

SPECIAL ASSISTANT TO  
THE ATTORNEY GENERAL



August 12, 1982

TO: The Attorney General

FM: Carolyn B. Kuhl *CHK*

Attached for your information is a copy of Justice Powell's recent remarks. He speaks out in support of the type of habeas corpus reform we have proposed and urges that Congress require exhaustion of administrative remedies as a prerequisite to § 1983 actions.

John Roberts will be contacting OLA to be sure they make use of this speech in support of our criminal law reform package.

Attachment

SPECIAL ASSISTANT TO  
THE ATTORNEY GENERAL



July 8, 1982

TO: Kenneth W. Starr  
Bruce E. Fein  
Stephen J. Brogan  
John G. Roberts  
Charles J. Cooper  
Dennis Mullins

FM: Carolyn B. Kuhl *CBK*

For your information.

DISTRICT JUDGE JOEL M. FLAUM

Judge Flaum's opinions earmark him as a would-be John Paul Stevens on the Seventh Circuit Court of Appeals, namely, a judge who would endorse or acquiesce in judicial activism except in the area of habeas corpus. (Justice Stevens joined the liberal bloc of the Supreme Court in the vast majority of 5-4 decisions during the last Supreme Court term.)

Judge Flaum's decision in United States v. Brighton Building & Maintenance Co., 431 F.Supp. 1118 (1977), indicates that he would tolerate substantial judicial intrusion into the prosecutorial decisions of the Executive Branch, contrary to separation of powers principles. In that case, Judge Flaum refused to accept a plea of nolo contendere by a criminal defendant in an antitrust bid-rigging case even though the government had recommended that the plea be accepted. Judge Flaum asserted that he knew better than the Antitrust Division that acceptance of a nolo plea from a Sherman Act indicatee would not sufficiently vindicate the antitrust laws. This mischievous view will compound the difficulties that the Antitrust Division is already encountering in dismissing without the approval of a judge cases that were ill-conceived. See the IBM and Mercedes Benz cases. Judge Flaum's approach in this case reveals a mind that perceives the judiciary as the curator of criminal law enforcement.

Judge Flaum also has indicated a willingness to imply private rights of action to vindicate federal regulatory statutes. For instance, he implied a private right of action under Title VI of the Civil Rights Act even though he stated that there was no dispositive precedent on that issue. Yakin v. University of Illinois, 508 F.Supp. 848 (1981). This attribute of Judge Flaum's judicial philosophy is worrisome because it permits private parties and judges to manufacture extensions of the law through private lawsuits, even though the agency charged with enforcement has not gone so far.

Judge Flaum also has a penchant for recognizing exotic and esoteric claims of constitutional rights. He has repeatedly displayed an unwillingness to grant motions to dismiss or motions for summary judgment against extravagant constitutional claims advanced by plaintiffs, thereby inflicting on defendants needless expense, uncertainty, and interference with operations of schools, local government and business.

For example, in Craft v. Board of Trustees of University of Illinois, 516 F.Supp. 1317 (1981), Judge Flaum refused to

dismiss a claim based on the notion that an individual has a Constitutional right to a medical education and degree. In that case Judge Flaum evidenced a willingness to be even more activist than the Supreme Court in second-guessing the decisions of school officials. Judge Flaum allowed the plaintiff medical students to proceed on a claim that University officials had violated their "substantive due process" rights even though the Supreme Court has cautioned that courts generally should not intrude into academic decisionmaking on substantive due process grounds.

Nor is Craft an isolated example of activist jurisprudence. In Robinson v. Leahy, 401 F.Supp. 1027 (1975), Judge Flaum allowed a plaintiff to proceed on a very broad claim that a juvenile who is a ward of the state has a constitutional right to treatment, even though he acknowledged that relevant case law by no means compelled the conclusion that such a right even existed. Similarly, in Rasmussen v. City of Lake Forest, 404 F.Supp. 148 (1975), Judge Flaum exhibited activist tendencies in an area where even the Supreme Court has urged restraint. Despite Supreme Court authority that a zoning ordinance is unconstitutional only if its provisions are "clearly arbitrary and unreasonable," Judge Flaum failed to dismiss a far-fetched constitutional claim that a zoning ordinance requiring one and one-half acre lot size constituted a "taking" without compensation in violation of the Fifth and Fourteenth Amendments. Again, Judge Flaum did not hesitate to undertake to second-guess the policy decisions of local officials.

Judge Flaum also seemingly has no qualms about constitutionalizing private defamation actions. Although he stated that there was no binding precedent on point, he held that an employee has a claim under the Fourteenth Amendment due process clause when the employee is allegedly defamed by his employer in connection with being suspended without pay. Blank v. Swan, 487 F.Supp. 452 (1980). Such a rule of law puts the federal courts in the position of passing judgment upon routine employment decisions, based not on state law, but rather on the court's whim in purporting to apply the Constitution. This Administration has repeatedly emphasized that it will appoint judges who will rectify such activist doctrines, not extend them.

Outside the area of habeas corpus, it is clear that Judge Flaum does not subscribe to the judicial philosophy of the President or the Attorney General. His selection for the Seventh Circuit Court of Appeals would destroy an opportunity to move the law in a propitious direction in which the judiciary plays a more modest role in governing the people. Indeed putting Judge Flaum on the Seventh Circuit would nullify many of the proper judicial trends Judge Posner has initiated during his tenure on that court.

# Memorandum



Subject

Debt Collection

Date

July 6, 1982

To Tex Lezar  
John Roberts

From Carolyn B. Kuhl

A handwritten signature, likely of Carolyn B. Kuhl, is written in the right margin next to the "From" field.

Attached is an update on debt collection I sent to the Attorney General last week. Bob Ford called me today to suggest that the Attorney General might refer to these figures in his speech to the U.S. Attorneys conference next week.

Bob also reminded me that the Attorney General has sent, or has in process, letters of congratulations to U.S. Attorneys Henry McMaster (South Carolina) and George Proctor (E.D. Arkansas), commending them for their debt collection activities. They may be at next week's conference.

Attachment

COPY FOR YOUR INFORMATION  
From  
Edward H. Funston  
Debt Collection Section  
EOUSA

756-6281

Folder: Chron. 3-1-82 to 8-31-82  
Series: Correspondence Files of  
Carolyn B. Kuhl, 1981-82  
Acc. #60-98-0832 Box 1  
RG 60 Department of Justice

Executive Office for United States Attorneys  
Report on Collections

CASH COLLECTIONS SHOWN IN THE U.S. ATTORNEYS' DOCKET AND  
REPORTING SYSTEM FOR FISCAL YEAR 1982 THROUGH MAY, 1982

<u>MONTH</u>	<u>CRIMINAL</u>	<u>CIVIL</u>	<u>TOTAL</u>
October, 1981	\$ 989,895	\$ 9,613,377	\$10,603,272
November, 1981	1,735,589	5,344,104	7,079,694
December, 1981	1,224,591	7,441,634	8,666,225
January, 1982	2,742,833	10,811,176	13,554,009
February, 1982	1,081,943	6,690,918	7,772,861
March, 1982	2,874,469	7,966,516	10,840,985
April, 1982	3,596,332	14,339,459	17,935,791
May, 1982	2,646,245	20,198,633	22,844,878
TOTAL	16,891,897	82,405,817	99,297,214

CUMULATIVE AVERAGES

First Month's Avg.	\$ 989,895	\$ 9,613,377	\$10,603,272
Two Month Avg.	1,362,742	7,478,741	8,841,483
Three Month Avg.	1,316,692	7,466,372	8,783,064
Four Month Avg.	1,673,227	8,302,573	9,975,800
Five Month Avg.	1,554,970	8,291,236	11,193,459
Six Month Avg.	1,774,887	7,977,954	9,752,841
Seven Month Avg.	2,035,093	8,886,741	10,921,834
Eight Month Avg.	2,111,487	10,564,663	13,732,797

AMOUNT AND PERCENTAGE OF INCREASE

Amount by which April 1982 exceeded avg. for 1st 6 mos. of FY 1982	1,821,445	6,361,505	8,182,950
Percentage Increase	203%	180%	184%
Amount by which May 1982 exceeded avg. for 1st 6 mos. of FY 1982	3,517,603	12,220,679	13,092,037
Percentage Increase	149%	253%	234%

\* Excludes Southern District of California which is not currently included in the D&R System because it is using PROMIS which is not yet programmed to report collection activities to the Department.

