

GENERAL EXPLANATORY NOTES ON TERMS AND METHODS

The statistics presented in the following tables are based on a number of assumptions and employ a number of conventions that the reader should bear in mind. These general explanatory notes present items that are common to most or all of the statistical tables in this Survey. Section A addresses terminology, and Section B provides notes on the methods generally used in compiling the data in this Survey. Additional notes that apply only to particular sets of tables are set forth at the beginning of each table set.

A. METHODOLOGY

1. How the statistical tables were compiled

As a general matter, the statistical tables in this Survey were compiled from information maintained by the Capital Crimes Unit (CCU) of the Criminal Division. As noted in the text of the Survey, when a United States Attorney submits a case for review, the prosecutors responsible for the case also submit information about the race/ethnicity of the defendant and any victim(s). That information is maintained in a database for statistical purposes only by paralegal assistants in the CCU and is kept apart from the information that is provided to the Review Committee and the Attorney General for use in the decision-making process.

In addition to the information described above, some of the statistical tables – particularly tables providing information about the charges against defendants – were compiled through a case-by-case review of memoranda submitted by United States Attorneys since 1988. That information, like the information on race/ethnicity drawn from the CCU database, was in some instances incomplete, and was supplemented by information provided by individual United States Attorneys' Offices in response to inquiries made specifically for purposes of preparing this Survey.

Although extensive efforts have been made to present accurate information in this Survey, some errors may remain as the result of incomplete information or as the result of data entry mistakes.

2. Cases excluded from the statistical tables

a. "Straddle" cases

In addition to the 682 post-protocol cases and 52 pre-protocol cases that are analyzed in this Survey, there were seven cases that cannot properly be considered either pre-protocol or post-protocol. Six of the seven cases involved offenses under the DKA, and the seventh was charged under a racketeering provision, 18 U.S.C. § 1959(a). In each of these seven cases, arising during the transition from the former procedures to the current ones, the United States Attorney submitted to the Attorney General a recommendation not to seek the death penalty in a

case that had been indicted prior to the adoption of the protocol, even though no such submission was in fact required. Because these cases were not in fact reviewed under the new protocol, and need not have been submitted under the former policy, they are essentially indistinguishable from an uncounted number of cases from the 1988-1994 period (during which a United States Attorney's decision not to seek the death penalty was not submitted for the Attorney General's approval) that are not accounted for in this Survey. Accordingly, these seven cases are excluded from the statistical compilations in this Survey.

b. Incomplete submissions

On occasion, United States Attorneys submit the information required by the protocol over a period of time, rather than all at once. The statistical tables in this Survey do not include cases in which United States Attorneys had submitted only partial information relating to a case as of July 20, 2000. Further, in one case, a United States Attorney entered into a plea agreement with a defendant after sending a submission to the CCU, but before that submission was received and processed. The statistical tables in this Survey do not include that case.

c. Cases charging offenses other than violations of the DKA prior to September 13, 1994

Before the enactment of the FDPA in 1994, there were a number of federal criminal statutes that defined offenses punishable by death (*e.g.*, mail bombing, in violation of 18 U.S.C. § 844(d)), albeit without providing procedures under which such a sentence could be imposed. For some time between the enactment of the DKA in 1988 (which set forth certain procedures for capital cases but did not explicitly apply them to all federal offenses which by their terms were punishable by death) and the enactment on September 13, 1994 of the FDPA (which set forth procedures that apply in any federal capital case), it was unclear whether the death penalty could be imposed for non-DKA offenses that, by the terms of the applicable statutes, were capital crimes. As a result, there were some cases prior to the enactment of the FDPA in which the government sought the death penalty for non-DKA offenses. Because the courts ultimately ruled that the death penalty could not constitutionally be applied in such circumstances, the few non-DKA cases from the pre-protocol period are not counted in this Survey.¹

¹A related issue, but distinct from that decided in the pre-FDPA cases, is whether the Constitution would preclude the use of the procedures now available under the FDPA to impose the death penalty in a non-DKA case in which the offense was committed prior to September 13, 1994. The latter question has not yet been decided in any judicial opinion.

3. Counting methods

a. Offense-related statistics.

