

Issues of

**CONSISTENCY**

in the Federal Death Penalty

A Roundtable Discussion  
on the Role of the U.S. Attorney

Robin Campbell, Writer

vera

INSTITUTE

of

JUSTICE



# Issues of

# CONSISTENCY

## in the Federal Death Penalty

A Roundtable Discussion  
on the Role of the U.S. Attorney

## Contents

- 2 Participants
- 3 Consistency: is it attainable?
- 5 Who prosecutes death penalty-eligible cases?
- 9 Deciding to seek the death penalty—or not
- 11 U.S. Attorneys and the Justice Department
- 13 Questions of racial/ethnic disparity
- 16 Final thoughts
- 19 Death penalty offenses

# Roundtable Participants\*

and the years they served as U.S. Attorneys

**Kent B. Alexander**

Northern District, Georgia; 1994–1997  
Senior Vice President and General Counsel, Emory University

**Zachary Carter**

Eastern District, New York; 1993–1999  
Partner, Dorsey & Whitney LLP

**Michael H. Dettmer**

Western District, Michigan; 1994–2001  
Counsel, Parsons Ringsmuth PLC

**Edward L. Dowd, Jr.**

Eastern District, Missouri; 1993–2000  
Partner, Bryan Cave LLP

**J. Don Foster**

Southern District, Alabama; 1994–2000  
Trial Lawyer, Jackson, Foster and Graham, LLC

**Walter C. Holton, Jr.**

Middle District, North Carolina; 1994–2001  
Private Practice, Grace, Holton, Tisdale & Clifton

**Gaynelle Griffin Jones**

Southern District, Texas; 1993–1997  
Senior Counsel, Compaq Computer Corp.

**Loretta Lynch**

Eastern District, New York; 1999–2001  
Litigation Partner, Hogan & Hartson, LLP

**Thomas Monaghan**

District of Nebraska; 1993–2001  
The Monaghan Group

**Katrina Pflaumer**

Western District, Washington State; 1993–2001  
Limited private practice; active in environmental and social justice issues

**Stephen C. Robinson**

District of Connecticut; 1998–2001  
Senior Research Fellow, Yale Law School

\*The Vera Institute solicited suggestions for roundtable participants from people familiar with the U.S. Attorneys who served between 1995 and 2000. This group was selected for its geographic diversity and diversity of views on the federal death penalty.

# 1

## Consistency: is it attainable?

On September 12, 2000, in the closing months of the Clinton administration, Attorney General Janet Reno released a statistical survey of the federal death penalty system showing that, between 1995 and 2000, 80 percent of defendants facing charges punishable by the federal death penalty, and more than 72 percent of those for whom the penalty was sought, were minorities, predominantly African-American or Hispanic.<sup>1</sup> “Sorely troubled” by the implication that the system might be operating unfairly, she called upon U.S. Attorneys to examine how their decisions might contribute to the disparity, saying, “We must do all we can in the federal government to root out bias at every step.”<sup>2</sup> Upon the release of a follow-up report in June 2001, Attorney General John Ashcroft expressed a similar commitment to the “high standards of fairness that are required in charging, trying, and sentencing those accused of federal death-eligible murders.”<sup>3</sup>

U.S. Attorneys have primary responsibility for initiating and prosecuting federal death penalty cases in each of 94 districts across the United States and its territories. To learn how their actions bear upon the concerns of the Attorneys General, the Vera Institute of Justice invited a group of former U.S. Attorneys who served during the survey period to participate in a roundtable discussion of the issues they confronted in deciding to seek the death penalty and the influence, if any, their decision-making process had on the racial and ethnic composition of those within the federal death penalty system.

In the ensuing discussion at Vera’s New York office, none of the participants indicated that they believed an overt bias against minorities was responsible for the racial imbalance.<sup>4</sup> In fact, the only bias the participants did recognize was a measure of self-conscious decision-making in reaction to the evident numerical imbalance, or as Zachary Carter, the former prosecutor from the Eastern District of New York, put it, an “unconscious and unavoidable pressure” to achieve racial parity.

The former prosecutors attributed the source of the racial imbalance, instead, to a different, but related question: whether the Justice Department had succeeded in its efforts to see the laws applied consistently across the country, a requirement of the 1972 Supreme Court ruling in *Furman v. Georgia* that death penalties be imposed “fairly, and with reasonable consistency, or not at all.”<sup>5</sup>

Did the U.S. Attorneys’ decision-making process influence the racial and ethnic makeup of those in the federal death penalty system?

[1] U.S. Department of Justice. *The Federal Death Penalty System, A Statistical Survey (1988-2000)*. Washington, D.C., 2000.

[2] Lacey, Marc and Raymond Bonner, “Reno Troubled by Death Penalty Statistics.” *The New York Times*, 13 September 2000, sec. A, p. 17.

[3] U.S. Department of Justice. *Hearing before the Committee on the Judiciary, House of Representatives, 107th Congress, First Session*, June 6, 2001.