# Memorandum



Subject		Date
<u>Plyler v. Doe</u> -- "The Texas Illegal Aliens Case"		June 15, 1982
To	From	
The Attorney General	Carolyn B. Kuhl John Roberts	<i>CK</i> <i>JR</i>

Today the Supreme Court issued its opinion in Plyler v. Doe, the "Texas Illegal Aliens Case." The Court held unconstitutional the Texas statute which authorizes local school districts to deny enrollment to children who are not legally admitted to the United States and denies state funds for the education of such children. Justice Brennan wrote the majority opinion in which Justices Marshall, Blackmun, Powell and Stevens joined. The Chief Justice authored a dissent joined by Justices White, Rehnquist and O'Connor.

While the Court declined to hold that illegal aliens could be designated a "suspect class" for purposes of Fourteenth Amendment Equal Protection analysis and declined to hold that education is a "fundamental right," the Court nonetheless applied a "heightened level" of judicial scrutiny, requiring the state to show that the statute furthered some "substantial goal" of the state. Applying this standard, the Court determined that Texas had failed to make a sufficient showing of a substantial government interest furthered by the statute. The majority concluded that "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation." Opinion of the Court at p. 27.

The dissent, written by the Chief Justice, chastizes the majority for "patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis" to achieve "an unabashedly result-oriented approach." Dissenting Opinion at p. 4. The Chief Justice articulates the need for judicial restraint in language similar to that you have used in recent speeches. For example,



[T]he Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense."

Id. at 1-2.

It seems likely that the dissenting Justices had particularly tried to win over Justice Powell, but were unable to do so. The dissent notes with specific approval the warning Justice Powell had given in an earlier case, where he had written that raising the level of judicial scrutiny in Equal Protection cases according to the Court's view of the societal importance of the interest affected, tends to cause the Court to assume a "legislative role."

As you will recall, the Solicitor General's office had decided not to take a position before the Supreme Court on the Equal Protection issue in this case. The briefs for the State of Texas were quite poor. It is our belief that a brief filed by the Solicitor General's Office supporting the State of Texas -- and the values of judicial restraint -- could well have moved Justice Powell into the Chief Justice's camp and altered the outcome of the case.

In sum, this is a case in which our supposed litigation program to encourage judicial restraint did not get off the ground, and should have.

SPECIAL ASSISTANT TO  
THE ATTORNEY GENERAL



March 24, 1982

TO: Ken Starr  
Bruce Fein  
Richard Willard  
Geoffrey Stewart  
Elizabeth Haile  
Chuck Cooper  
John Roberts

FM: Carolyn B. Kuhl *CBK*

Shiela Joy has prepared the attached  
list of court of appeals judges who are  
eligible to retire through the end of  
1982.

Attachment

UNITED STATES CIRCUIT JUDGES ELIGIBLE TO RETIRE DURING 1982

<u>CIRCUIT</u>	<u>NAME</u>	<u>DATE ELIGIBLE</u>	<u>STATE OF RESIDENCE AT TIME OF APPT'MT</u>
DC	Robinson, Spottswood	07-26-81	District of Columbia
DC	Wright, J. Skelly	01-14-76	Louisiana
DC	Tamm, Edward A.	04-21-71	District of Columbia
DC	*Robb, Roger	05-09-79	District of Columbia
DC	MacKinnon, George	06-16-79	Minnesota
1st	no one eligible		
2nd	Kaufman, Irving R	06-24-75	New York
3rd	Seitz, Collins Jr.	07-18-81	Delaware
4th	Butzner, John D	10-02-82	Virginia
4th	Russell, Donald S	01-04-77	So. Carolina
5th	Brown, John R.	12-10-74	Texas
	*Garza, Reynaldo	07-07-80	Texas
6th	Edward <del>S</del> , George C.	08-06-79	Michigan
	*Brown, Bailey	06-16-82	Tennessee
7th	Cummings, Walter Jr.,	08-15-81	Illinois
8th	**Stephenson, Roy L.	03-14-82	Iowa
	**Henley, J. Smith	05-18-82	Arkansas
9th	no one eligible		
10th	Seth, Oliver	05-30-80	New Mexico
	Doyle, William E.	10-02-76	Colorado
11th	no one eligible		

\*Has sent letter announcing intention to retire

\*\*An indication has been given that judge will retire(no formal letter as yet)

# Memorandum



Subject  
League of Women Voters  
Mailing re Voting Rights Act

Date  
March 22, 1982

To  
The Attorney General

From  
Carolyn B. Kuhl

*CBK*

Brad Reynolds has sent the attached letter to the President of the League of Women Voters regarding inaccuracies in the League's mailing regarding the Voting Rights Act. Copies of the letter and its enclosures were sent to all Directors and Trustees of the League.

cc: Deputy Attorney General  
Robert McConnell  
Thomas DeCair  
John Roberts



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 19, 1982

Ms. Ruth Hinerfeld  
President  
League of Women Voters  
1730 M Street, N.W.  
Tenth Floor  
Washington, D. C. 20036

Dear Ms. Hinerfeld:

It has come to my attention that the League of Women Voters recently conducted a mail campaign soliciting contributions to "help the League's Emergency Campaign on Voting Rights. . . ." I am writing you because the two-page letter which was distributed over your name unfairly misrepresents the President's position on the extension of the Voting Rights Act, as that position has been explained in testimony before Congress by representatives of the Department of Justice.

Your letter states that the Administration is "supporting changes in the Act that would gut all its enforcement provisions." This is flatly incorrect. The Administration supports a straight ten-year extension of the enforcement provisions of this important civil rights legislation without change.

The recommended changes to the Act are contained in a bill passed by the House of Representatives which includes a proposed amendment to Section 2, or the permanent provision, of the Voting Rights Act. The amendment seeks to remove the intent test that has been in Section 2 since the Act was passed in 1965, and put in its stead an "effect" standard that measures a violation on the basis of election results. The Administration opposes this proposed change to Section 2 because it would permit political subdivisions across the country -- at all levels of government -- to be branded "discriminatory" whenever their election results failed to mirror the racial or language-minority makeup of the particular jurisdiction. As the Washington Post correctly observed in commenting on the prospect of an effects test in Section 2 of the Voting Rights Act, its "logical terminal point" is "that election district lines must be drawn to give proportional representation to minorities" -- essentially the equivalent of quotas in electoral politics.

There is, of course, sharp disagreement over the merits of the proposed amendment to Section 2. The political debate on this critically important subject is not well served, however, when one of the protagonists includes in a national mailing a wildly distorted account of the position of others. In this regard, your letter can be read to suggest not only that the Administration seeks to amend the enforcement provision of Section 2, but also that we seek to "gut" the Section 5 pre-clearance provision of the Act -- the enforcement provision administered by the Justice Department which is at the very heart of the Act. As anyone who has listened to the President and the Attorney General would know, both assertions are false.

The League of Women Voters has a fine reputation as a non-partisan and fair-minded organization. In the hope that some effort can be made to correct the serious misstatements which have been circulated, I am sending you and the League's Directors and Trustees the Attorney General's and my testimony on the Voting Rights Act which sets forth in greater detail the Administration's position. I am also enclosing an article from Commentary magazine discussing the dangers inherent in the modification of Section 2 proposed by the House bill.