In some cases, a defendant was charged with multiple offenses under different criminal statutes, each of which was potentially punishable by death. Often in such cases, each decision-maker in the Department's process recommended the same outcome as to all offenses – either to seek the death penalty for all counts or for none. But in some instances, the United States Attorneys, the Review Committee, or the Attorney General reached different conclusions about different statutory offenses committed by the same defendant. Attempting to account for those relatively few cases proved to be very difficult, and risked causing more confusion in the presentation of statistics than was warranted. Accordingly, in compiling the offense-related statistics reported in this Survey, a recommendation or decision to seek the death penalty against a defendant with respect to *any* offense was treated as a recommendation or decision to seek the death penalty with respect to *all* offenses charged against that defendant.

b. Victim-related statistics

Several defendants were accused of crimes resulting in the deaths of multiple victims. In many such cases, each decision-maker in the Department's process recommended the same outcome with respect to all victims – either to seek the death penalty for all the offenses resulting in the victims' deaths or not to seek the death penalty at all. But in some instances, a participant in the review process reached different conclusions with respect to crimes against different victims committed by the same defendant. Here again, in compiling the victim-related statistics reported in this Survey, a recommendation or decision to seek the death penalty against a defendant as punishment for causing the death of *any* victim was treated as a recommendation or decision to seek the death penalty with respect to *all* victims associated with that defendant.

Moreover, in several cases, multiple defendants were accused of crimes resulting in the death of the same victim. In many such cases, each decision-maker in the Department's process recommended the same outcome with respect to all defendants accused of causing the death of the same victim – either to seek the death penalty for all defendants or not to seek the death penalty for any of them. But in some instances, a participant in the review process reached different conclusions with respect to different defendants accused of causing the death of the same victim. In tables that report statistics about the race/ethnicity of victims *without* reference to the race/ethnicity of defendants, each victim is counted only once. In these tables, where a participant in the review process recommended or authorized seeking the death penalty for at least one defendant, the victim was counted as a victim of a crime for which the death penalty was recommended or authorized.

c. Recommendations

Both the United States Attorneys and the Review Committee occasionally altered their initial recommendations about whether the death penalty should be sought. While in some instances such reconsideration resulted from the discovery of new evidence or the presentation of additional information by the defendant, there were also cases in which it was the result of a frank exchange of views among the various participants in the decision-making process rather than the gathering of additional facts. For purposes of uniformity in reporting the statistics in this Survey, the tables in this Survey generally report only the *initial* recommendation of the United States Attorney and the Review Committee in each case. Exceptions to this practice in specific anomalous cases are noted below.

c. Anomalous cases

Certain cases involved anomalous circumstances that made it possible to count them in a number of different ways for purposes of this Survey. Each of those instances, and the choices made for how to count them, are described below.

- New information leading to reconsideration in favor of seeking death. In the case of one Asian defendant (categorized in the "Other" racial group) in the Eastern District of California, the United States Attorney initially recommended that the death penalty not be sought, and the Review Committee and the Attorney General both concurred. After additional information about the case was discovered, the United States Attorney, the Review Committee and the Attorney General all favored seeking the death penalty. Throughout this Survey, this defendant is reported as having had recommendations in favor of seeking the death penalty by both the United States Attorney and the Review Committee, and as having had a decision by the Attorney General to seek the death penalty. As a result, the initial recommendations and decision against seeking the death penalty are not reported in the statistical tables.
- Fugitives. Two defendants in separate cases (one Black defendant in the Eastern District of Virginia and one Hispanic defendant in the District of Puerto Rico) were fugitives at the time the respective United States Attorneys made the submissions required under the protocol. Both the Review Committee and the Attorney General reviewed each case and decided to defer taking final action. In each case, after the defendant was apprehended, but before the case was submitted for renewed consideration, the defendant entered into a plea agreement. Each of these cases is reported as having been the subject of a plea agreement after submission by the United States Attorney but prior to consideration by the Review Committee and the Attorney General. As a result, the initial decisions to defer are not reported in the statistical tables.

- Overlapping prosecution: With one exception, all of the 682 post-protocol defendants and 52 pre-protocol defendants are different individuals, each of whom was charged with federal offenses subject to the death penalty in only one district. The one exception is Theodore Kaczynski, a White defendant who was charged with capital offenses in both the Eastern District of California and the District of New Jersey. The recommendations by each United States Attorney are reported separately. As a result, although there were 681 individuals charged with federal offenses subject to the death penalty in the post-protocol period, the statistical tables report information about a total of 682 defendants.

4. Information about specific Attorneys General.

The statistical tables in this Survey do not distinguish among the four Attorneys General who have made decisions about whether to seek the death penalty since the re-introduction of capital punishment in the federal criminal justice system in 1988. Limited information about the decisions of specific Attorneys General is therefore provided here.

All of the defendants considered during the post-protocol period were considered by Attorney General Reno. With respect to the pre-protocol cases, which were all submitted with recommendations by United States Attorneys in favor of seeking the death penalty, Attorney General Thornburgh decided to seek the death penalty against all of the eight defendants submitted to him for consideration; Attorney General Barr decided to seek the death penalty against all of the 20 defendants submitted to him for consideration; Acting Attorney General Gerson decided to seek the death penalty against all of the four defendants submitted to him for consideration; and Attorney General Reno decided to seek the death penalty against 15 of 20 defendants submitted to her for consideration. Of the remaining five pre-protocol defendants, Attorney General Reno decided not to seek the death penalty against four defendants; and she considered but did not make a death penalty decision with regard to one defendant who was a fugitive and who subsequently died.