[4] This was also the opinion of a second Department of Justice survey, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (June 6, 2001), which was released under Attorney General John Ashcroft and concluded that “the cause of this disproportion is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases.”

[5] *Callins v. Collins*, 93-7054 (1994), Dissenting Opinion of Justice Harry Blackmun.

“We are all theoretically applying the same set of rules and trying to apply those rules in a way that is fair and just, but coming out with wildly disparate recommendations and solutions to the problem.”



STEPHEN ROBINSON

In early 1995, soon after the federal death penalty laws were expanded to include more than 40 new crimes, Attorney General Reno established a protocol that was intended to ensure that federal death penalty-eligible crimes elicited a similar response whether they were committed in Harlem or Hollywood, or anywhere in between. But the same survey that documented the racial imbalance cast doubt upon the protocol's effectiveness by showing that cases were unevenly distributed across the country. Of the 183 instances in which U.S. Attorneys sought permission from the Justice Department to seek the death penalty from 1995 to 2000, it reported that 25 came from Virginia, 14 from both Texas and New York, and only eight from the nation's most populous state, California. Meanwhile, 40 districts made no death penalty recommendations.

The roundtable participants reached a similar conclusion by drawing on their own experiences. “We are all theoretically applying the same set of rules and trying to apply those rules in a way that is fair and just, but coming out with wildly disparate recommendations and solutions to the problem,” said Stephen Robinson, the former U.S. Attorney from Connecticut, who noted “a huge disparity across the country.” Said Kate Pflaumer of Washington State's Western District, “There is not a consistent standard between the county I live in and the next county, so how on earth could this happen across the country?”

The participants cited a number of factors that account for differing responses to similar offenses. In some jurisdictions, for example, the peculiarities of the local legal structure thrust capital punishment cases onto the federal docket. In other circumstances, something as idiosyncratic as the U.S. Attorney's personal bias against the death penalty could keep cases at bay. Moreover, the influence these factors exerted was not always constant. “You can say you want consistency and you can even outline standards, but the weight you give to the various things that you rely upon [in deciding to seek the death penalty] is going to be different from district to district,” observed Loretta Lynch, who succeeded Carter in New York's Eastern District.

In detailing these distinctions over the course of the discussion, the former prosecutors shed light on the ways in which inconsistent application of the death penalty affected the racial and ethnic makeup of the defendant population. If any consensus was found, it was that Congress had delivered the courts a difficult, if not impossible, challenge when it expanded the federal death penalty in 1994 to include a plethora of new crimes—particularly drug- and gang-related homicides in which arrests occur disproportionately in minority communities. Reminding his colleagues that such offenses were traditionally handled by states while the federal death penalty was reserved for narrower offenses like treason, Walter Holton, who served in North Carolina's

Middle District, said, “I don’t think our system ever designed or contemplated uniformity. I think there is a reason there were 13 U.S. Attorneys originally, a reason there are 94 now.” Characterizing the expanded federal penalty as “a political tool for Congress to stand up and look strong,” Holton seemed to speak for many of the former prosecutors when he asserted that the true source of the racial imbalance lay not in the federal death penalty process, but in the laws themselves.

# 2

## Who prosecutes death penalty-eligible cases?

In Michigan, a state without a death penalty since 1846, there was virtually no experience with capital crime prosecution to draw upon in 1994 when broad national death penalties were instated. Soon after the law went into effect the criminal division supervisor on Michael Dettmer’s Western District staff prematurely approved the charging of a defendant with a federal death penalty crime based only on circumstantial evidence, to then discover that they had the wrong person. “It really brought home to me that the U.S. Attorney has a major gatekeeping responsibility for the cases that come in the office,” said Dettmer, who afterwards carefully scrutinized the judgments of his career prosecutors in all death penalty-eligible cases.

As gatekeepers, U.S. Attorneys must decide which cases among the body of federal death penalty-eligible offenses they will pursue. Most of these offenses are homicides that before 1994 would have been prosecuted in state courts. As no reliable mechanism exists to bring every murder to the U.S. Attorneys’ attention, their first task as gatekeepers is to find the cases that they might prosecute. This is not always easy, as Kent Alexander, formerly of Georgia’s Northern District, found. “There are so many homicides in the Atlanta area,” he recalled, “there was no way we could keep up with them on a case by case basis.”

The cases federal prosecutors do learn about (and, by extension, those they prosecute) reach them through an ad hoc network of institutions and players. Sometimes this network pushes cases toward the federal docket. Simple



THOMAS MONAGHAN

# Studies of Racial Bias in the Federal Death Penalty

Concern about racial bias in the application of federal capital punishment laws has yielded a yet-to-be completed series of studies.

A statistical study released by the Justice Department on September 12, 2000, near the end of the Clinton administration, showed that from January 27, 1995, to July 20, 2000, U.S. Attorneys submitted 682 capital-eligible cases to the Justice Department in Washington for review. Of the defendants in these cases, 548 (or 80 percent) were black, Hispanic, or another racial minority. Following the review process, the Justice Department approved seeking the death penalty in 159 cases; 115 (or 72 percent) of these defendants were black, Hispanic or another racial minority.