Thank you in advance for taking the steps necessary to return the debate on this issue to a discussion grounded on fairly reasoned analysis.

Sincerely,




Wm. Bradford Reynolds  
Assistant Attorney General  
Civil Rights Division

cc w/Attachments: Directors/Trustees

# Memorandum

*R- No Regrets C*



Subject

ACTION Reception -- March 21, 1982

Date

March 19, 1982

To

From

Chips Stewart *Chips*

Edward Schmults  
Rudy Giuliani  
Lowell Jensen  
Stan Morris  
Jeffrey Harris  
David Hiller  
Jack Kenney  
Mark Richard  
David Margolis  
☒ Carolyn Kuhl  
Hank Habicht  
John Roberts  
Robert Bucknam  
Ken Caruso

Approximately 300 people have been invited to the ACTION reception on March 21st, 5-7 p.m., at the Russell Senate Office Building. Several agency heads are expected to attend such as Bud Mullen. The hosts have encouraged Justice Department officials to be present at this reception.

\* If you would like to attend, please contact my secretary, Roberta Duff, at 633-2927 before 3 p.m. today to ensure that your name appears on the security guest list.

RSVP at 633-2927 before 3 p.m. today.

Attachment



ACTION  
cordially invites you  
to attend a reception  
on the eve of the  
White House Briefing  
on  
Drug Use and the Family.

At the  
Russell Senate Office Building  
318 Senate Caucus Room  
First & Constitution Ave., N.E.

March 21, 1982  
5pm — 7pm

R.S.V.P.

(For security reasons, must have list of all in  
attendance)



SPECIAL ASSISTANT TO  
THE ATTORNEY GENERAL



March 15, 1982

TO: Mr. Schmults  
Mr. Reynolds  
Mr. McConnell  
Mr. Rose  
Mr. Starr  
Mr. DeCair  
Mr. Roberts  
Mr. Cooper

FM: Carolyn B. Kuhl

*CBK*

RE: Voting Rights

The attached letter from the  
League of Women Voters came to me  
with a reply envelope for enclosure  
of a contribution.

Attachment

SPECIAL ASSISTANT TO  
THE ATTORNEY GENERAL



March 15, 1982

TO: The Attorney General

FM: Carolyn B. Kuhl *CK*

RE: League of Women Voters' Mailing  
on the Voting Rights Act

The attached letter from the League of Women Voters came to me with a reply envelope for enclosure of a contribution.

Although Ruth Hinerfeld, President of the League, has testified in favor of the House bill, I find it hard to believe that there is widespread understanding in that organization of the consequences of the position she is taking. Perhaps it would be useful to meet with the Board of Directors (or other governing body) of the League to explain our position fully.

I have circulated this letter to others in the Department.

Attachment

RH LWV-917  
RUTH HINERFELD

(6743)  
WASH DC

(0823-CMS-15B-21)RC

EXPEDITE URGENT REPLY REQ

I'M SENDING THIS ALERT TO YOU AND THOUSANDS OF OTHER CITIZENS WHO HAVE DEMONSTRATED A LONG-STANDING CONCERN FOR EQUAL RIGHTS.

THE VOTING RIGHTS ACT OF 1965 WHICH PASSED THE HOUSE OF REPRESENTATIVES IS STILL THREATENED IN THE SENATE. THE LEAGUE OF WOMEN VOTERS IS MOBILIZING A MASSIVE EFFORT TO RESIST ATTEMPTS TO GUT OR DESTROY THIS HISTORIC LEGISLATION THROUGH ADMINISTRATIVE TECHNICALITIES.

DURING THE PAST TWO DECADES NOTHING HAS HAD HIGHER PRIORITY FOR THE LEAGUE OF WOMEN VOTERS THAN EXTENDING THE RIGHT TO VOTE AND TO PARTICIPATE IN THE POLITICAL PROCESS TO ALL AMERICANS.

MANY CITIZENS FORGET THAT THESE RIGHTS HAVE NOT ALWAYS BEEN GUARANTEED IN OUR LAND -- DESPITE THE PROMISE OF OUR CONSTITUTION AND THE DECLARATION OF INDEPENDENCE.

IT TOOK A STRONG AND VIBRANT SUFFRAGE MOVEMENT TO GUARANTEE WOMEN'S POLITICAL RIGHTS, AND WOMEN ARE STILL FIGHTING FOR THEIR OTHER RIGHTS IN OUR SOCIETY.

AND IT WAS NOT UNTIL RECENTLY THAT MINORITY AMERICANS WERE GUARANTEED THE RIGHT TO VOTE.

WHEN THE VOTING RIGHTS ACT WAS ENACTED IN 1965, MANY ASSUMED THE BATTLE TO BE OVER.

IT IS NOT.

WHILE MANY SAY THAT THEY ARE FOR VOTING RIGHTS, WHAT THEY MEAN BY THAT IS OFTEN MISLEADING. MANY "SUPPORTERS" OF VOTING RIGHTS ARE IN FACT SUPPORTING CHANGES IN THE ACT THAT WOULD GUT ALL ITS ENFORCEMENT PROVISIONS -- THE VERY PROVISIONS WE WORKED SO HARD TO GET IN 1965. INCLUDED RIGHT NOW, UNFORTUNATELY, IN THIS LIST OF "SUPPORTERS" IS THE PRESIDENT OF THE UNITED STATES; STROM THURMOND, CHAIRMAN OF SENATE JUDICIARY COMMITTEE; ORRIN HATCH, CHAIRMAN OF THE SENATE SUBCOMMITTEE DEALING WITH THIS BILL; AND MANY OTHER MEMBERS OF THE UNITED STATES SENATE.

FAILURE TO EXTEND A STRONG VOTING RIGHTS ACT WILL NOT ONLY CURTAIL PARTICIPATION BY MINORITIES IN THE ELECTORAL PROCESS, IT WILL SEND A MESSAGE TO MILLIONS OF MINORITY GROUP MEMBERS THAT AMERICA IS TURNING ITS BACK ON THEM.

SUCH A REACTION IS THE LAST THING AMERICA NEEDS TODAY.

THAT'S WHY THE LEAGUE OF WOMEN VOTERS IS AN IMPORTANT LEADER IN THE CAMPAIGN TO FIGHT FOR PRESERVATION OF THE CURRENT VOTING RIGHTS GUARANTEES.

WE HAVE BEGUN TO RECRUIT ALLIES FROM ALL ELEMENTS OF OUR SOCIETY -- REPUBLICANS AND DEMOCRATS, BUSINESS AND LABOR, CONSERVATIVES AND LIBERALS -- FOR THE NON-PARTISAN FIGHT FOR DEMOCRATIC RIGHTS.

BUT WE NEED YOUR HELP. THE TASK WILL BE DIFFICULT AND ENORMOUSLY EXPENSIVE. WE MUST REACH OUT TO CONCERNED CITIZENS LIKE YOU FOR SPECIAL CONTRIBUTIONS TO HELP THE LEAGUE'S EMERGENCY CAMPAIGN ON VOTING RIGHTS TODAY.

YOUR CONTRIBUTION WILL MAKE IT POSSIBLE FOR US TO MOBILIZE AN EFFECTIVE COALITION TO STOP THE HATCH AND THURMOND PLANS BY LETTING WAVERING SENATORS AND REPRESENTATIVES KNOW THAT MILLIONS OF CONCERNED AMERICANS -- NOT ONLY MINORITIES -- WILL BE WATCHING THEM.

THIS NATION CANNOT AFFORD A RETURN TO THE "STATES RIGHTS VS. CIVIL RIGHTS" BATTLES OF THE PAST.

WE CANNOT AFFORD TO TURN BACK THE CLOCK ON VOTING RIGHTS.

