

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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February 2, 2009

Congressional Research Service

Report RL30962

*Capital Punishment: An Overview of Federal Death Penalty
Statutes*

Elizabeth B. Bazan, American Law Division

January 5, 2005

Abstract. With the passage of P.L. 103-322, the Violent Crime Control and Law Enforcement Act of 1994, the federal death penalty became available as a possible punishment for a substantial number of new and existing civilian offenses. On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 made further modifications and additions to the list of federal capital crimes. On June 25, 2002, P.L. 107-197, the Terrorist Bombings Convention Implementation Act of 2002, added another capital crime to the United States Code. The Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, enacted December 17, 2004, included provisions which impacted or expanded some of the existing death penalty provisions. This report lists the current federal capital offenses and summarizes the procedures for federal civilian death penalty cases.

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Capital Punishment: An Overview of Federal Death Penalty Statutes

Updated January 5, 2005

Elizabeth B. Bazan
Legislative Attorney
American Law Division

<http://wikileaks.org/wiki/CRS-RL30962>

Capital Punishment: An Overview of Federal Death Penalty Statutes

Summary

With the passage of P.L. 103-322, the Violent Crime Control and Law Enforcement Act of 1994, the federal death penalty became available as a possible punishment for a substantial number of new and existing civilian offenses. On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 made further modifications and additions to the list of federal capital crimes. On June 25, 2002, P.L. 107-197, the Terrorist Bombings Convention Implementation Act of 2002, added another capital crime to the United States Code. The Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, enacted December 17, 2004, included provisions which impacted or expanded some of the existing death penalty provisions. This report lists the current federal capital offenses and summarizes the procedures for federal civilian death penalty cases.

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Capital Punishment: An Overview of Federal Death Penalty Statutes

Introduction

With the passage of P.L. 103-322, the Violent Crime Control and Law Enforcement Act of 1994, the federal death penalty became available as a possible punishment for a substantial number of new and existing civilian offenses. Further changes to the list of federal capital punishment statutes resulted from the passage of the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, on April 24, 1996. On June 25, 2002, the Terrorist Bombings Convention Implementation Act of 2002, P.L. 107-197, added another capital crime to the United States Code. Some of the existing death penalty provisions were expanded, directly or indirectly, by the enactment on December 17, 2004, of the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458. This report lists the current federal death penalty offenses and summarizes the procedures for civilian death penalty cases.¹

¹While a discussion of the death penalty provisions applicable to military personnel is beyond the scope of this paper, there are a number of these statutory provisions in the Uniform Code of Military Justice, including: 10 U.S.C. §§ 885 (desertion in time of war); 890 (assaulting or willfully disobeying a superior commissioned officer in time of war); 894 (mutiny, sedition, attempted mutiny, or failure to suppress or report a mutiny or sedition); 899 (misbehavior before the enemy); 900 (subordinate compelling surrender); 901 (improper use of countersign in time of war); 902 (forcing a safeguard); 904 (aiding the enemy); 906 (spying in time of war); 910 (improper hazarding of a vessel); 913 (misbehavior of a sentinel in time of war); and 918 (premeditated murder or murder in the course of burglary, sodomy, rape, robbery, or aggravated arson). A military death penalty statute creating a capital offense for the commission of espionage in violation of the Uniform Code of Military Justice, enacted in the 99th Congress, is codified at 10 U.S.C. § 906a. The sentencing procedures set forth for the court-martial in this section specify aggravating and mitigating factors to be considered, require special findings regarding the existence of these factors, and direct that an accused may have broad latitude in presenting mitigating or extenuating evidence. This statute evidently was intended to conform to minimum constitutional standards, but the Supreme Court has not yet passed upon its constitutional validity.

10 U.S.C. § 920(a) also provides for capital punishment as a possible punishment for rape. Under Rule 1004(c)(9) of the Rules for Court-Martial in the *Manual for Courts-Martial*, the death penalty is only available as a sentencing option in a rape case under 10 U.S.C. § 920 if “(A) The victim was under the age of 12; or (B) The accused maimed or attempted to kill the victim.” In *Coker v. Georgia*, 433 U.S. 584 (1984), the United States Supreme Court held the death penalty disproportionate, under the Eighth Amendment’s prohibition of cruel and unusual punishment, to the rape of an adult woman by an escaped felon who had been serving sentences for murder, rape, kidnapping, and aggravated assault at the time of his escape, where the victim survived. (For more discussion of the *Coker*

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decision, see fn. 7, *infra.*) In *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983), *on remand*, 17 M.J. 978 (C.M.R. 1984) (substituting confinement for life at hard labor for death penalty), *review denied*, 18 M.J. 401 (C.M.A. 1984), the United States Court of Military Appeals observed that:

Congress obviously intended that in cases where an accused servicemember is convicted of premeditated murder, certain types of felony murder, or rape, the court-martial members should have the option to adjudge a death sentence. See Articles 118 and 120 [10 U.S.C. § 918 and 920]. Probably this intent cannot be constitutionally effectuated in a case where the rape of an adult female is involved, *Coker v. Georgia*, 433 U.S. 584 . . . (1977) – at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense. . . .

16 M.J. at 380. See, *United States v. Rojas*, 15 M.J. 902, 927 n. 9 (N.M.C.M.R. 1983, *remanded on other grounds*, 17 M.J. 154 (C.M.A. 1984); *United States v. Clark*, 18 M.J. 775, 776 (N.M.C.M.R. 1984) (“Current appellate decisional authority indicates that the offense of rape, as alleged against the appellant, is not an offense for which the death penalty can be adjudged. . . . A sentence of death for the crime of rape of an adult woman is prohibited by the Eighth Amendment to the U.S. Constitution. *Coker v. Georgia*, 433 U.S. 584, . . . (1977). Therefore, the capital aspect of punishment purportedly authorized under Article 120 has been effectively invalidated.”); *United States v. Christie*, 1995 CCA LEXIS 220 (A.F. Ct. Crim. App. August 28, 1995); *United States v. Clark*, 18 M.J. 775, 776 (N.M. Ct. Crim. App. 1984); *United States v. McReynolds*, 9 M.J. 881, 882 (A.F.C.M.R. 1980). See also, *United States v. Curtis*, 32 M.J. 252, 266 (C.M.A. 1991), and *United States v. Straight*, 42 M.J. 244, 247 (C.A.A.F 1995), interpreting Rule 1004(c)(9) as having been drafted in an effort to comply with *Coker*.