The scale of this racial imbalance concerned Attorney General Janet Reno. She told a Senate hearing that more information was needed to understand how homicide cases make their way into and through the federal system and to determine if bias plays any role in death penalty cases. Accordingly, she instructed the National Institute of Justice (NIJ) to solicit research proposals from outside experts to answer these questions.

During his own confirmation hearings before the Senate, the next Attorney General, John Ashcroft, promised to follow through with the called-for studies. Under his leadership, the Justice Department released a second report on June 6, 2001.

The second report expanded the universe of cases to 973 by including those "in which the facts would have supported a capital charge, but which were not charged as capital crimes." According to the department, this report "produced no evidence of bias against racial and ethnic minorities." Still, the Justice Department concluded that changes could be made to existing federal death penalty procedures to promote public confidence in the fairness of the process and to improve its efficiency, specifically requiring U.S. Attorneys to submit a broader range of cases for review in Washington. NIJ has since called for further study of the broad pool of homicide cases from which federal capital-eligible cases are drawn.



examples are the “dogs”—cases that are old or difficult to try—that local prosecutors occasionally try to pass off to federal officers. Less often, the network may pull cases away. One participant told of an elected local prosecutor who maneuvered to keep a murder case that could have gone to the federal court because she believed that prosecuting it herself would advance her political career. Understanding and learning to manage the opposing push and pull of this network lets U.S. Attorneys better control the number and kind of cases they prosecute.

The most significant factor pushing cases toward the federal docket is the existence of a federal interest in the case. This interest is unequivocal in the small percentage of crimes that have always been reserved for federal courts: treason, local corruption, murder committed on federal property, etc. The bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City is a prominent example.

Far more cases reach U.S. Attorneys’ desks because federal law enforcement agencies are investigating the crime. As a result of a change initiated by Attorney General Reno, since 1994 the Federal Bureau of Investigation and the Drug Enforcement Agency have become increasingly involved in local law enforcement efforts. Communities that are struggling with a continuing crime problem—usually organized crime or gang activities—frequently ask for federal assistance because they want access to investigative and prosecutorial options they don’t have themselves. As Loretta Lynch explained, “[Local law enforcement people] will present a case to the bureau or to the U.S. Attorney’s office and say, ‘We have been working on this investigation for a long time. We don’t think we can make it. We think you can make it because your grand jury rules are better, your accomplice rules are better, or it is better as a RICO [Racketeer Influenced and Corrupt Organizations].’” At other times, investigations are conceived and initiated by joint state and federal task forces. Regardless of how federal agencies become involved, whenever a federal death penalty-eligible offense is identified, the U.S. Attorney must decide whether or not to prosecute it.

In some parts of the country, cases may be pushed toward federal courts by defense attorneys when it serves their clients’ interests, participants said. Defense attorneys in states like New York have little influence over where a case is tried. But in some Georgia counties, according to Kent Alexander, they might “push” for the federal prosecutor to take a case because they believe “the chance of a death penalty is less with a Presidentially appointed U.S. Attorney than with an elected district attorney.” Local prosecutors in Georgia and other death penalty states usually have more experience seeking the sanction than U.S. Attorneys, and, because capital punishment is often popular with the public, elected judges may be more comfortable granting it. Fed-

Defense attorneys in Georgia might “push” a case to the federal system because they believe “the chance of a death penalty is less with a Presidentially appointed U.S. Attorney than with an elected district attorney.”



KENT ALEXANDER

“The U.S. Attorney has a major gatekeeping responsibility for the cases that come into the office.”



MICHAEL DETTMER

eral courts also typically invite more scrutiny and have more rigorous death penalty review procedures. As J. Don Foster, of Alabama’s Southern District, noted, Alabama state courts do not require a jury to be unanimous to grant the death penalty—and whatever the jury’s decision, the judge may unilaterally override it.

Not all cases sent to the U.S. Attorneys belong there. In states with no death penalty, local authorities have been known to push cases toward federal prosecutors simply because they want access to the federal death penalty itself. Yet several participants said that simply acquiescing to law enforcement

wishes constitutes a lapse in the federal prosecutor’s responsibility. “Cops

like to have cases with longer sentences and no parole and all of that,”

noted Thomas Monaghan, the former U.S. Attorney in Nebraska.

“While some of that is okay, I think too many prosecutors...don’t take a strong enough view of what is going on in their district. They don’t do the strategic planning appropriately and they end up letting the cops make the decision or the penalty drive the case.” Said J. Don Foster: “Until you have been able to stand up to an FBI agent who wants you to prosecute somebody, you really haven’t matured as a U.S. Attorney.”