BUT THAT'S EXACTLY WHAT COULD HAPPEN IF WE FAIL TO ACT NOW.

WHEN YOU BECOME A FRIEND OF THE LEAGUE BY HELPING TO SUPPORT OUR EFFORTS IN THIS HISTORIC BATTLE, I WILL SEE TO IT THAT YOU RECEIVE REGULAR COPIES OF THE VOTER, OUR HIGHLY-ACCLAIMED PERIODICAL WHICH WILL KEEP YOU POSTED ON VOTING RIGHTS DEVELOPMENTS AND OTHER KEY ISSUES OF THE DAY.

BUT PLEASE, ACT NOW. THE FIGHT WILL BE A TOUGH ONE. WE DON'T HAVE A MOMENT TO LOSE IN OUR EFFORTS TO BLOCK ATTEMPTS TO DEPRIVE MINORITY AMERICANS OF THEIR HARD-EARNED RIGHTS.

RUTH HINERFELD  
PRESIDENT  
LEAGUE OF WOMEN VOTERS

# Memorandum



Subject

Request From National Center for State  
Courts for Consideration of Research  
Proposal

Date

February 18, 1982

To

Stanley E. Morris  
Associate Deputy Attorney General

From

Carolyn B. Kuhl  
Special Assistant to  
the Attorney General

*CBK*

The attached letter from the National Center for State Courts asks that the Attorney General have NIJ consider immediately a research proposal related to meeting Supreme Court requirements for use of the death penalty. The letter requests that the research proposal be considered before our review of research priorities is completed.

What response do you recommend? I suppose we could assure the group that the review will be completed shortly and also state that to expedite consideration we will have NIJ immediately consider the project design aspects of the proposal so that a grant could be processed as soon as possible after our priorities review is complete.

Attachment

cc: John Roberts

I suggest asking Dieckman to respond for the A.G.  
Telling them no final decisions will be made  
until the proposal is carefully reviewed. We could  
review a draft before it goes out. O.K.?

*Sh*

# National Center for State Courts

300 Newport Avenue  
Williamsburg, Virginia 23185  
(804) 253-2000

January 29, 1982

## BOARD OF DIRECTORS

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Superior Court of Los Angeles, CA

Edward B. McConnell  
Executive Director

Honorable William French Smith  
Attorney General of the United States  
Department of Justice  
Constitution Avenue and Tenth Street, NW  
Washington, DC 20530

Dear Mr. Attorney General:

The decisions of the United States Supreme Court upholding the constitutionality of state capital punishment laws have imposed significant obligations upon state appellate courts to review each state death sentence to assure its consistency with the punishment meted out in previous similar cases in the state, i.e., to conduct a "proportionality review". These obligations have been amplified further in some states by the terms of their particular death penalty statutes. The states are uncertain as to the appropriate guidelines to be followed in the fulfillment of "proportionality review" requirements.

This subject was discussed last year by the Conference of Chief Justices at its midyear meeting in Houston, Texas, and has been pursued since that time by the staff of the National Center for State Courts in conjunction with representatives of interested state court systems. This work has resulted in a concept paper, dated January 1982, submitted on our behalf by the National Center for State Courts to the Bureau of Justice Statistics and the National Institute of Justice requesting financial support to assist us in developing "proportionality review" processes and procedures for our courts. A copy of the concept paper is attached.

This proposal seems to us consistent with the priority of your administration to apply available federal assistance to the problems of reducing violent crime in the various states. The passage of a federal capital punishment statute is one of your legislative priorities; to assist the states in implementing their existing death penalty laws should be of equal importance.

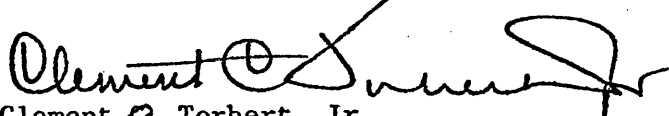
We understand that this proposal is of interest to Acting Director Underwood of the National Institute of Justice (perhaps to be monitored jointly with the Bureau of Justice Statistics) but that consideration of any new grant proposals by his office has been suspended pending review of all Justice Department research priorities by a department-wide policy group.

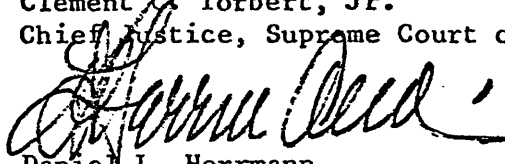
Honorable William French Smith  
Attorney General of the United States  
Page 2  
January 29, 1982

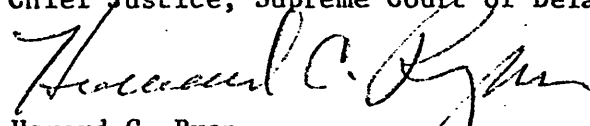
Because the proposed project is so obviously consistent with the Department's basic aims of providing the states with practical assistance in their efforts to deal with violent crime, we request that you authorize the National Institute of Justice to consider this request immediately, without awaiting the completion of the Department's review of the Institute's overall program plan.

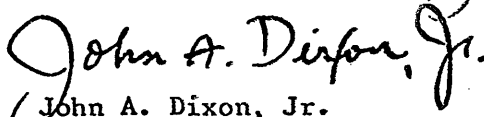
One or more of us would be glad to meet with you or your representative, or to discuss the importance of the proposed project with you by telephone, at your convenience. We very much appreciate your attention to this request along with the many other pressing matters of your office.

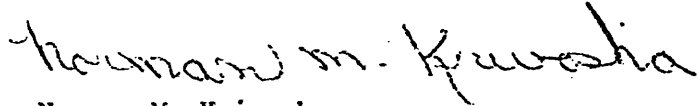
Sincerely,

  
Clement Torbert, Jr.  
Chief Justice, Supreme Court of Alabama

  
Daniel L. Herrmann  
Chief Justice, Supreme Court of Delaware

  
Howard C. Ryan  
Chief Justice, Supreme Court of Illinois

  
John A. Dixon, Jr.  
Chief Justice, Supreme Court of Louisiana

  
Norman M. Krivosha  
Chief Justice, Supreme Court of Nebraska

  
Roger L. Wollman  
Chief Justice, Supreme Court of South Dakota

cc: Edward C. Schmultz  
Rudolph W. Guiliani  
James L. Underwood, w/o enclosure  
Benjamin H. Renshaw, w/o enclosure  
John M. Greacen, w/o enclosure

PROPORTIONALITY REVIEWS OF DEATH SENTENCES  
BY STATE APPELLATE COURTS

Concept Paper

January, 1982

SUBMITTED TO:

Bureau of Justice Statistics  
Department of Justice  
633 Indiana Avenue, NW  
Washington, DC 20531

and

National Institute of Justice  
633 Indiana Avenue, NW  
Washington, DC 20531

SUBMITTED BY:

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## INTRODUCTION

The rising tide of violence is the crime topic of most interest and concern to the American public. "Violent crime" has been labelled by the President, in his address to the International Association of Chiefs of Police on September 28, 1981, as "a major priority."<sup>1</sup> The Attorney General, recognizing the centrality of violent crime as an issue for his department, appointed a Task Force on Violent Crime in April of last year to study the federal government's past programs to fight crime and to advise him of ways to improve their effectiveness in reducing criminal violence. One of that Task Force's recommendations (Recommendation 15) called upon the Attorney General to "direct responsible officials in appropriate branches of the Department of Justice to give high priority to testing systematically programs to reduce violent crime and to inform state and local law enforcement and the public about effective programs."<sup>2</sup>

It has traditionally been difficult for criminal justice agencies to identify projects or activities that affect violent crime specifically. Most criminal justice improvement efforts can be expected to result in incidental enhancement of our violent crime fighting capabilities. But for most criminal justice system agencies and activities, the acts of violence that are cumulatively of such savage impact on the citizen are rare and unpredictable events, extremely difficult to anticipate,

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<sup>1</sup>Address by President Ronald Reagan, International Association of Chiefs of Police Annual Meeting (Sept. 28, 1981).