Prior to enactment of 10 U.S.C. § 906a, President Reagan issued an executive order which changed the sentencing procedures in the Manual of Courts-Martial in an apparent attempt to conform them to minimum constitutional standards. E.O. 12473, issued April 13, 1984. In *Loving v. United States*, 517 U.S.748 (1996), *writ of mandamus denied*, 47 M.J. 438 (C.A.A.F. 1998), *cert. denied*, 525 U.S. 1040 (1998), the Supreme Court addressed a constitutional challenge on Eighth Amendment and separation of powers grounds to the aggravating factors applicable to military death penalty cases promulgated by executive order and included in Rule for Courts-Martial (RCM) 1004, as amended. *Loving* contended that fundamental policy determinations with respect to aggravating factors in death penalty cases must be made by Congress through statutory enactments, rather than by the President. The Court, assuming that *Furman v. Georgia*, 408 U.S. 238 (1972), and subsequent cases applied to the crime and sentence before it, found that the aggravating factors included in RCM 1004 were necessary, from a constitutional perspective, to adequately narrow the class of persons eligible to receive the death penalty under the statute under which *Loving* was convicted and sentenced. Further, the Court rejected *Loving's* contention that the President's promulgation of these aggravating factors by executive order violated separation of powers principles. The Court found that the Congress had the power to delegate the authority to prescribe aggravating factors in military capital murder cases to the President, and had in fact made a valid delegation of that authority in 10 U.S.C. §§ 818, 836(a) and 856. The Court also found a connection between the delegated authority and the President's constitutional duties as Commander in Chief. The capital sentencing procedures governing civilian capital cases first added by P.L. 103-322, Title VI, Sec. 60002(a), codified at 18 U.S.C. §§ 3591-3598, as amended, do not apply to "prosecutions under the Uniform Code
(continued...)

Capital Offenses

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held unconstitutional a capital sentencing scheme which gave the sentencing decision-maker unbridled discretion in determining whether to impose a death sentence in a given case. Prior to the passage of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, all but two² of the existing federal civilian death penalty provisions suffered from constitutional frailties like those of the Georgia statute at issue in *Furman*. The Act revived the death penalty for several previously unenforceable capital offenses, added capital punishment to the penalties available for a few other existing federal offenses and created a number of new capital offenses. The Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132,

¹(...continued)

of Military Justice (10 U.S.C. § 801)." P.L. 103-322, Title VI, Sec. 60004, 18 U.S.C. § 3591 note.

²In 1974, the Congress enacted a death penalty statute for air piracy where death resulted from the commission of the offense, and responded to the concerns reflected in *Furman* by including procedures designed to tailor the sentencing discretion of the judge or jury in determining the appropriate sentence to impose in the case before them. The substantive provisions were codified at 49 U.S.C. §§ 1472(i) and (n) (49 U.S.C. § 46502 in the revised Title 49 of the United States Code), while the procedures for a separate sentencing hearing, specifying aggravating and mitigating factors to be considered in the sentencing determination, and requiring a special verdict finding the existence or non-existence of each of the factors, were codified at then existing 49 U.S.C. App. § 1473(c)/49 U.S.C. § 46503. The constitutional sufficiency of these procedures was not tested. They might have given rise to a question as to whether they satisfied the constitutional minimum in light of the Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), which held invalid Ohio's death penalty statute because it failed to permit consideration, in a capital case, of any aspects of the defendant's character or record or the circumstances of the offense as a mitigating factor. The federal air piracy sentencing provisions in former 49 U.S.C. App. § 1473(c)/49 U.S.C. § 46503 appeared to limit the mitigating factors which may be considered in a capital case, and therefore might have been subject to attack. The death penalty sentencing procedures for aircraft piracy in former 49 U.S.C. App. 1473(c)/49 U.S.C. § 46503 were repealed by Sec. 60003(b)(2), 108 Stat. 1970, of P.L. 103-322. In a capital aircraft piracy case under current law, the general death penalty sentencing provisions in 18 U.S.C. § 3591 *et seq.* would apply. For a discussion of capital sentencing provisions, see the discussion of capital sentencing procedures starting at page 13, *infra*.

In the Anti-Drug Abuse Act of 1988, P.L. 100-690, the death penalty was made available for certain controlled substances offenses where intentional death resulted from the offense. 21 U.S.C. §§ 848(e) and (g)-(r). The measure, as amended, includes sentencing procedures which provide for a separate sentencing hearing; specifies aggravating and mitigating factors, detailing the means of proof and requiring special findings concerning them; and supplies instruction for the imposition, appeal, and execution of a death sentence. The availability of counsel as well as investigative, expert and other services for indigent defendants is also addressed. The composition of the jury is specified, and the jury is required to return to the court a certificate signed by each juror indicating that discrimination played no part in his or her sentencing decision. Thus far, these capital sentencing provisions have withstood constitutional challenge.

expanded and modified the list of federal capital punishment offenses. Two other statutes further expanded the reach of the federal death penalty, the Terrorist Bombings Convention Implementation Act of 2002, P.L. 107-197, and the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458. In the wake of these Acts, the death penalty is an available sentencing option for the following offenses:

- 7 U.S.C. § 2146(b)—first degree murder of any person while engaged in or on account of the performance of his or her official duties with respect to the transportation, sale, or handling of certain animals under 7 U.S.C. ch. 54, §§ 2131 *et seq.* This provision cross-references 18 U.S.C. §§ 1111 (murder) and 1114 (protection of officers and employees of the United States) for applicable punishment.
- 8 U.S.C. § 1324(a)—murder, with death resulting from smuggling aliens into the United States.
- 15 U.S.C. § 1825(a)(2)(C)—killing of an official while engaged in or on account of performance of his or her official duties under 15 U.S.C. § 1821 *et seq.*, which deals with protection of horses in horse shows, exhibitions, sales, or auctions.
- 18 U.S.C. §§ 32 and 34—willful destruction of aircraft within the special aircraft jurisdiction of the United States; of any civil aircraft used, operated, or employed in interstate, overseas or foreign air commerce; or of aircraft facilities, where death results.³ Sections 32 and 34 also cover performing an act of violence or incapacitation against any individual on such aircraft which is likely to endanger the safety of the aircraft, where death results. Where a U.S. national is on board the civil aircraft involved or would have been on board, where an offender is a U.S. national, or where an offender is found in the U.S. after commission of such an offense, these provisions would also cover: engaging in a willful act of violence against an individual while on board a civil aircraft registered in a country other than the United States, which act is likely to endanger the aircraft in flight, where death results; willfully destroying a civil aircraft registered in a country other than the U.S. or damaging it so as to make it incapable of flight or endangering its safety in flight, where death results; or willfully placing a device or substance on such an aircraft likely to destroy that aircraft, to render it incapable of flight, or to endanger its safety while in flight, where death results.
- 18 U.S.C. §§ 33 and 34—willful destruction of motor vehicles engaged in interstate or foreign commerce, or their facilities, where death results.⁴

³The offense is set forth generally in 18 U.S.C. § 32, while the penalty for commission of the offense where death results is drawn from 18 U.S.C. § 34. The latter section makes the death penalty available for offenses prohibited by 18 U.S.C. ch. 2 (§§ 31-38), which result in the death of any person.