Several of the former federal prosecutors found that the best way to manage the case inflow was to communicate their priorities to the players in the ad hoc network. “We would sit down with the [local] prosecutor’s office and talk about the cases we would take,” said Gaynelle Griffin Jones, of the Southern District in Texas. Lynch spoke of talking with the heads of the federal agencies and “letting them disseminate down to their troops: ‘Loretta wants [to focus on] organizations, she wants high-level drug trafficking, she wants RICO.’” When Edward Dowd became U.S. Attorney for the Eastern District of Missouri, St. Louis’ police, prosecutors, and courts were struggling against one of the highest murder rates in the country. After meeting with local police and state justice officials, he agreed to help out by handling violent crime cases in his office, an arrangement that yielded two death penalty-eligible carjacking cases.

Becoming an active gatekeeper, some of the former prosecutors found, indirectly influenced the racial composition of the federal death penalty defendant population. When Stephen Robinson focused his Connecticut office on federal-state task force investigations of drug gangs, for example, all of the defendants were African-Americans and Latinos from minority communities in Hartford, Bridgeport, and New Haven. Robinson knew he could have pursued crimes that would have yielded non-minority offenders—convenience store hold-ups involving murder, for example—but that was not where he felt he could have the greatest impact. He also knew that because of his decision, non-minority defendants “generally were just not going to come in the door.”

# 3

## Deciding to seek the death penalty—or not

Beginning in 1995, U.S. Attorneys were required to send Washington a review of every capital punishment-eligible case that entered their office, along with an explanation of their rationale for seeking or not seeking the death penalty. The Attorney General could challenge—even overrule—the regional prosecutors’ recommendations. Yet it is worth noting that in cases where the Attorney General overruled the U.S. Attorney and required the seeking of the death penalty, no death sentences were ever imposed in court.<sup>6</sup>

As in Washington, consistency was an overriding concern in the districts. “We knew that the decision we made today to recommend or not recommend was going to be an anchor around which other decisions would revolve,” explained Zachary Carter. And just as various factors push and pull cases toward and away from the federal system, so, too, do forces push and pull cases that enter the system toward or away from the death penalty itself. To ensure that these factors received full consideration, many of the former prosecutors established procedures within their offices to examine death penalty-eligible cases.

These procedures frequently included committees charged with making recommendations to the U.S. Attorney. Much thought was given to the composition of these committees. For example, noting that it might “skew the decision-making to have only pro-death penalty people in the discussion,” Carter included non-voting participants who opposed the penalty as a matter of principle. “A person who was predisposed against [the death penalty] might be the best advocate on the mitigating issues part of the discussion,” he explained. Michael Dettmer, although he himself is opposed to the death penalty, wasn’t concerned about the individual philosophical beliefs of his committee members. He did insist, however, that the membership comprise not only civil and criminal attorneys but also a cross section of his entire office staff, including secretarial and administrative employees.

Perhaps the most obvious variable was the U.S. Attorney’s own attitude toward the death penalty. Stephen Robinson made this point, acknowledging that he personally found the sanction “morally indefensible.” “That colors everything that then happens in my office with respect to the process,” he said.



WALTER HOLTON

[6] Some of these cases resulted in plea bargains that led to life sentences.

Robinson intentionally counterbalanced his bias by appointing a committee that “believed in the death penalty and was capable of voting for it in appropriate cases.” Nonetheless, there were no death penalty recommendations from Connecticut during his tenure.

For many, the quality and quantity of proof was also an issue. Some reported setting higher than usual standards for death penalty cases, a position that tended to pull cases away from the sanction. “You have to be certain, absolutely certain, that the people you are going to try to execute did what you are accusing them of and that you can prove it,” said Edward Dowd. Not satisfied with convincing the jury beyond a reasonable doubt, Carter aspired to “mathematical certainty” of a defendant’s guilt before he would seek the death penalty.

In practice, such standards often meant passing up the death penalty in cases where it might otherwise have been sought. For example, organized crime cases were common in Carter’s

New York office, and his staff had become skilled in winning them using testimony of accomplice witnesses. He noted, however, that accomplices, usually cooperating in exchange for lighter sentences themselves, may perceive an advantage in embellishing their testimony, sometimes on issues directly bearing on the appropriateness of a death sentence. Whenever he considered a case overly reliant on such testimony, Carter was reluctant to seek the death penalty even if he felt the crime warranted it on every other level.

Feelings, especially strong visceral reactions to a crime, also can be a factor in death penalty decisions. J. Don Foster recommended the death penalty in two cases during his tenure in Alabama. In one case, the defendant was accused of shooting to death a former accomplice who was scheduled to testify against him in a federal drug case two days later. In the other, a young woman, part of a five-person bank hold-up team, shot a female teller at close range with a sawed-off shotgun. The victim in the latter case reportedly lived only long enough to ask her colleagues to tell her husband and children that she loved them. “In my book, that was the stronger death penalty case,” said Foster, citing his emotional reaction. The Attorney General disagreed, however, and only the drug case defendant was tried for a capital offense. (A jury found him guilty, but sentenced him to life without parole.)

Visceral reactions can vary from district to district, depending upon regional crime patterns. Traditional organized crime or drug murders, for example, may fail to excite much outrage in districts where such activity has become routine. “In the Eastern District, we got numbed because of the number of mob-related homicides we get exposed to,” said Carter.