<sup>2</sup>Attorney General's Task Force on Violent Crime, Final Report 23 (1981).

prevent, or respond to in any systematic fashion. Even for prosecutors and courts, crimes of violence are generally confronted as individual instances of antisocial conduct, lacking consistent pattern or predictability.

One criminal justice endeavor that is focused exclusively upon crimes of violence, and on the most heinous of those crimes, is the enactment into law and application of the death penalty. A topic of intense discussion and debate in this country over the past twenty years, capital punishment has been put into place in 36 states since previous federal and state statutes were ruled unconstitutional by the United States Supreme Court in 1972 in Furman v. Georgia<sup>3</sup> and succeeding cases. While social science research findings have not established conclusively that the death penalty serves as a deterrent to any particular type of criminal conduct, the widespread re-enactment of capital punishment laws shows that our citizens and their elected legislative and executive leaders believe that it is a necessary and appropriate criminal sanction. The reasons for its widespread adoption by the states are similar to the arguments recently presented to the Congress by the Attorney General in support of the passage of a death penalty statute covering a limited number of federal crimes:

Both the President and I have repeatedly indicated in public statements that we support the imposition of the death penalty in carefully circumscribed conditions for the most serious crimes. In our view, the death penalty is warranted for two principal reasons. First, common sense tells us that the death penalty does operate as an effective deterrent for some crimes involving premeditation and calculation, and that it thus will save the lives of persons who would otherwise become the permanent and irretrievable victims of crime. Second, society does have a right -- and the Supreme Court has confirmed that

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<sup>3</sup>Furman v. Georgia, 408 U.S. 238 (1972).

right -- to exact a just and proportionate punishment on those who deliberately flout its laws; and there are some offenses which are so harmful and so reprehensible that no other penalty, not even life imprisonment without the possibility of parole, would represent an adequate response. The actions of our state legislatures over the past decade and the results of recent opinion polls clearly establish that a large majority of the American public share this view that the death penalty is a necessary and appropriate sanction for the most heinous crimes.

.....  
It is our view that S. 114, which would permit the imposition of the death penalty only in a limited number of cases involving the brutal taking of human life or the creation of the gravest of risks to the national security and which sets forth the necessary procedures and safeguards to assure that the death penalty would not be imposed in an arbitrary or discriminatory fashion, provides both a constitutional and enforceable means for the restoration of the death penalty at the federal level.<sup>4</sup>

Most scholars and practitioners in the criminal justice area believe that a sanction's deterrent value is closely related to a potential offender's perception of the speed and certainty with which it will be applied.<sup>5</sup> Currently there are more than 700 persons under sentence of death in the United States prisons. The number of convicted murderers added to death row has increased every year since 1977. During 1980, the last year for which data are available, 187 persons were sentenced to death while 48 persons were removed from death row. In contrast to the average of 200 executions per year during the 1930's, only four prisoners have been executed during the past five years.<sup>6</sup> Thus, the overwhelming

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<sup>4</sup>Violent Crime: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (Oct. 23, 1981) (statement of William French Smith, Attorney General).

<sup>5</sup>See generally, F. Zimring & G. Hawkins, Deterrence: The Legal Threat in Crime Control (1973).

<sup>6</sup>Bureau of Justice Statistics Bull., July 1981.

percentage of persons sentenced to death are not executed, but become death-row inmates whose convictions and sentences are appealed ad infinitum. Whatever the ultimate potential deterrent effects of capital punishment may be, they are not being obtained under the current process of implementing the penalty.

As noted by the Attorney General in his testimony quoted above, the central issues in the enactment and implementation of a capital punishment law are assuring that it is limited to a small number of the most serious cases, and that it is applied in an accurate, fair and nondiscriminatory manner. Because of its seriousness and finality, a sentence of death will never be imposed and executed "quickly" in this country. It will always be accompanied by procedural and substantive safeguards intended to postpone its execution until all non-frivolous possibilities that an injustice may be done are removed. There are legislative efforts underway to deal with the most persistent procedural problem associated with the administration of the death penalty -- the repetitiveness of collateral attacks on state court criminal convictions in the federal courts.<sup>7</sup> However, the current administration of the death penalty also suffers from a major substantive weakness, as well -- the lack of adequate techniques for state appellate courts to use to assure that the penalty is not applied capriciously or discriminatorily.

In its landmark 1972 decisions, the Supreme Court ruled that existing capital punishment laws had been applied arbitrarily and capriciously, thereby violating Eighth Amendment guarantees. Since then, the 36 states

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<sup>7</sup>See, e.g., S. 653, introduced by Senators Thurmond and Chiles in this Congress and Recommendation 42 of the Attorney General's Violent Crime Task Force.

that have passed new death penalty statutes have attempted to specify carefully the types of cases in which the death penalty can be applied, identify aggravating or mitigating circumstances which a jury can consider, and provide for procedural safeguards that minimize the risk of arbitrary and capricious imposition of the penalty. The principal problem faced by the legislatures and the courts is in assuring that the death sentence is applied fairly and nondiscriminatorily. How is it possible to make certain that a person sentenced to death is not executed for a type or category of murder for which other convicted persons have been given life sentences? The issue could be resolved, one might suppose, if the death sentence were required for every conviction of a capital crime or of a particular category of capital crime. But the Supreme Court has struck down such "mandatory" capital sentencing approaches,<sup>8</sup> requiring that a state give a person convicted of a capital crime an opportunity to present any and all evidence that he or she considers likely to have a mitigating effect upon the sentencing decision. The jury must be given the discretion and duty to decide whether the mitigating evidence submitted, when weighed against the seriousness of the crime committed and other aggravating circumstances that are present, justifies the granting of mercy or requires the imposition of the ultimate penalty. The state courts are therefore faced with the difficult task of determining whether a particular death sentence, imposed by a jury under these circumstances, is consistent with or out of step with the usual behavior of capital sentencing juries in that state faced with similar

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<sup>8</sup>Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978).

crimes and offenders. For if a particular jury fails to grant mercy in a case in which most other juries in that state would grant mercy, or a jury imposes the death sentence for an impermissible reason, such as the offender's race, the courts of the state must have a means for identifying and vacating that conviction. Otherwise the state's entire capital sentencing process is in jeopardy of falling before an Eighth Amendment challenge.

Many of the states have addressed this problem by requiring that each death sentence be reviewed by an appellate court to ensure that it is not "excessive" or "disproportionate." Deciding how to make such determinations has consumed a great deal of time and effort on the part of appellate courts and legal scholars. The difficulties in making proportionality reviews have been discussed in numerous court opinions and law review articles.<sup>9</sup> The courts of the state of Georgia, in particular, have given the matter considerable attention. Nonetheless, a

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<sup>9</sup>See, e.g., Majority, plurality and dissenting opinions in McCautha v. California, 402 U.S. 183 (1970); Gregg v. Georgia, 428 U.S. 153 (1976); and Godfrey v. Georgia, 446 U.S. 420 (1980) cited in Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981). See generally D. Baldus, Proportionality Review of Death Sentences: Issues and Procedures, Outline of Remarks, Conference of Chief Justices Annual Meeting (Feb. 1981); D. Baldus, Quantitative Methods for Judging the Comparative Excessiveness of Death Sentences, in The Use, Nonuse, Misuse of Applied Social Research in the Courts 83 (Saks & Baron, 1980); Baldus, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1 (1980); Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 917 (1979); C. Black, Capital Punishment: The Inevitability of Caprice and Mistake (1974); Black, Due Process for Death: Jurek v. Texas and Companion Cases, 26 Cath. U.L. Rev. 1 (1976); Bowers and Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 Crime & Delinq. 563 (1980); Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099 (1953). See also articles cited in 33 Stan L. Rev. 1, 3 n.5, 12 nn.28-29 (1980).

death sentence, found by the Georgia Supreme Court to be not disproportionate to other sentences in similar cases, was recently vacated by the United States District Court on the grounds that the state's review process in the case had been inadequate and that its result was demonstrably wrong.<sup>10</sup> This decision portends serious problems for the supreme courts of Georgia and the other states having capital punishment statutes as they attempt to meet the U. S. Supreme Court's standards for a constitutionally acceptable capital punishment process.