⁴The offense is set forth generally in 18 U.S.C. § 33, while the penalty for commission of
(continued...)

- 18 U.S.C. § 36—murder committed in furtherance of or to escape detection of a major drug offense by firing a weapon into a group of two or more people (drive-by shooting).⁵
- 18 U.S.C. § 37—murder, with death resulting from a violation of the proscription against the use of violence at international airports. U.S. jurisdiction under this provision covers instances where the prohibited activity takes place in the United States or where it takes place outside the United States and the offender is later found in the United States, or where an offender or a victim is a U.S. national. It does not cover instances where the relevant conduct was committed in the United States during or in connection with a labor dispute and the conduct is a felony under pertinent State law.⁶
- 18 U.S.C. § 115(b)(3)—first degree murder of a member of the immediate family of a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. § 1114, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties.
- 18 U.S.C. §§ 229 and 229A(a)(2)—knowingly developing, producing, acquiring, transferring directly or indirectly, receiving, stockpiling, retaining, owning, possessing, using, or threatening to use any chemical weapon; or knowingly assisting or inducing any person to do any of the above; or knowingly attempting or conspiring to do any of the above, where death results. The offenses are defined in 18 U.S.C. § 229 and do not cover retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, pending destruction of the weapon. Also exempt from coverage of these offenses are persons, including members of the U.S. Armed Forces, authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer or receive the chemical weapon pending destruction of the weapon. Similarly exempt is any otherwise nonculpable person, in an emergency situation, if the person is attempting to destroy or seize the weapon. This covers conduct committed within the United States; committed by a U.S. national outside the United States; committed against a U.S. national while the national is outside the United States; or committed against property owned, leased, or used by the United States or any federal agency or department, whether within or outside the United States.

⁴(...continued)

the offense where death results is specified in 18 U.S.C. § 34.

⁵See also, 18 U.S.C. § 34, which makes capital punishment available for any offense prohibited by 18 U.S.C. ch. 2 (§§ 31-38) where death results.

⁶See also, 18 U.S.C. § 34, which makes the death penalty available for any offense prohibited by 18 U.S.C. ch. 2 (§§ 31-38) where death results.

- 18 U.S.C. § 241—murder, with death resulting from a conspiracy to violate civil rights. Also appears to provide for possible capital punishment where acts constituting a conspiracy against rights under this section involve kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or attempted killing, regardless of whether death results from the commission of the offense. *But see*, 18 U.S.C. § 3591(a)(2).⁷

⁷Under the Supreme Court's reasoning in *Coker v. Georgia*, 433 U.S. 584 (1977), and its progeny, a death penalty imposed under such circumstances, where the commission of the offense did not result in a death, might give rise to a question as to whether the punishment imposed was disproportionate to the crime committed. *Coker* involved the rape of an adult woman by an escaped felon who had been serving sentences for murder, rape, kidnapping, and aggravated assault at the time of his escape, where the victim survived. The Court, while acknowledging the seriousness of the crime, found the death penalty disproportionate to the offense. This case has given rise to questions as to whether the death penalty would be found appropriate, under Eighth Amendment cruel and unusual standards, for any offense where a death did not result. *See, e.g., Coker*, 433 U.S., at 621 (Burger, C.J., dissenting). Indeed, Chief Justice Burger also raised a question as to whether the death penalty might also be open to challenge under the plurality's reasoning for crimes such as "treason," "airplane hijacking, kidnapping, and mass terrorist activity," which, although dangerous and constituting a serious threat to public safety, did not necessarily result in immediate death. *Id.* Similar reasoning might give rise to a question as to the constitutionality of a death penalty for espionage where death did not result from the commission of the offense.

Except with respect to espionage and treason as addressed in 18 U.S.C. § 3591(a)(1), and certain controlled substances offenses referred to in 18 U.S.C. § 3591(b), the *Coker* issue raised by provision of a death penalty for offenses not involving death may be minimized by the impact of 18 U.S.C. § 3591(a)(2), which provides that a death sentence may be imposed upon a defendant found guilty of

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593--

- (A) intentionally killed the victim;
 - (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
 - (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person other than one of the participants in the offense, and the victim died as a direct result of that act; or
 - (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,
-

Under Subsection 3591(a)(1), the death penalty is made available in cases where the defendant has been found guilty of an offense described in 18 U.S.C. § 794 (espionage) or § 2381 (treason), without explicitly restricting the availability of capital punishment to those cases in which death results. Subsection 3591(b) makes the death penalty available for a
(continued...)

- 18 U.S.C. § 242—murder, with death resulting from a deprivation of civil rights under color of law. Also appears to make capital punishment available for acts constituting a deprivation of rights under color of law involving kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or attempted killing, regardless of whether a death occurs during the commission of the offense. *But see*, 18 U.S.C. § 3591(a)(2).⁸
- 18 U.S.C. § 245(b)—murder, with death resulting from a deprivation of federally protected rights. Also appears to make death penalty available for deprivation of federally protected rights if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or attempted aggravated sexual abuse, or attempted killing, regardless of whether a death occurs during the commission of the offense. *But see*, 18 U.S.C. § 3591(a)(2).⁹
- 18 U.S.C. § 247—murder, with death resulting from intentionally damaging religious property or intentionally obstructing the free exercise of religion.

⁷(...continued)

defendant who has been found guilty of

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or member of the family or household of such person,

....

⁸As discussed in greater depth at fn. 7, above, it is questionable whether the death penalty may be constitutionally applied in cases where the offense committed does not result in death, in light of the Supreme Court's 1977 decision in *Coker v. Georgia*, *supra*. Note that operation of 18 U.S.C. § 3591(a)(2) would appear to limit the availability of the death penalty where death did not result from commission of an offense under 18 U.S.C. § 242, despite language in the offense statute that appears to provide for possible capital punishment.