Even if every district were to have similar crime problems, the same guidelines for deciding how to prosecute them, and U.S. Attorneys with iden-

“You have to be certain, absolutely certain, that the people you are going to try to execute did what you are accusing them of and that you can prove it.”



EDWARD DOWD

tical personal beliefs, they might still present different recommendations, because public attitude also pushes cases toward, or pulls them away from, the death penalty. Robinson's reluctance to seek the death penalty didn't raise public objections in Connecticut, but it would have been wildly out of step in a state like Texas, where according to Gaynelle Griffin Jones, "We have such a strong [state] death penalty, and the community tolerance for death is such that you almost are bizarre if you are coming at it from another direction."

With so many variables influencing the decision to seek the death penalty, it is not surprising that the consistency requirement set by *Furman v. Georgia* presented a problem for the U.S. Attorneys and the entire death penalty system. "If you are going to have the death penalty, you have to have consistency," said Walter Holton, paraphrasing the ruling. His own opinion was that, "We have spent x number of years dealing with this, and we have come to the conclusion that you can't meet Furman."

# 4

## U.S Attorneys and the Justice Department

Not long after she was nominated to become Attorney General, Janet Reno told reporters she was "personally opposed" to the death penalty. Yet in subsequent confirmation hearings before the Senate Judiciary Committee she said she looked forward to "developing death penalty statutes" with Congress and promised "procedures" to "prevent disparate treatment" in their application.<sup>7</sup> Later, in keeping with her promise, Reno created the Capital Case Review Committee to provide her with recommendations on when—and when not—to seek the death penalty. She also created what is commonly known as the "death penalty protocol," which gave U.S. Attorneys guidelines for weighing issues in death penalty cases and procedures to follow in pursuing them.

As the top decision-makers on the regional level, the U.S. Attorneys were at a disadvantage when it came to seeking consistency. Unlike their boss, they did not have the benefit of knowing what their peers were deciding in similar cases. Moreover, if their own pool of death penalty-eligible cases was shallow, they might not even be able to draw internal comparisons.



ZACHARY CARTER

[7] Rory K. Little. "The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role" *Fordham Urban Law Journal*, March 1999, p.22.

Without consulting the protocol a U.S. Attorney might decide, for example, to seek a death sentence because a victim or victim’s family wanted the penalty. The protocol indicates, however, that those wishes should not influence the prosecutor’s decision. Thus, Washington ordered Vermont prosecutors to seek the death penalty for a defendant who injured a woman and killed her son with a mail bomb even though, as Kate Pflaumer recalled, the wounded mother specifically asked that the punishment not be sought.

The attitude of the review committee was, “If you believe you could prove the case and the penalty is available to you, then you should avail yourself of that penalty.”

By and large, the roundtable participants considered the Attorney General successful in making death penalty decisions without engaging her own beliefs. Some even thought that the oversight provided by the review committee created a bias in favor of the penalty.

Loretta Lynch, one of several former prosecutors who said they repeatedly had to explain decisions not to seek the penalty, characterized the attitude on the committee as: “If you believe you could prove the case and the penalty is available to you, then you should avail yourself of that penalty.”

A systemic explanation for this perceived pro-death penalty bias was offered by Kate Pflaumer. After a 1995 change in procedure required every death penalty-eligible crime to be reviewed in Washington—rather than only those cases in which the U.S. Attorney sought permission to pursue the punishment—an additional department was created to process the suddenly expanded caseload. As the new Capital Crimes Unit also helped prosecutors try those cases where permission was granted, it was intentionally staffed with state prosecutors with experience trying death penalty cases themselves. Noting that most states won’t require prosecutors to try death penalty cases if they are personally opposed to the sanction, Pflaumer reasoned that the universe of experienced death penalty prosecutors was disproportionately pro-death penalty and therefore more likely to seek the punishment than a randomly selected group. “The more we develop echelons in Washington,” she concluded, “it seems to me the more the [Justice] Department becomes pro-death penalty.”

Others said their frustration with Washington resulted not from any perceived predilection for the death penalty but rather from the time-consuming review process itself. Kent Alexander recalled two cases that piqued the review committee’s interest. The first concerned a prison inmate who murdered a guard by creeping up behind him and smashing his head with a hammer. The second involved a getaway driver who had been waiting in the car and did not know that his partner had shot and killed someone while holding up a liquor store. “We spent an equal amount of time with the Justice Department on both cases jumping through a lot of hoops, all in the name of forming this federal standard,” said Alexander, who thought it obvious that only the first case warranted the death penalty. The review committee eventually agreed.

“It seemed like a great deal of time and energy was being focused at the



LORETTA LYNCH

wrong place,” said Walter Holton, who said the scrutiny would have been better directed toward states, which have many more cases and far less oversight.

