since the Supreme Court ruled in 1976 that the Georgia death penalty statute was constitutional, only one person has been involuntarily executed. This record is not sufficient to conclude that the legislative scheme proposed by *Gregg* v. *Georgia*, 428 U.S. 153 (1976), will result in any less discrimination than before.

In sum, we believe that in light of all the serious problems posed by the death penalty, it should not be enacted without some significant demonstration that it will deter violent crime more effectively than other punishment, such as mandatory life sentences. No such demonstration has been made.

II. THE DEATH PENALTY IS WRONG IN PRINCIPLE

The death penalty is the harshest punishment which can be inflicted. In our view, it is wrong in principle. Senator Kennedy expressed this view in recommending clemency in the Sirhan case in 1969:

> My brother was a man of love and sentiment and compassion. He would not have wanted his death to be a cause for the taking of another life.

We believe that the act of premeditated execution is itself a debasing denial of the sanctity of life. This is aggravated by the fact that executions today still involve such barbaric suffering that as a matter of public policy, they are conducted in private. The late Senator Philip Hart, in opposing the death penalty in 1974, eloquently explained his concern about the brutality of the death penalty:

> As for the brutalizing effect of the death penalty, abolitionists are often accused of holding a double standard—concern for the sanctity of life when it comes to convicted murderers, but no equal reverence for the lives of the innocent victims. Such attacks are unfair. There is a valid distinction between killing when there is a clear and present danger than one would otherwise become an innocent victim and society's right to punish criminals after the fact of their offense. If executions could bring back to life the innocent victims of criminal murder, or if the prospective victim can save his own life at the cost of killing his attacker, all people except the absolute pacifist would value the innocent life over the life of the murderer. But those are not the kinds of choices we face in passing death penalty statutes unless it is shown that they will protect innocent lives effectively when other punishments will not.

(See the additional views of Senator Philip Hart (Michigan) in the Committee Report to accompany S. 1401, S. Rept. No. 93-721, 93d Congress, 1st session 46 (1974).)

III. THIS DEATH PENALTY LEGISLATION MAY WELL BE UNCONSTITUTIONAL

Having stated briefly some of the reasons underlying our position that a federal capital punishment bill should not be enacted, we wish to express opposition to a number of particularly troublesome features of S. 114 as reported.

First, although treason and espionage have historically been regarded as offenses for which the death penalty may be imposed, the Supreme Court decision in *Coker* v. *Georgia*, 433 U.S. 584 (1977) creates serious doubt as to the constitutionality of the provisions of this bill permitting the imposition of the death penalty for crimes where death does not result. The Court in *Coker* held that the death penalty could not be imposed for a rape in which death did not result. The rationale of that case is equally applicable to treason, espionage, and attempted assassinations of the President—all crimes where death does not result.

Second, we do not believe that there should be any place in a federal capital punishment statute for determination of facts bearing on the imposition of the death penalty by a majority vote of the jury. An amendment proposed by Senator Hatch and adopted by the Committee permits a jury to disagree as to which aggravating factor they have relied on, so long as all jurors agree that some aggravating factor is present. Under this amendment, the death penalty may be imposed even though a majority of the jurors could not agree on any aggravating factor. As the Justice Department in its comments on S. 114 said, serious constitutional questions are raised unless there is a requirement "that a jury's findings as to the existence of any aggravating factor be unanimous" (emphasis added).

Third, we are concerned about another Committee amendment which cuts back on the standard of appellate review of the imposition of the death penalty. Under the legislation as introduced, the trial judge must affirm the sentence if he makes three determinations. This amendment strikes the third determination—"that the sentence of death is not excessive, considering both the crime and the defendant." We believe that this amendment eliminates a constitutionally mandated requirement. Under the Supreme Court decision in *Coker* v. *Georgia*, 433 U.S. 584 (1977), an appellate court must look at the death penalty sentence to determine whether it is out of proportion to the severity of the crime. This amendment eliminated determination by the trial judges, provided by the original legislation, which was designed to meet the constitutional requirement that the appellate court must review each sentence to ensure that it is not disproportionate to other sentences in similar circumstances.

In conclusion, we believe that capital punishment is wrong in principle, wrong as public policy, and wrong as reported out of Committee. The majority has not made a persuasive case that the death penalty will deter violent crime or will meet the constitutional requirements of due process of law and equal protection of the laws.

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