⁹It is questionable whether the death penalty can constitutionally be applied in cases where the offense does not result in death, in light of the Supreme Court's decision in *Coker v. Georgia*, *supra*, as discussed in greater depth at fn. 7, above. Note that operation of 18 U.S.C. § 3591(a)(2) would seem to limit the availability of the death penalty for offenses under 18 U.S.C. § 245(b) which do not result in death, even though the language of the offense provision appears to provide for possible capital punishment.

Also appears to make capital punishment available for acts which constitute intentionally damaging religious property or intentionally obstructing free exercise of religion involving kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or attempted killing. *But see*, 18 U.S.C. § 3591(a)(2).¹⁰

- 18 U.S.C. § 351—assassination of Members of Congress, the Cabinet, or the Supreme Court, or major Presidential or Vice Presidential candidates.
- 18 U.S.C. § 794(a), 18 U.S.C. § 3591(a)(1)—espionage resulting in the identification and consequent death of an agent of the United States, or involving 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.¹¹
- 18 U.S.C. § 794(b), 18 U.S.C. § 3591(a)(1)—espionage in time of war with intent that information be communicated to the enemy. Covers collection, recording, publishing, or communicating, or attempting to elicit any information with respect to movement, numbers, description, condition, or disposition of Armed Forces, ships, aircraft, or war materials of the United States; plans, conduct, or supposed plans or conduct of naval or military operations; any works or measures undertaken to fortify or defend any place; or any other information relating to the public defense, which might be useful to the enemy.¹²

¹⁰As discussed in greater depth at fn. 7, *supra*, it is uncertain whether the death penalty may be applied to offenses which do not result in death in light of the Supreme Court's decision in *Coker v. Georgia*, *supra*. Note that operation of 18 U.S.C. § 3591(a)(2) would appear to limit the availability of the death penalty for offenses under 18 U.S.C. § 247 which do not result in death, even though the language of the offense provision appears to provide for possible capital punishment.

¹¹It is uncertain whether the death penalty may be applied to offenses which do not result in death, in light of the Supreme Court's analysis in *Coker v. Georgia*, *supra*, which is discussed in greater depth at fn. 7, *supra*. The issue would be whether, under the Eighth Amendment's cruel and unusual standard, the penalty would be deemed disproportionate to the crime. *But see*, *U.S. v. Regan*, 221 F. Supp. 2d 661 (E.D. Va. 2002) (denying defendant's motion to strike government's Notice of Intention to Seek the Death Penalty in a case where the defendant was charged with attempted espionage and there was no allegation of death resulting from the commission of the offense. Defendant premised his motion not on *Coker*, but on an Eighth Amendment comparative proportionality argument. Statutory aggravating factors were that, in commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; and that, in commission of the offense the defendant knowingly created a grave risk of death to another person.).

¹²In light of the Court's reasoning in *Coker v. Georgia*, *supra*, as discussed at fn. 7, *supra*, a death sentence imposed for this offense may be subject to an Eighth Amendment challenge on the grounds that the punishment is disproportionate to the crime. Such a challenge would appear to have less force if the commission of the offense caused someone's death; such a

(continued...)

- 18 U.S.C. § 844(d)—interstate transportation or receipt of explosives with the knowledge or intent that they are to be used to kill another, where death results directly or proximately to any person, “including any public safety officer performing duties.”
- 18 U.S.C. § 844(f)(3)—malicious damage or destruction or attempted damage or destruction of any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States or any department or agency thereof through use of fire or explosives, where the conduct directly or proximately caused the death of any person, “including any public safety officer performing duties.”
- 18 U.S.C. § 844(i)—malicious damage or destruction or attempted damage or destruction, through the use of fire or explosives, of real or personal property used in interstate or foreign commerce or used in any activity affecting such commerce, where death results directly or proximately to any person, “including any public safety officer performing duties.”
- 18 U.S.C. § 924(c) and (j)(1)—gun murders during federal crimes of violence or drug trafficking crimes.
- 18 U.S.C. § 930—first degree murder involving use of firearm or other dangerous weapon during attack on a federal facility.
- 18 U.S.C. § 1091—genocide committed in the United States or by a United States national.
- 18 U.S.C. § 1111—first degree murder within the special maritime or territorial jurisdiction of the United States.¹³
- 18 U.S.C. § 1114—first degree murder of federal officers or employees, including members of the uniformed services, while such officer or employee is engaged in or on account of the performance of official duties, or of any person assisting such officer or employee in the performance of such duties or on account of that assistance.
- 18 U.S.C. § 1116(a)—first degree murder of foreign officials, official guests, or internationally protected persons. Authorizes United States jurisdiction over the offense if the victim is an internationally protected person outside the United States where the victim is a representative, officer, employee, or agent

¹²(...continued)

result may be likely considering the nature of the information which may be involved in such war-time disclosures and the potential impact of such disclosures.

¹³49 U.S.C. § 46506(1) extends federal criminal jurisdiction to certain offenses committed aboard an aircraft in flight. One of the offenses referenced by this subsection is 18 U.S.C. § 1111.

of the United States; where an offender is a U.S. national; or where an offender is afterwards found in the United States.

- 18 U.S.C. § 1118—murder by a federal prisoner serving life sentence at the time of the offense.
- 18 U.S.C. § 1119—first degree murder of U.S. national outside the United States but within the jurisdiction of a foreign country.
- 18 U.S.C. § 1120—first degree murder by escaped federal prisoner who was confined under a life sentence.
- 18 U.S.C. § 1121—murder of state or local official, officer, or employee, or other person aiding federal criminal investigations, or of state correctional officer while the victim is engaged in the performance of official duties, because of the performance of such duties, or because of the victim's status as a public servant.
- 18 U.S.C. § 1201—violation of federal kidnapping laws where death results. Except in the case of kidnapping of a minor by his or her parent, this section covers kidnapping when the victim is transported in interstate or foreign commerce; when the act is committed within the special maritime or territorial jurisdiction of the United States or within the special aircraft jurisdiction of the United States; when the victim is a foreign official, internationally protected person, or official guest; or when the victim is a federal officer or employee covered by 18 U.S.C. § 1114 who is kidnapped while engaged in or on account of performance of official duties. Where the victim is an internationally protected person outside the United States, U.S. jurisdiction is authorized if the victim is a representative, officer, employee, or agent of the United States; if an offender is a U.S. national; or if an offender is afterwards found in the United States.
- 18 U.S.C. § 1203—hostage taking where death results.
- 18 U.S.C. § 1503—first degree murder of court officer or juror in federal judicial proceedings.
- 18 U.S.C. § 1512—murder, with death resulting from tampering with a federal witness, victim or informant.
- 18 U.S.C. § 1513—first degree murder, with death resulting from retaliation against a federal witness, victim or informant.
- 18 U.S.C. § 1716—mailing or depositing for mailing nonmailable injurious articles where death results.
- 18 U.S.C. § 1751(a), (b)—assassination/first degree murder of the President; President-elect; Vice President; or, if there is no Vice President, the officer next in order of succession to the Presidency; of the Vice President-elect; of another person acting as President under the Constitution and laws of the

United States; or of certain employees of the Executive Office of the President or of the Office of the Vice President. Also covers kidnapping of any of these officials or employees, where death results.