The Attorney General’s office often challenged the U.S. Attorneys’ decisions. Yet only a handful of recommendations were overruled during the survey period. The experiences of several roundtable participants suggested that particularly knotty disagreements could sometimes be resolved through reasoned—if protracted—discussion. On one occasion when the review committee was pressuring him to seek the death penalty for a case in which his own committee had voted unanimously against the sanction, Stephen Robinson resorted to telephoning the Attorney General at home in the evening to explain their rationale. “We had a very long, personal discussion about why I thought it was really, really, really, really, really the wrong thing to do,” he recalled. “At the end of the day, she agreed.”

Regardless of what their peers were doing or Washington’s views on national consistency, most participants said they preferred a system that would, as Pflaumer put it, “trust the informed judgment of the person who represents the community and the particular place they came from.” Even as they acknowledged the Attorney General’s surprising familiarity with the details of every case she discussed with them, the regional prosecutors felt they understood the cases and the local conditions better. “The reason we have the U.S. Attorney drawn from the districts,” explained Zachary Carter, “is because they’re presumptively most knowledgeable about the local crime culture and community needs and standards.”

Only a handful of U.S. Attorneys’ decisions were overruled by the Justice Department during the survey period.

# 5

## Questions of racial/ethnic disparity

Late into the roundtable discussion, J. Don Foster leaned forward in his chair and took a measure of the afternoon’s proceedings. “I have been listening carefully today, and I think it has been an excellent discussion,” he said. “But I have not heard a case made for racism as a factor in the application of the death penalty in the federal system.”

“I have not heard a case made for racism as a factor in the application of the death penalty in the federal system.”



J. DON FOSTER

Foster’s observation was, to an extent, an acknowledgement of the Justice Department’s efforts to protect federal death penalty decisions from being swayed by issues of race. The protocol requires, for example, that all direct references to race be stripped from case files sent to Washington so that the issue can, plausibly, be eliminated as a factor—conscious or otherwise—in decisions made by the committee or the Attorney General.

Nonetheless, the possibility that race might influence their own death penalty decisions concerned the roundtable participants as well—both during the discussion and when they were in office.

“I don’t think we have yet reached a place in this country where race goes unnoticed or doesn’t matter,” Stephen Robinson reminded the others when the subject came up. Alluding to the earlier observation that visceral reactions can influence death penalty decisions, he added, “Clearly we have

visceral reactions to acts of people, but we also have reactions to who people are, the way they look.”

Another participant pointed out, however, that what may appear to be racially conscious decision-making isn’t always so. “There are a lot of proxies for race that skew the recommendations in the direction of one ethnic group or another,” said Zachary Carter. As an example, he suggested that Italian organized crime figures may be seen as less likely to become targets of a capital prosecution because they are white. But as was noted earlier, the real reason prosecutors may not seek the death penalty for these defendants is because the testimony against them comes from former accomplices, their victims are often other organized crime figures, or after decades of repetition by other mobsters, their offenses are too familiar or too common to elicit much indignation.

Many of the participants pointed out that the problem presented by the presence in federal court of large numbers of African-American and Latino defendants charged with serious felonies is relatively new. Michael Dettmer noted that defendants entering the federal justice system were primarily white and charged with white collar crimes until the early ’80s. He ascribed the change in defendant demographics to the urban crack cocaine epidemic of that period. Gaynelle Griffin Jones recalled that when she was an assistant in the Southern District of Texas the office’s focus was on financial fraud in the savings and loan industry and “you rarely saw anything but white men coming through.” It was only after the focus turned to drug trafficking on the southwest border that almost every defendant, including those prosecuted in death penalty cases, was Hispanic.

As Jones’ experience suggests, U.S. Attorneys can shape the demographics of their defendant population when they define their prosecution priorities. Hence, Stephen Robinson’s decision to concentrate his office’s resources on federal-state task force investigations of drug gangs yielded black and Latino



defendants: “It was the kinds of crimes we were focusing on that were bringing in the murders,” he said.

U.S. Attorneys are not the only ones whose decisions can have this effect. To better understand the demographic imbalance in the federal death penalty system it is also useful to understand the racial composition of all those who enter the system. Or, as Kate Pflaumer put it, “You have to look back at what the police do and why they do it.”

Almost all of the former prosecutors agreed that police agendas—especially those of federal law enforcement agencies that feed so many cases to the federal courts—shifted with the passage of the federal crime laws of 1988 and, more importantly, 1994. The former prosecutors did not attribute the racial disparity to the way these laws were enforced. Rather, in their view, it was the result of how the laws were conceived and written. “No matter how you enforce [them], if you do enforce [them], the disparate numbers are going to show up because [the laws] are geared toward a particular crime problem,” said Walter Holton.

Whether the legislative agenda was racially biased or not depends upon whom you ask. Holton said he believed there were “lots of threads of racism” in Congress when it passed the Administration-backed Violent Crime Control and Law Enforcement Act in 1994. Specifically, he detected an implicitly racist—and “very much political”—attitude of “us-against-them” in the bill’s focus on urban crime.