#### Legal Issues and Current Judicial Practices

The Supreme Court held in Gregg v. Georgia (1976),<sup>11</sup> and a series of companion cases, that the death penalty is not inherently incapable of fair and nondiscriminatory application. In Gregg, it concluded that the requirement in the Georgia statute that the state supreme court conduct a "proportionality review," coupled with the limited statutory classes of murder cases in which the jury would be allowed to impose the penalty and other procedural safeguards, was sufficient to free the administration of the death penalty from the caprice that had fatally flawed the statutes struck down in and after Furman. The law in this area is still fluid. For instance, in Jurek v. Texas,<sup>12</sup> the Supreme Court upheld a capital punishment scheme that did not include this same standard for appellate review of death sentences; there the Court found other procedures sufficient to achieve the purpose of nondiscriminatory imposition of the

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<sup>10</sup>Blake v. Zant, 513 F. Supp. 713, 818 (S.D. Ga. 1981).

<sup>11</sup>Gregg v. Georgia, 428 U.S. 153 (1976).

<sup>12</sup>Jurek v. Texas, 428 U.S. 262 (1976).

sanction. It seems likely from subsequent cases, nonetheless, that the Supreme Court intends to require the states to create and use realistic means for determining that the death penalty is not applied to one individual in a type of case in which most others have been given life imprisonment. In Godfrey v. Georgia,<sup>13</sup> the Court's plurality, quoting from Mr. Justice White's concurring opinion in Furman, summarized the existing law as follows:

A capital sentencing scheme must, in short, provide a "meaningful basis for distinguishing the few cases in which (the penalty) is imposed from the many cases in which it is not."<sup>14</sup>

In the concluding statement of the Court's holding at the end of the same opinion, Mr. Justice Stewart repeated much the same language:

There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.<sup>15</sup>

In Moore v. Balkcom,<sup>16</sup> U. S. District Judge Edenfield concluded that the Georgia state supreme court's review of a murder conviction and death sentence failed this standard. In the Moore case, the sentencing judge had explained on the record below that, even though there was mitigating evidence on the defendant's behalf, it was nonetheless necessary to impose the death penalty for every murder committed in the course of a burglary. On appeal, the Georgia Supreme Court had compared

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<sup>13</sup>Godfrey v. Georgia, 446 U.S. 420 (1980).

<sup>14</sup>Id. at 427.

<sup>15</sup>Id. at 433.

<sup>16</sup>13 F. Supp. 772 at 803 (1981).



the case to other murders, but not to other murders conducted in the course of a burglary -- the criterion upon which the trial judge had put such reliance. Finding that the trial judge's standard was not the general practice within the state of Georgia, as expressed in the decisions of juries that had, it seems, generally imposed life imprisonment in such cases, the U. S. District Court found itself forced to vacate the death sentence.

In a fascinating appendix to his opinion,<sup>17</sup> Judge Edenfield points out the many difficulties involved in meeting the Supreme Court's objective of guaranteeing that the death penalty is carried out in a "principled" manner. He expresses the view that "visions of comparing 'similar cases' and discovering 'patterns' of sentencing" which "have the seductive appeal of science and mathematics" are "illusory." He concludes:

There is no objective way to describe "the case" at hand. There are no "similar cases," and there is no constitutional sentencing "pattern."<sup>18</sup>

Concluding that the Court's requirement is unworkable, he suggests an alternative standard--that a reviewing court merely be required to determine whether a rational trier of fact could place the case under review in that "small number of extreme cases" in which death can be imposed constitutionally.<sup>19</sup>

We are not convinced that such a pessimistic view of the viability of the Supreme Court's "proportionality review" approach is warranted. The inadequacy of existing attempts to carry it out does not demonstrate its futility. Considerable work has been done to create workable approaches to proportionality review. This concept paper proposes a conscientious effort to test them in practice.

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<sup>17</sup>513 F. Supp. 772 at 818 (1981).

<sup>18</sup>Id. at 827.

<sup>19</sup>Id. at 826-27.

The issues with respect to an appellate court proportionality review, noted by Judge Edenfield, in fact abound. The appellate court must first decide which cases to compare with the one on appeal. Is the appellate court required to compare this sentence with decisions made before Furman, or only with those concluded under the current post-Furman statute? Is it to compare the current case only with other capital cases that have been appealed, and therefore appear in its appellate court files? Should it limit its review to other cases in which a death verdict has been rendered, or must it also consider cases in which the jury or trial judge imposed a life sentence? If it must consider cases in which a death penalty was not imposed, should it consider only those cases in which the prosecutor sought the death penalty? If not, must it also consider all homicide cases, whether or not the prosecutor chose to file a capital murder charge? The answers to all but the last two questions are readily apparent from the purposes of proportionality review. It would seem essential to consider nonappealed as well as appealed cases, and to compare the current sentence with previous life as well as death decisions.<sup>20</sup> Most current state appellate court review processes fail to do so.

Once the universe of cases is identified, the really difficult issues in comparison begin. How does the reviewing court identify "similar" cases? What characteristics of the offense and the offender are relevant? The number of victims? Age of the victim? Type of weapon

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<sup>20</sup>However, in Proffitt v. Florida, 428 U.S. 242, at 259 n.16 (1976), the Supreme Court's plurality declined to invalidate Florida's review process for its failure to go beyond previously appealed death sentence cases.

used? Existence of torture? Gruesomeness of the killing itself? The nature of the relationship between the victim and the offender? Motive, especially for contract killings? The prior record of the offender? The offender's prior crimes of violence? The defendant's education, work, and family background? Mental health information about the defendant and his likelihood of committing other crimes of violence? The disagreements among the members of the U.S. Supreme Court about the relevancy of these various factors<sup>21</sup> shows that each state will have to reach its own conclusions about the factors that make cases "similar." Consistency in their application within a state is more important than national uniformity in their definition.

Even when there is agreement concerning the definition of "similarity," major logistical problems arise concerning the collection and analysis of the relevant case data. The previous discussion of the issues concerning the universe of cases within which comparisons should be made suggests that information about non-appealed and non-death penalty decisions ought to be included in the analysis if it is to serve the Supreme Court's objective of showing in a "principled way" that the instant case belongs among the few in which death is to be imposed rather than the many in which it is not. To our knowledge there is at present only one appellate court that utilizes a systematic procedure for obtaining information about the case characteristics of all cases in which a sentence of death is one of the possible trial outcomes. This system was developed by the Georgia Supreme Court with the assistance of

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<sup>21</sup>Godfrey v. Georgia, 446 U.S. 420 (1980).

Professor David Baldus and the Georgia Attorney General. Even the Georgia Supreme Court, however, does not have an automated data processing system to compile and analyze the case data. The lack of systematic data collection procedures and management information systems renders the task of reviewing sentences of death for comparative excessiveness extremely difficult and time consuming. Furthermore, the fairness of death sentences which are upheld by reviews which may not consider all the relevant comparison cases or all the relevant characteristics of the cases considered can be questioned. Thus, appellate courts badly need assistance in developing data collection procedures and management information systems to aid them in making proportionality reviews.