B. TERMINOLOGY

1. Differences between state and federal data due to different methods of accounting for Hispanic ethnicity

In presenting information about the federal government's implementation of the death penalty, this Survey uses the term "Hispanic" as a separate category to refer to persons of Hispanic ethnicity regardless of race. As a result (with the exception of state statistics obtained from other sources as noted), the terms "White," "Black," and "Other" as used in this Survey refer only to non-Hispanic members of those racial groups. In contrast, several compilations of state statistics, including some cited in this Survey, include persons of Hispanic ethnicity within the racial categories of "White," "Black," and "Other." As a result of these different uses of

terminology, the reader should use care in comparing state and federal statistics concerning race and ethnicity.

According to the U.S. Census Bureau, approximately 91 percent of the Hispanic population would, if described by race, be categorized as "White," while approximately six percent would be categorized as "Black" and approximately three percent would be categorized as Other.² A reader seeking to compare the relative proportions of "White" and non-"White" individuals in a given group may thus draw very different conclusions based on the terminology used in presenting the data. For example, among the statistics reported in this Survey is the following: from 1995 to 2000, the Attorney General decided to seek the death penalty against a total of 159 defendants. Using "Hispanic" as a separate category that includes persons of any race whose ethnicity is Hispanic (and therefore using "White," "Black" and "Other" to refer only to non-Hispanic members of those respective racial groups), the racial/ethnic distribution of these 159 defendants are categorized as follows:

	Total	White	Black	Hispanic	Other
Number	159	44	71	32	12
Percent	100%	28%	45%	20%	8%

But if only racial categories were used, and if the Census Bureau statistics about the racial distribution of persons of Hispanic ethnicity were assumed to be applicable, the racial distribution of this same group of 159 defendants would likely appear as follows:

	Total	White	Black	Other
Number	159	73	73	13
Percent	100%	46%	46%	8%

The difference made by the use of terminology does not necessarily explain all the apparent differences between the state and federal data. Nevertheless, the reader should exercise care in attempting to compare state and federal statistics.

2. "Intraracial and "interracial"

²See Department of Commerce, U.S. Census Bureau, Population Division, Publication NP-D1-A, Projections of the Population by Age, Sex, Race, and Hispanic Origin for the United States: 1999 to 2100 (Jan. 13, 2000) <<http://www.census.gov/population/projections/nation/detail/d1999_00.pdf>>. Similarly, the Department of Justice's Bureau of Justice Statistics (BJS) reports that of the 314 Hispanic persons under sentence of death in the United States at the end of 1998, 285 (91 percent) were White, 14 (4 percent) were Black, and 15 (5 percent) were of other races. See Department of Justice, Bureau of Justice Statistics, Capital Punishment 1998 (rev. Jan. 6, 2000) <<<http://www.ojp.usdoj.gov/bjs/pub/pdf/cp98.pdf>>>.

In reporting information about the racial/ethnic characteristics of the victims of capital offenses, this Survey uses the terms "intra-racial" and "inter-racial" to describe offenses. As used in this Survey, "intra-racial" refers to a crime in which the offender and *all* victims are within the same racial/ethnic category, and "inter-racial" refers to a crime in which the racial/ethnic category of the offender differs from the category of at least one victim of the offense. With respect to individuals in the category of "Other" races, an offense is described as intra-racial only if the defendant and victim(s) are members of the same specific racial group within the "Other" category (*e.g.*, if the defendant and victims are all Asian). In the single case where the defendant and victim were members of different racial groups within the "Other" category, the offense is described as an inter-racial homicide for purposes of the discussion below.

3. Table numbering

a. "A" and "B" Tables

A number of the tables in this Survey have numbers that include an "A" or a "B." "A" is used for tables reporting statistics about the post-protocol period from 1995 to 2000, and "B" is used for tables concerning the pre-protocol period from 1988 to 1994. No such suffixes are used with respect to tables concerning the Review Committee, because the Committee did not exist in the pre-protocol period.

b. Number suffixes. There are several tables that provide statistics about specific subsets of cases. In each of these cases, a numbered suffix is used for each subset. Thus, for example, in reporting statistics about cases involving intra-racial and inter-racial homicides, Table 10A reports on all cases in the post-protocol period, and is then followed by five separate tables, numbered 10A-1 through 10A-5, that provide more specific information about cases involving, respectively, White victims, Black victims, Hispanic victims, Other victims, and multiple victims of varied race/ethnicity.