Loretta Lynch argued that the relative ease with which the death penalty was invoked when defendants were likely to be African-American or Hispanic suggested a systemic disregard for minority citizens. “Apply the death penalty to securities fraud prosecutions and wipe out [the racial disparity] just like that,” she suggested, knowing that no legislature would even imagine such a strategy. But when the defendants are primarily poor and minority, she said, “you don’t have anybody there on the floor of Congress saying, ‘Wait a minute.’”

Whatever its cause, the disproportionate number of minorities in the system made many of the former prosecutors more race conscious than they wanted to be. The first three death penalty cases in Edward Dowd’s district had African-American defendants. In the fourth, the kidnapping and murder of a young Bosnian immigrant girl, he finally had a defendant who was white. “I was relieved when I saw it,” said Dowd. Kent Alexander described getting a white defendant as, in some ways, “a complete relief.”

Zachary Carter worried that attitudes like these—which he shared—might twist enforcement of the federal death penalty laws into a perverse sort of “equal injustice” against white defendants. “If you are a decent human being dedicated to equal justice, and you have already made a decision to recom-

When the focus in Texas was on financial fraud in the savings and loan industry, “you rarely saw anything but white men coming through.”



GAYNELLE GRIFFIN JONES

mend the death penalty in a series of cases in which there are people of color,” he explained, “there may be an unconscious impulse to achieve artificial balance. Then, God forbid the next white defendant that comes up, you may have a problem.”

Yet even if it were possible to show that federal death penalty laws were faultless in design and execution, for participants like Lynch they are problematic simply because of their disparate impact on minorities. “That, to me, has always been the problem with the death penalty,” she said. “Because you can be as fair as possible in a particular case, but the reality is that the federal death penalty is going to hit harder on certain groups.”

# 6

## Final thoughts

Even though many of the former U.S. Attorneys blamed Congress for having crafted laws that target crimes committed in minority communities, they offered several recommendations about what current and future U.S. Attorneys could do to minimize the laws’ disproportionate impact.

In light of recent national reductions in crime, Kate Pflaumer noted that the primary conduit of minority death penalty cases—joint federal and local law enforcement task forces—may have become unnecessary. Cutting back on task forces that focus predominantly on inner-city crime would be one way to reduce the racial imbalance, she said.

Others disagreed, saying that the option of bringing federal crime fighting expertise to local communities was still necessary. As they saw it, redirecting federal resources in order to protect minority offenders from the death penalty would inadvertently penalize minority communities that rely on such aid to maintain low local crime rates. Such a policy, suggested J. Don Foster, might be “a greater impact of racism than actually prosecuting people who are guilty of murder.”

A compromise was offered by Zachary Carter. “If we are invited in to deal with what is primarily a local problem because we have superior resources, then we should accept the invitation,” he said. But, he added, referring to the

The disproportionate number of minorities in the system made many of the former prosecutors more **RACE CONSCIOUS** than they wanted to be.

death penalty, “we should leave our nuclear weapon at home.” In other words, Carter agreed with those who felt that continued federal involvement in local law enforcement was justified, but he thought the federal death penalty system would be more consistent and racially proportionate if the sanction were reserved for cases with an “extraordinary and distinct federal interest” that was not concurrent with state concerns. Citing as examples offenses such as treason, espionage, and terrorism, he said, “If you start with those, almost by definition you are eliminating the offenses that necessarily attract by ethnicity or race.”

Many of the roundtable participants continued to express the belief that improving consistency was the key to instituting a fairer federal death penalty. Yet they were divided on how to do this.

To reconcile national standards with local discretion, Kate Pflaumer recommended a return to the pre-1995 standard, with Washington reviewing only those cases in which the U.S. Attorneys wanted to seek capital punishment. “At least then you are applying the consistency principle to something that has already come up from a community perspective,” she said. “I think everyone up the chain should agree before death is sought.”

Others observed that this approach would not address the disparity question. Without surveying every eligible case, noted Carter, there is no way of knowing whether there is “an inappropriate, embarrassing disparity that is a product of people deciding in exactly comparable, if not identical, cases not to seek the death penalty for inappropriate reasons.”

Recapitulating his earlier suggestion, Carter called for narrowing the scope of the legislation itself. “There are too many offenses for which the death penalty is permissible,” he said. “If you narrow them to a pinpoint...it will be consistent and you can control disparity better.”

Other participants advanced suggestions aimed at eliminating lingering doubts about the existing laws and process. Ed Dowd advocated giving the defense every opportunity to avoid the death penalty. It was not enough, he said, for prosecutors simply to meet with defense attorneys as the protocol requires, or to simply comply with the current rules of discovery. “If you are going to try to take somebody’s life, you should give them all of the evidence you have,” he said. “You should give them everything.”

Still others suggested expanding the U.S. Attorneys’ mandate to scrutinize the actions of law enforcement agencies. “It is our job to ask the questions,” said Thomas Monaghan. “I think we need to take an active role in monitoring and somewhat changing the behavior of agencies that bring cases to us.”

Ultimately, the conversation returned to the essential difficulty of making death penalty decisions. The protocol Janet Reno created to ensure that the

“I think everyone up the chain should agree before death is sought.”