- 18 U.S.C. § 1958—murder, with death resulting from the use of facilities of interstate commerce in the commission of a murder for hire.
- 18 U.S.C. § 1959(a)(1)—murder, as consideration for receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity; or murder for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.¹⁴
- 18 U.S.C. § 1992—murder, with death resulting from wrecking trains or related structures, facilities or appurtenances, employed in interstate commerce.
- 18 U.S.C. § 2113(e)—murder, with the death resulting from: robbery or attempted robbery of a federally insured bank or savings and loan association or credit union; knowing receipt of stolen goods from such a robbery; avoiding or attempting to avoid apprehension for such an offense; or escaping or attempting to escape from arrest or confinement from such an offense.
- 18 U.S.C. § 2119(3)—murder, with death resulting from carjacking or attempted carjacking, of a car transported in interstate commerce.
- 18 U.S.C. § 2245—murder, with death resulting from a federal sexual abuse offense.¹⁵
- 18 U.S.C. § 2251—murder, with death resulting from violation of federal laws against sexual exploitation of children.
- 18 U.S.C. § 2280—violence against maritime navigation where death results: committed against or on board a ship flying the United States flag; committed in the United States where the activity is not prohibited by pertinent state criminal law; committed by a United States national or a stateless person who habitually resides in the United States; committed against a United States

¹⁴Section 6802(e) of P.L. 108-458, the Intelligence Reform and Terrorism Prevention Act of 2004, expands the list of offenses considered “racketeering activity” as defined in 18 U.S.C. § 1961 to include any act which is indictable under 18 U.S.C. §§ 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), and section 831 (relating to nuclear weapons). Under 18 U.S.C. § 1959(b), “racketeering activity” as used in § 1959 has the meaning set forth in § 1961, so the effect of the expansion of the definition of “racketeering activity” is, in part, to indirectly expand the possible circumstances in which the death penalty may be available under 18 U.S.C. § 1959.

¹⁵49 U.S.C. § 46506(1) extends federal criminal jurisdiction to certain offenses committed aboard an aircraft in flight, including 18 U.S.C. ch. 109A, dealing with sexual abuse. Among the provisions of Chapter 109A is 18 U.S.C. § 2245, added by P.L. 103-322.

national; committed to coerce the United States; or committed by one later found within the United States.

- 18 U.S.C. § 2281—murder, with death resulting from violence committed aboard a fixed ocean platform within the United States or by a United States national or against a United States national, committed to coerce the United States, or committed by one later found within the United States.
- 18 U.S.C. § 2332(a)(1)—murder of a United States national overseas.
- 18 U.S.C. § 2332a—where death results, use, attempted use, or conspiracy to use, weapons of mass destruction (1) against a United States national outside the United States; (2) against any person or property within the United States, where either (A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense, (B) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce, (C) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense, or (D) the offense or the results of the offense affect interstate or foreign commerce or, in the case of a threat, attempt or conspiracy, would have affected interstate or foreign commerce;¹⁶ (3) against any property owned, leased or used by the federal government; or (4) against any property within the United States that is owned, leased, or used by a foreign government. 18 U.S.C. § 2332a(a). Subsection 2332a(b), added by P.L. 104-132 and amended by P.L. 108-458, makes the death penalty also available with respect to any U.S. national who, without lawful authority, uses or threatens, attempts, or conspires to use a weapon of mass destruction outside of the United States, where death results. P.L. 104-132 modified the definition of "weapon of mass destruction," to include any destructive device as defined in 18 U.S.C. § 921; any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; any weapon involving a disease organism; or any weapon that is designed to release radiation or radioactivity at a level dangerous to human life. However, before passage of Section 6802(b) of P.L. 108-458, both 18 U.S.C. §§ 2332a(a) and (b) excluded chemical weapons as defined under 18 U.S.C. § 229F from the "weapons of mass destruction" included in the elements of these offenses.

¹⁶Section 6802(a) of P.L. 108-458 amended subsection (2) of 18 U.S.C. § 2332a(a), expanding the range of potential targets or victims covered by the offense. Section 6802(a) of P.L. 108-458 also added subsection (4), again broadening the range of factual situations covered by the offense. In addition, it amended 18 U.S.C. § 2332a(c) to add a new definition of "property," including all real and personal property. Section 6802(b) of P.L. 108-458 expanded the scope of "weapons of mass destruction" covered by the offense provisions in both 18 U.S.C. §§ 2332a(a) and (b) to include chemical weapons as defined in 18 U.S.C. § 229F. By expanding the victims, targets, and circumstances covered by the offense provisions in 18 U.S.C. §§ 2332a(a) and (b), Section 6802 of P.L. 108-458 expanded the circumstances in which the death penalty might be available where death resulted from the commission of the offenses involved.