Once data is collected, the questions do not end. As Professor Baldus has pointed out in his previous writings on these issues,<sup>22</sup> there are a variety of analytical techniques that can be applied to the data to determine whether or not a particular death sentence is disproportionate or excessive. Is a particular sentence excessive if half of all "similar" cases have resulted in life sentences? Is the determination to be made by matching like cases, or by calculating a cumulative seriousness score for all death cases and comparing the score for this case with the median score of previous death sentence decisions? Use of sophisticated statistical analyses of sentencing data may not enhance its utility for a reviewing court. Experience with the

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<sup>22</sup>D. Baldus, Quantitative Methods for Judging the Comparative Excessiveness of Death Sentences, in The Use, Nonuse, Misuse of Applied Social Research in the Courts 83 (Saks & Baron, 1980); Baldus, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1 (1980).

development of sentencing guidelines through empirical analysis of past sentencing practices suggests many cautions.<sup>23</sup> Our statistical techniques are not as powerful as they need to be. The data they rely upon is incomplete. Judges have difficulty understanding and applying social science information; they tend to be either too skeptical or too naive in their use of statistics and statistical analyses. It is important to note that the development of sophisticated analyses of the data collected is not essential to the success of the undertaking. The availability of the complete information by itself should greatly improve the reliability of the appellate review of death sentences.

Considerable work has already been done on all of these issues, principally by Professor Baldus and his colleagues. Baldus has concluded that adequate data gathering, classifying, and analyzing processes can be created and put into use in appellate courts to assist reviewing judges in making proportionality determinations. He has demonstrated their utility with existing data from California cases, and in current work funded by the National Institute of Justice in the state of Georgia. Copies of two of his major articles are included in Appendix C.

In his work, Professor Baldus has concluded that the initial obstacle to effective proportionality review processes at the appellate court level is the development of adequate information systems for gathering the necessary data and assuring its completeness and accuracy. Other issues that need to be addressed are the willingness of appellate judges to use the information in making life and death decisions. It is

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<sup>23</sup>William D. Rich, L. Paul Sutton, Todd R. Clear and Michael J. Saks, Sentencing Guidelines: Their Operation and Impact on the Courts (August 1981) (unpublished draft).

essential that information of this sort is viewed by the judges neither as a substitute for their own weighing of the evidence and application of judgment, nor as irrelevant gobbledygook. Related to this issue is the willingness of the judges to specify for persons creating the information system the factors that they consider relevant and irrelevant to their decisions. Once the basic information system aspects of proportionality review processes are put into place in several appellate courts, there will be an opportunity to refine the statistical analyses that can be applied to the data gathered. It is clear from Baldus' current work that elementary case matching techniques can be applied to this kind of data with reliable results.

Need for the proposed project

The Conference of Chief Justices has had a continuing interest in the administration of the death penalty. At its midyear meeting in Houston, Texas, last winter, the Conference asked Professor Baldus to present the findings from his studies of proportionality review processes. During his presentation, Baldus set forth his conclusions about the various issues discussed above,<sup>24</sup> his confidence that useful processes can be developed and applied to the problems encountered by other states in developing or improving their death sentence review processes, and his suggestion that the Chief Justices use the staff of the National Center for State Courts to assist them in applying his findings and experience to the laws and structures of their own states.

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<sup>24</sup>D. Baldus, Proportionality Review of Death Sentences: Issues and Procedures, Outline of Remarks, Conference of Chief Justices Annual Meeting (Feb. 1981).

Following that meeting the National Center queried the various state supreme courts to determine their interest in having the National Center serve in this role. To date, 13 of the 36 states with capital punishment laws have expressed their interest in participating with the National Center in a proportionality review process.<sup>25</sup> In late summer, National Center staff prepared and discussed with interested Chief Justices and state court administrators a proposal for a jointly-funded technical assistance effort to carry out a study of the issues involved and to help participating states implement their own systems once the underlying problems were resolved. Since that time four states have offered to make financial contributions toward a project of the sort suggested. Further analysis of the work that needs to be done to provide the courts with the assistance they need has convinced the National Center that the scope of the effort will require support from federal grant monies. This concept paper describes the tasks that need to be performed, the manner in which the National Center proposes to address them, and the cost of the project.

Professor Baldus has been extremely helpful to the National Center in conducting this further analysis. He had agreed to be a consultant to the National Center in the conduct of the project.

The proposed project will devise systematic procedures for collecting information about relevant case characteristics, develop information management systems for processing and organizing the data, and explore the potential utility of several quantitative measures of comparative

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<sup>25</sup>Alabama, Arizona, California, Delaware, Illinois, Louisiana, Montana, New Mexico, Nebraska, North Carolina, Ohio, South Dakota, and Virginia.

excessiveness. By providing appellate courts with enhanced capabilities for making proportionality reviews, the project will increase the likelihood that unfair or disproportionate death sentences will be identified and vacated within the state court's own procedures. Furthermore, the efficient, principled determination of excessiveness will increase the certainty of the decision-making process, increase citizen confidence in the criminal justice system, and decrease the length of time death cases remain on appeal. These effects should ultimately increase the deterrent effect of capital punishment on violent crime.

The experiences of the state courts in attempting to carry out the Supreme Court's mandate to devise "principled" ways of distinguishing among the few who are sentenced to death and the many who are not will be important to the Court as it develops further the legal doctrines and standards governing state death penalty statutes. In fact, the ultimate constitutionality of capital punishment may rest upon the success of the states in demonstrating that they can, in fact, administer the death penalty in a rational and principled manner.

#### PROPOSED PROJECT

##### Overview

The general objective of the proposed project will be to develop information management systems that can provide appellate courts with the systematic information necessary to conduct the type of proportionality reviews of death sentences that the U.S. Supreme Court has required. An experienced staff, high-level Task Force, and expert consultants will plan and perform the work. Systematic data collection procedures and a



model information management system will be developed and made available to state appellate courts. The model systems will be adapted to the individual statutes and circumstances of four to six participating states and implemented in the court systems of those states. Data collected in the participating states will be used to undertake a preliminary evaluation of various quantitative methods for assessing comparative excessiveness. Project work will span 18 months, which are divided equally into three phases consisting of planning, model system development, and implementation of the system in the participating states.

#### Objectives

The purpose of the proposed project is to provide appellate courts with the information necessary to conduct a review of the comparative excessiveness of death sentences sufficient to meet the standards of the U.S. Supreme Court. Six specific objectives derive from this general goal:

1. To develop model procedures and instruments for collecting data about all cases in which there was a conviction for an offense punishable by death.
2. To design and develop a model information management system for appellate courts which can provide easy access to case data, classify cases on the basis of similar characteristics, and provide indices of comparative excessiveness.
3. To study and evaluate appellate review procedures and offer recommendations concerning those with greatest potential effectiveness and practicality.
4. To adapt the model data collection procedures and information management system to the specific laws and court procedures of the participating states and to provide technical assistance in the implementation of the procedures and system in each of those states.
5. To monitor and evaluate the collection of data and operation of the information management system in each participating state and to furnish technical and legal assistance as problems and issues arise.

6. As time and resources permit, to use the data collected by the participating states to evaluate various statistical methods for determining similarity of cases and for measuring comparative excessiveness.

#### Method

Task Force. A task force on Appellate Reviews of Sentences of Death will be appointed to provide general direction and supervision for the project. Six members will be selected from a list of nominees which includes prominent judges, prosecutors, defense attorneys, court administrators, statisticians, and computer specialists. The Task Force will meet periodically to consider legal and technical issues associated with appellate reviews of death sentences, to design the model data collection procedures and instruments, to approve the design specifications of the model information management system, and to issue a report which describes the work of the Task Force and staff and includes recommendations for all appellate courts with the responsibility for reviewing death sentences.