KATE PFLAUMER

federal death penalty was consistently and fairly applied in spite of personal beliefs, local mores, regional crime patterns, and the idiosyncrasies of state systems, amounted in Carter's view to "artificial decision-making" in determining whether a human being lives or dies. "If I had to make

"If I had to make a choice...of whether or not there should be a federal death penalty, it would not turn on whether I believe there are crimes so horrific that the person deserves to die, but rather, when you look at the aggregate of all the cases, whether the process of choosing in and of itself may be immoral."

— *Zachary Carter*

a choice...of whether or not there should be a federal death penalty," he concluded, "it would not turn on whether I believe there are crimes so horrific that the person deserves to die, but rather, when you look at the aggregate of all the cases, whether the process of choosing in and of itself may be immoral."

The difficulty of making such decisions was also apparent to Monaghan. "At the end of the day, we had an Attorney General who did not believe in the death penalty but believed it her obligation to enforce it if it was going to be enforced and tried to make it fair," he said, towards the end of the discussion. "I don't think you can make something fair that you don't believe in. I don't think we did, particularly."

# Death penalty offenses

Nearly sixty separate sections of the U.S. Code address capital sentencing procedure and its application. But the actual number of federal death penalty-eligible offenses, as noted in the Justice Department's 2000 study of the death penalty system, "depends on the definition of 'offense.'" The following list of capital crimes is drawn from a report issued by the Congressional Research Service on May 9, 2001.

- ▷ Treason
- ▷ Espionage in time of war with intent that information be communicated to the enemy
- ▷ Espionage resulting in the identification and consequent death of an agent of the United States
- ▷ Assassination or kidnapping resulting in the death of the President, Vice President, or next in order of succession
- ▷ Murder of a member of Congress, the Cabinet, Supreme Court, or of major Presidential and Vice Presidential candidates
- ▷ Murder of foreign officials, official guests, or internationally protected persons
- ▷ Murder of a United States national overseas
- ▷ Murder of federal officers or employees engaged in or on account of their official duties
- ▷ Murder of an official engaged in official duties with respect to transportation, sale, or handling of certain animals
- ▷ Murder of a state or local official, officer, or employee or other person aiding a federal investigation; murder of a state correctional officer
- ▷ Retaliatory murder of an immediate family member of law enforcement officials
- ▷ Retaliatory murder of a federal witness, victim, or informant
- ▷ Murder resulting from tampering with a federal witness, victim, or informant
- ▷ Murder of a court officer or juror in federal judicial proceedings
- ▷ Murder by a federal prisoner, or escaped federal prisoner, serving a life sentence at the time of the offense
- ▷ Murder for hire involving the use of facilities of interstate commerce
- ▷ Murder committed during commission of a racketeering offense
- ▷ Murder committed during a violation of federal kidnapping laws
- ▷ Bank robbery-related murder
- ▷ Murder related to carjacking or attempted carjacking

- ▷ Murder committed in relation to a federal sexual abuse offense
- ▷ Murder committed in violation of federal laws against sexual exploitation of children
- ▷ Murder committed during a drug-related drive-by shooting
- ▷ Murder committed by firearms during crimes of violence or drug trafficking crimes
- ▷ Certain crimes related to a continuing criminal enterprise, including trafficking in large quantities of drugs and murder of a law enforcement officer in furtherance of a controlled substances offense
- ▷ Use, attempted use, or conspiracy to use weapons of mass destruction resulting in death
- ▷ Intentional use of chemical weapons resulting in death
- ▷ Mailing non-mailable injurious articles where death results
- ▷ Death resulting from offenses involving the transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce
- ▷ Genocide committed in the United States or by a United States national
- ▷ Murder committed during an attack on a federal facility
- ▷ Hostage-taking resulting in death
- ▷ Torture resulting in death
- ▷ Civil rights offenses resulting in death
- ▷ Death resulting from intentionally damaging religious property or intentionally obstructing the free exercise of religion
- ▷ Murder related to the smuggling of aliens into the United States
- ▷ Murder within the special maritime or territorial jurisdiction of the United States
- ▷ Violence against maritime navigation resulting in death
- ▷ Violence against a fixed ocean platform resulting in death
- ▷ Murder, with death resulting from wrecking trains used in interstate commerce
- ▷ Murder committed at an airport serving international civil aviation
- ▷ Destruction of aircraft, motor vehicles, or related facilities resulting in death
- ▷ Air piracy or attempted air piracy resulting in death

The Vera Institute of Justice is a nonprofit organization that works closely with government to improve the services that people rely on for safety and justice. Vera develops innovative, affordable programs that often grow into self-sustaining organizations, studies social problems and current responses, and provides practical assistance to public officials in New York and throughout the world.



VERA INSTITUTE OF JUSTICE  
233 BROADWAY, 12TH FLOOR  
NEW YORK, NEW YORK 10279  
(212) 334-1300  
FAX (212) 941-9407  
WWW.VERA.ORG

CHRISTOPHER E. STONE, DIRECTOR