Section 6802(b) eliminated that exclusion so that the offenses defined in 18 U.S.C. §§ 2332a(a) and (b) now can involve such chemical weapons.¹⁷

- 18 U.S.C. § 2332b—acts of terrorism transcending national boundaries, where death results. Specifically prohibits killing, kidnapping, maiming, committing an assault resulting in serious bodily injury or committing an assault with a dangerous weapon within the United States. Also prohibits creating a substantial risk of serious bodily injury to another by destroying or damaging any structure, conveyance, or other real or personal property within the United States, or attempting or conspiring to do so, where the conduct transcends national boundaries and meets set jurisdictional criteria. Those criteria include: the offender used the mails or any facility of interstate or foreign commerce; the offense obstructed, delayed or affected interstate or foreign commerce, or the offense would have done so if consummated; the victim or intended victim is the U.S. government, a member of the uniformed services, or any official, officer, employee, or agent of the any of the three branches of the U.S. government or of any department or agency of the United States; the structure, conveyance or other real or personal property is, in whole or in part, owned, possessed, or leased by the United States or a department or agency thereof; the offense is committed in the territorial sea of the United States, including the airspace above, the seabed and subsoil below, and artificial islands and fixed structures erected thereon; or the offense is committed within the special maritime or territorial jurisdiction of the United States. The death penalty is available for any such offense involving a killing or resulting in death to any person from conduct prohibited by this section.
- 18 U.S.C. § 2332f—unlawfully delivering, placing, discharging, or detonating an explosive or other lethal device in, into, or against a place of public use, a government facility, a public transportation system, or an infrastructure facilities, with intent to cause death or serious bodily injury or to cause extensive destruction, where such destruction causes or is likely to cause major economic loss, where death results.¹⁸

¹⁷18 U.S.C. § 229F defines the term “chemical weapon to mean, together or separately: a toxic chemical and its precursors, except where intended for a purpose not prohibited under 18 U.S.C., chapter 11B, as long as the type and quantity is consistent with such a purpose; a munition or device, specifically designed to cause death or other harm through toxic properties of such toxic chemicals, which would be released as a result of the employment of such a munition or device; and/or any equipment specifically designed for use directly in connection with the employment of such munitions or devices.

¹⁸This provision was added on June 25, 2002, as part of the Terrorist Bombings Convention Implementation Act of 2002, P.L. 107-197, Section 102(a), 116 Stat. 721. For applicable criminal penalties, the section cross references to 18 U.S.C. § 2332c. Federal jurisdiction over the offenses in 18 U.S.C. § 2332f is based on the existence of the following specified circumstances: If the offense is committed in the United States, (1) the offense must be committed against another nation or political subdivision thereof or a governmental facility of such nation or political subdivision, including its embassy, other diplomatic or consular premises; (2) the offense must be committed in an attempt to compel another nation or political subdivision thereof or the United States to act or to abstain from acting; (3) the

(continued...)

- 18 U.S.C. § 2340A—torture or attempted torture committed outside the United States by a person acting under color of law, where death results. United States jurisdiction under this provision covers offenses where the alleged offender is a U.S. national or where the alleged offender is present in the United States, regardless of the nationality of the victim or alleged offender.
- 18 U.S.C. § 2381, 18 U.S.C. § 2391(a)(1); U.S. Constitution, Article 3, Sec. 3, cl. 1—treason by a person owing allegiance to the United States. Involves either levying war against the United States or adhering to enemies of the United States, giving aid and comfort to them either within the United States or elsewhere. Constitution provides that no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.¹⁹
- 18 U.S.C. § 2441—War crimes committed by or against a member of the Armed Forces of the United States or a national of the United States as defined in section 101 of the Immigration and Nationality Act, 8 U.S.C. § 1101,²⁰ where death results.
- 21 U.S.C. § 461—killing of a person engaged in or on account of his or her official duties under 21 U.S.C. § 451 *et seq.*, with respect to inspection of poultry or poultry products.

¹⁸(...continued)

offense must be committed on board a vessel flying the flag of another nation, on board an aircraft registered under the laws of another nation, or on board an aircraft operated by the government of another nation or political subdivision thereof; (4) a perpetrator is found outside the United States; (5) a perpetrator is a national of another nation or a stateless person; or (6) a victim is a national of another nation or a stateless person. If the offense takes place outside the United States, (1) a perpetrator must be a U.S. national; (2) a victim must be a U.S. national; (3) a perpetrator must be found in the United States; (4) the offense must be committed in an attempt to compel the U.S. to do or abstain from doing any act; (5) the offense must be committed against a governmental facility of the United States or a political subdivision thereof, including a U.S. embassy or other diplomatic or consular premises; (6) the offense must be committed on board a vessel flying the U.S. flag or registered under U.S. law at the time the offense was committed; or (7) the offense must be committed on board an aircraft operated by the United States. Federal jurisdiction does not apply to the activities of armed forces during an armed conflict under the laws of war; to activities undertaken by military forces of a state in exercise of their official duties; or to offenses committed within the United States, where both the alleged offender and the victim(s) are U.S. citizens and the alleged offender is found within the U.S.; or where jurisdiction is predicated solely on the nationality of the victims or the alleged offender and the offense has no substantial effect on interstate or foreign commerce.

¹⁹If no death results from the commission of this offense, then, under the reasoning of the Court in *Coker v. Georgia*, *supra*, a death sentence imposed for this crime may be open to constitutional challenge. See discussion in fn. 7, *supra*.

²⁰22 U.S.C. § 1101(a)(22) defines “national of the United States” to mean “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”

- 21 U.S.C. § 675—killing of a person engaged in or on account of his or her official duties with respect to meat inspection under 21 U.S.C. § 601 *et seq.*
- 21 U.S.C. § 848(c)(1), 18 U.S.C. § 3591(b)(1)—drug kingpin violation committed as part of a continuing enterprise under conditions set forth in 21 U.S.C. § 848(b), involving twice the amount of controlled substances specified in 21 U.S.C. § 848(b)(2)(A) or twice the gross receipts specified in 21 U.S.C. § 848(b)(2)(B).²¹
- 21 U.S.C. § 848(c)(1), 18 U.S.C. § 3591(b)(2)—attempted murder by a drug kingpin endeavoring to obstruct justice.²²
- 21 U.S.C. § 848(e)(1)—intentional killing in the course of a violation of the drug kingpin statute.
- 21 U.S.C. § 848(e)(1)—murder of a law enforcement officer in furtherance of a controlled substances offense.
- 21 U.S.C. § 1041—killing of a person engaged in or on account of his or her official duties under 21 U.S.C. § 1031 *et seq.*, with respect to inspection of eggs and egg products.
- 49 U.S.C. §§ 46502(a)(2)(B) and (b)(1)(B)—air piracy, where death of another person results from the commission or the attempt. Subsection 46502(a)(2)(B) applies to aircraft piracy committed within the special aircraft jurisdiction of the United States. Subsection 46502(b)(1)(B) applies to an offense committed on an aircraft in flight outside the special aircraft jurisdiction of the United States and later found in the United States, where the takeoff or landing of the aircraft involved was located outside the territory of the aircraft's country of registration.