Staff. The Task Force will be assisted in its work by a competent and experienced staff, consisting of a project director knowledgeable in courts research, quantitative analysis, and computer systems; a systems analyst, who has had experience in providing technical assistance to state courts; a scientific programmer, who has been trained in both information systems and scientific programming; and a senior attorney, who is expert in criminal procedure and legal research. The staff will carry out the directives of the Task Force, prepare data collection instruments and information system designs for the Task Force's consideration, draft position papers and recommendations for the Task Force to review, and provide technical assistance to court personnel in the participating states.

Consultants. Several legal and statistical consultants will be employed to advise the Task Force members and staff. David Baldus, profession of law at the University of Iowa, an expert in the law related to sentences of death and a pioneer in the use of quantitative techniques for determining comparative excessive of death sentences, has agreed to serve as the major consultant to the Task Force. The input from Baldus and the other consultants will greatly facilitate the work of the Task Force.

Project Tasks.

Task I. The objective of the first task will be to develop model data collection procedures and instruments. In order to accomplish this, several difficult questions of major import must be decided. To cite a few examples: Precisely what information about the crime, the accused, the victim, and the circumstances surrounding the crime should be obtained? (e.g., should the defendant's employment history be recorded? or, what are permissible mitigating circumstances?) Who or what should be the source of the information, e.g., the prosecutor, defendant, police, or judge? Which official should be charged with the responsibility for obtaining, verifying, maintaining, and transmitting the information? In resolving these hard questions, the Task Force will construct a model instrument appropriate for recording case data in, or readily adaptable to the particular needs of, all or most state courts. It will also devise procedures for collecting these data which will best ensure their accuracy and confidentiality. In conducting the work of Task I, the Task Force and staff will draw extensively from questionnaires used by Professor Baldus in his previous work.

Task II. During Task II a model system will be developed for managing the kind of information that would be produced by the model data collection instruments and procedures developed in Task I. Design specifications for the information system will be determined by the nature and amount of information obtained for each case, the number of cases, the kinds of computers used by the various state court systems, and the ways in which the data will need to be accessed, analyzed, and displayed. It is anticipated that both batch and interactive versions of the system will be created.

Task III. The purpose of the third task is to evaluate possible appellate court procedures for reviewing sentences of death in terms of their excessiveness in comparison with sentences given in other similar cases. Currently, these proportionality reviews are conducted by appellate judges themselves when cases are heard on appeal. There has been considerable variability in the manner in which the reviews have been undertaken. David Baldus has made the interesting recommendation that the appellate court appoint a master to make the proportionality review, thereby opening it up to the adversarial process and providing the judges with expert assistance in determining whether the sentence of death was disproportionate relative to the sentences given in other similar cases. As a result of its study, the Task Force will issue a set of recommendations concerning the most effective methods for making proportionality reviews.

Task IV. Task IV will involve adapting the model data collection procedures and instruments and the model information management system to the individual needs and requirements of the participating states.

Because of the substantial differences among state criminal statutes and court system procedures, modifying the model methods to meet the unique circumstances of each state is not expected to be an easy task. The Supreme Court has required each state with a death penalty statute to establish its own criteria for the imposition of a sentence of death within a set of general guidelines. The bases for proportionality reviews, therefore, should differ from state to state. Consequently, the model data collection procedures and instruments and information management system have to be adapted to the circumstances of each of the participating states. As part of this task, the project staff will provide on-site technical assistance to court personnel responsible for implementing the system in their respective states.

Task V. The fifth task of the proposed project will consist of monitoring and evaluating the operation of data collection procedures and information management systems after they have been implemented in the participating states. Through this process, problems will be identified and solved, and ways to improve efficiency will be tested. As time and resources permit, the staff will use the case data collected in the participating court systems to evaluate various quantitative methods for assessing similarity of cases and measuring comparative excessiveness. A number of such analytic methods have been proposed by Baldus and his associates (see attached law review article). While it is not expected that much progress will be made during the course of this 18-month project toward the goal of determining the optimal quantitative techniques for identifying comparatively excessive death sentences, the necessary basis for making this determination will be laid. The proposed

project represents a necessary first step which must be taken to provide appellate judges with the information they must have in order to make proportionality reviews and to provide the data by which the various quantitative procedures can be evaluated.

#### Project Plan

The 18-month period of the proposed project will be divided into three 6-month phases. During Phase 1 the Task Force, staff, and consultants will be appointed, the organization and mode of operation of the Task Force established, and Task I carried out. During the second phase, Tasks II and III will be completed. Finally, Tasks IV and V will be undertaken in Phase 3. The Task Force will meet three times during Phase 1 and two times in each of the last two phases. The tasks are organized in both logical and chronological order so that they may be accomplished in the most cost-effective manner.

#### Project Products

The major products of this project will be the model data collection procedures and instruments and model information management system with supporting documentation. Other products will include the modified procedures and systems implemented in each of the participating states. Finally, a Task Force report will be issued which discusses the important legal issues and technical problems in carrying out proportionality reviews and offers recommendations concerning the most effective procedures.

#### Project Costs and Financing

The total cost of the proposed project is estimated to be \$229,413. The major categories of expenditure include personnel, computer,

consultants, travel, and publications. The National Center proposes to finance this project with both federal and state funds. Thus far, judicial leaders in four states (Louisiana, South Dakota, Nebraska, and Alabama) have expressed strong interest in their states' participation in the project, including the possibility of making a financial contribution of as much as \$10,000 each toward its cost. Assuming \$40,000 of state support, the National Center would request \$189,413 from the federal government. This amount of federal contribution could support an expanded effort if additional states also decided to participate in and support the project.

A breakdown of the estimated project costs is included in Appendix A attached.

Resumes of the proposed staff persons are included in Appendix B.

## APPENDIX A

### Preliminary Budget Proportionality Reviews of Death Sentences Proposal April 1, 1982 - September 30, 1983

#### A. Personnel

1.	Project Director (\$35,000/yr.) 18 mos. x .50 x \$35,000	\$ 26,250
2.	Systems Analyst (\$32,000/yr.) 8 mos. x .50 x \$32,000	10,667
3.	Scientific Programmer (\$27,000/yr.) 11 mos. x 1.00 x \$27,000	24,750
4.	Senior Staff Attorney (\$38,000/yr.) 10 mos. x .20 x \$38,000	<u>6,333</u>
		\$ 68,000
7.	Merit and COL Increments @ .10	6,800
8.	Leave Factor Adjustment @ .08	(5,984)

Subtotal Personnel \$ 68,816

B. Fringe Benefit @ .3548 \$ 24,416

#### C. Contractual

1.	Computer Time	5,000
2.	Consultants	<u>5,000</u>

Subtotal Contractual \$ 10,000

#### D. Travel

1.	Task Force Meetings with 6 Members and 3 Staff and Consultants: 3+2+2 = 7 meetings @ 2 days	
	Airfare (7x8)-1 = 55 trips x \$575	\$ 31,625
	Ground Transportation 55 x \$25	1,375
	Per Diem 55 x 2 x \$70	<u>7,700</u>

Subtotal \$ 40,700



2. Staff Travel to Participating States (4)  
2 staff x 3 trips x 4 states = 24 trips @ 3 days

Airfare 24 x \$575	\$ 13,800
Ground Transportation 24 x \$25	600
Per Diem 24 x 3 x \$70	<u>5,040</u>
Subtotal	\$ 19,440

3. Consultant Travel to Williamsburg  
6 trips @ 2 days

Airfare 6 x \$575	\$ 3,450
Ground Transportation 6 x \$25	150
Per Diem 6 x 2 x \$70	<u>540</u>
Subtotal	\$ 4,440

Subtotal Travel	\$ 64,580
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E. <u>Publications</u>	1,000
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F. <u>Indirect Costs</u> (\$93,232 x .65)	\$ 60,601
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<u>TOTAL</u>	<u>\$229,413</u>
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State's Contribution	\$ 40,000
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Federal Share	\$189,413
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Appendices B and C available upon request.