Capital Sentencing Procedures

Under 18 U.S.C. § 3432, a capital defendant must be provided a copy of the indictment and a list of veniremen and prosecution witnesses, stating the place of abode of each, at least three full days before trial begins. P.L. 103-322 amended this provision to permit the list of veniremen and witnesses to be withheld from a capital defendant if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

²¹As noted in fn. 7, *supra*, it is questionable, in light of the Supreme Court's decision in *Coker v. Georgia, supra*, whether the death penalty may be constitutionally applied to cases where a death does not result from the commission of the offense.

²²The imposition of a death sentence for this offense might also give rise to an Eighth Amendment proportionality challenge under *Coker v. Georgia, supra*, see fn. 7, *supra*.

P.L. 103-322 also amended 18 U.S.C. § 3005 to provide that the trial court in a capital case shall, upon defendant's request, promptly assign two counsel, at least one of whom shall be learned in the law applicable to capital cases. Counsel shall have free access to the accused at all reasonable hours. In assigning such counsel, the court must consider the recommendations of the Federal Public Defender organization, if one exists in the district. Otherwise, the recommendation of the Administrative Office of the United States Courts must be taken into account.

Sentencing procedures for federal civilian capital cases are codified at 18 U.S.C. §§ 3591-3598.²³ The government must give a capital defendant timely notice before trial or before a guilty plea is accepted that the prosecution intends to seek a death sentence and must specify the aggravating factor or factors upon which it intends to rely for this purpose.²⁴ This notice must be filed with the court.²⁵ The new statutory procedures specify mitigating and aggravating factors to be considered in determining whether a death sentence is warranted in a given case.²⁶ In addition to the specified mitigating factors,²⁷ other factors in the defendant's background, record, or character or any other mitigating circumstances may be considered. In addition to the specified aggravating factors,²⁸ the jury, or if there is no jury, the court, may

²³These capital sentencing procedures were added by P.L. 103-322, Title VI, Sept. 13, 1994, 108 Stat. 1960 ; and have been amended by P.L. 103-322 Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1960, 2150; P.L. 104-132, Title VII, § 728, April 13, 1996, 110 Stat. 1302; P.L. 104-294, Title VI, §§ 601(b)(7), 604(b)(35), Oct. 11, 1996, 110 Stat. 3499, 3508; P.L. 105-6, § 2(c), March. 19, 1997, 111 Stat. 12; and P.L. 107-273, Div. B., Title IV, §§ 4002(e)(2) and 4002(e)(8), Nov. 2, 2002, 116 Stat. 1810.

²⁴18 U.S.C. § 3593(a).

²⁵*Id.*

²⁶18 U.S.C. § 3592.

²⁷Under 18 U.S.C. § 3592(a), specified mitigating factors may include: a defendant's impaired capacity; the fact that the defendant acted under unusual and substantial duress; the defendant's minor participation in the capital offense; the fact that equally culpable defendant(s) will not be punished by death; the fact that the defendant has no prior criminal record; the defendant's severe mental or emotional disturbance when committing the offense; and the victim's consent to the conduct which resulted in his or her death.

²⁸18 U.S.C. § 3592(b) sets out aggravating factors applicable to treason or espionage capital offenses, including a defendant's prior espionage or treason offense for which he or she could have been sentenced to life imprisonment or death, the fact that the defendant knowingly created a grave risk of substantial danger to national security in the commission of the offense at bar, or the fact that the defendant knowingly created a grave risk of death to another person in commission of the offense.

18 U.S.C. § 3592(c) sets forth sixteen aggravating factors for homicide. Among these are: the fact that the death or injury resulting in death occurred during commission, attempted commission or flight from commission of one of a series of specified felonies; the defendant's prior conviction for a state or federal felony involving a firearm, other than a capital offense under 18 U.S.C. §924(c) and (j); the defendant's prior conviction for a federal or state offense which resulted in death, for which life imprisonment or a death sentence was authorized by statute; the defendant's prior conviction of two or more federal

(continued...)

consider whether any other aggravating factor for which notice has been given exists.²⁹

²⁸(...continued)

or state felonies, committed on separate occasions, involving infliction or attempted infliction of serious bodily injury or death; knowing creation of grave risk of death to one or more persons other than the victim of the offense during the commission of the offense or escape from apprehension for the offense; commission of the offense in an especially heinous, cruel, or depraved manner; procurement of commission of the offense by payment or promise of payment; commission of the offense for pecuniary gain; commission of the offense after substantial planning and premeditation to cause another's death or to commit an act of terrorism; the defendant's prior conviction of two or more federal or state drug trafficking felonies; the victim's particular vulnerability due to old age, youth or infirmity; the defendant's previous conviction of serious drug felonies under title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, for which sentences of at least five years of imprisonment could be imposed, or previous conviction for engaging in a continuing criminal enterprise; the defendant's commission of the offense during the course of engaging in a continuing criminal enterprise where the offense involved distribution of drugs to persons under 21; the fact that the offense was committed against certain high public officials or federal public servants (including judges, law enforcement officers, or employees of a U.S. penal or correctional institution while engaged in official duties or because of their official duties or their status as public servants); where the offense involves sexual abuse under 18 U.S.C. § 2241 *et seq.*, or sexual abuse of children under 18 U.S.C. § 2251 *et seq.*, the fact that the defendant was previously convicted of sexual assault or child molestation; or the fact that the defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

Aggravating factors for drug offense death penalties are set forth in 18 U.S.C. § 3592(d). These eight factors include: previous conviction of a state or federal offense involving the death of a person for which the death penalty or life imprisonment was authorized; previous conviction of two or more federal or state felonies committed on different occasions involving importation, manufacture or distribution of a controlled substance or involving the infliction of or attempted infliction of serious bodily injury or death; previous conviction of a state or federal offense involving manufacture, distribution, importation or possession of a controlled substance for which a sentence of imprisonment for five years or more was authorized; the defendant's use of a firearm in the commission of the offense or in furtherance of a continuing criminal enterprise, or the defendant's having knowingly directed, advised, authorized or assisted another to use a firearm to threaten, intimidate, assault or injure a person; the defendant directly distributed controlled substances to a person under age 21 during the commission of the offense or during a continuing criminal enterprise of which the offense was a part; the defendant directly used minors in drug trafficking during the offense or during a continuing criminal enterprise of which the offense was a part; or the defendant directly distributed controlled substances near schools during the offense or during a continuing criminal enterprise of which the offense was a part; or the offense involved the importation, manufacture, or distribution of a controlled substance mixed with a potentially lethal adulterant, where the defendant was aware of the presence of the adulterant.

²⁹The statutory provisions permitting the prosecutor to propose and the jury to consider nonstatutory aggravating factors, 18 U.S.C. §§ 3592(c) and 3593(a), have withstood constitutional challenges alleging that it constituted an impermissible delegation of legislative powers to the Executive Branch. *See, e.g., United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated and remanded for reconsideration in light of Ring v. Arizona*, 536 (continued...)

In a capital case, a separate sentencing hearing must be held before a jury or, if there is no jury, before the court.³⁰ The government must prove aggravating factors beyond a reasonable doubt, while the defendant must prove mitigating factors by a preponderance of the information.³¹ Where the hearing is before a jury, aggravating factors must be found unanimously. Special findings as to mitigating factors may be made by one or more members of the jury.³² If no aggravating factors are found, the court must impose a sentence other than death.³³

The jury must be instructed that its capital sentencing decision must not involve any consideration of the race, color, religious beliefs, national origin, or gender of the defendant or of any victim. Each juror must certify that these considerations were not involved in his or her individual decision and that the juror would have made the

²⁹(...continued)

U.S. 584 (2002), 536 U.S. 953 (2002), *cert. denied* ___ U.S. ___, 123 S. Ct. 2273 (2003), *rehearing denied*, ___ U.S. ___, 124 S. Ct. 19 (2003), *on remand* 357 F.3d 745(8th Cir. 2004) (death sentence vacated and remanded for imposition of life sentence); *motion for rehearing en banc granted and judgment vacated*, 2004 U.S. App. LEXIS 9190 (May 11, 2004); *United States v. Sampson*, 275 F. Supp. 2d 49 (D. Mass. 2003). They have also passed muster under Eighth Amendment analysis, *United States v. Sampson*, *supra*; *United States v. Frank*, 8 F. Supp. 2d. 253 (S.D.N.Y. 1998) (finding that Federal Death Penalty Act did not violate the constitutional prohibition against cruel and unusual punishment by permitting nonstatutory aggravating factors); *U.S. v. Llera Plaza*, 179 F. Supp. 2d 444 (E.D. Pa. 2001) (holding nonstatutory aggravating factors did not permit wholly arbitrary and capricious death sentences in violation of Eighth and Fourteenth Amendments); *U.S. v. Nguyen*, 928 F. Supp. 1525 (D. Kan. 1996) (holding that consideration of nonstatutory aggravating factors did not result in arbitrary and capricious sentencing in violation of the Eighth Amendment); *U.S. v. Sampson*, *supra* (risk of execution of innocent individuals did not mean that Federal Death Penalty Act was unconstitutional under Eighth Amendment). The Federal Death penalty Act has also withstood challenges based upon the ex post facto clause, Art. I, Sec. 9, cl. 3, of the U.S. Constitution, *see*, *U.S. v. Allen*, *supra*; *U.S. v. Frank*, *supra*; *U.S. v. Nguyen*, *supra*; *U.S. v. McVeigh*, 944 F. Supp. 1478 (D. Colo. 1996); *U.S. v. Chanthadara*, 928 F. Supp. 1055 (D. Kan. 1996). Some cases have considered the effect of *Ring v. Arizona*, *supra*, upon the sufficiency of an indictment in federal death penalty cases, *see*, *U.S. v. Jackson*, 327 F.3d 273 (4th Cir. 2003), *cert. denied*, 540 U.S. 1019 (2003) (holding that an aggravating factor necessary to the imposition of the death penalty must be alleged in the indictment); *U.S. v. Higgs*, 353 F. 3d 281 (4th Cir. 2003), *cert. denied*, ___ U.S. ___, 125 S. Ct. 627 (2004) (finding that since only one aggravating factor need be found by the jury for the death penalty to be imposed under the Federal Death Penalty Act, if one statutory factor is alleged in the indictment and that aggravating factor is found by the petit jury, the indictment is not defective because it did not include all aggravating factors that the jury might consider in determining whether to impose the death penalty); *U.S. v. Regan*, 221 F. Supp. 2d 672 (E.D. Va. 2002). In *U.S. v. Quinones*, 317 F.3d 86 (2d Cir. 2003), the court denied a motion for rehearing on an unsuccessful challenge to the Federal Death Penalty Act on the basis that the death penalty was unconstitutional per se because DNA tests had indicated that innocent people have been sentenced to death.

³⁰18 U.S.C. § 3593(b).

³¹18 U.S.C. § 3593(c).

³²18 U.S.C. § 3593(d).

³³18 U.S.C. § 3593(e).

same sentencing recommendation regardless of the race, color, religious beliefs, national origin, or sex of the defendant or of any victim.³⁴

No one may be sentenced to death for an offense committed while under the age of 18.³⁵ Nor can a death sentence be carried out upon a pregnant woman,³⁶ a person who is mentally retarded, or who, because of a mental disability, lacks the capacity to understand the death penalty and the reason it was imposed.³⁷ Finally, a death penalty may not be imposed under these death penalty provisions upon a person subject to the criminal jurisdiction of an Indian tribal government for an offense which occurred within Indian country and for which federal jurisdiction is based “solely upon Indian country,” unless the tribe's governing body has elected to have the new capital sentencing procedures in 18 U.S.C. ch. 228, §§ 3591-3598, applicable to the land and persons subject to its criminal jurisdiction.³⁸

The law provides for mandatory review of a death sentence upon timely notice filed. The court of appeals will reverse and remand for resentencing upon a finding that the sentence was the product of prejudice or passion, that the evidence does not support the finding of the existence of an aggravating factor, or that legal error requiring reversal exists.³⁹

Once appeals are exhausted, an execution is to be conducted according to the laws of the state in which the sentence is imposed. If the laws of that state do not provide for implementation of a death sentence, the court will designate another state which does have such laws, and the execution will be carried out in the manner prescribed by the latter state's laws.⁴⁰ State or local facilities may be used for execution. The United States marshal charged with supervising the implementation of the death sentence may also use the services of state or local officials or of a person such officials employ for that purpose. However, neither federal nor state employees may be required to participate in a capital prosecution or execution.⁴¹

³⁴18 U.S.C. § 3593(f).

³⁵18 U.S.C. § 3591(b).

³⁶18 U.S.C. § 3596(b).

³⁷18 U.S.C. § 3596(c).

³⁸18 U.S.C. § 3598.

³⁹18 U.S.C. § 3595.

⁴⁰18 U.S.C. § 3596(a).

⁴¹18 U.S.C. § 3597.