No. 07-60732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES FORD SEALE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

EN BANC BRIEF FOR THE UNITED STATES AS APPELLEE

LORETTA KING
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
TOVAH R. CALDERON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4142

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LEGISLATIVE HISTORY:

RULE:

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JURISDICTIONAL STATEMENT

A federal grand jury charged the defendant under 18 U.S.C. 1201(a) and (c). The district court had jurisdiction under 18 U.S.C. 3231. Final judgment was entered on September 18, 2007. The defendant filed a timely notice of appeal. This Court has jurisdiction to review the district court judgment under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

On November 19, 2008, this Court issued a memorandum advising counsel

to limit briefing and oral argument to the issue addressed by the panel, that is, "whether the change in the statute of limitations for the federal kidnaping statute, which was effected by the 1972 amendment to the federal kidnaping statute, applies retroactively to [the defendant's] 1964-1966 conduct" (Mem. 11/19/08).[1]

On February 10, 2009, this Court asked counsel for the United States to also address:

> (1) whether the Supreme Court lacks constitutional authority to transform a capital crime into a non-capital crime for all purposes when Congress has exercised its constitutional prerogative to classify the crime as capital and that classification is consonant with the Eighth Amendment; and (2) whether, consequently, federal kidnaping remained a capital crime for statute-of-limitations purposes after *United States* v. *Jackson*, 390 U.S. 570 (1968), because the Court held that 18 U.S.C. 1201's death penalty provisions violated a defendant's procedural rights under the Fifth and Sixth Amendments but did not hold that the provisions violated the defendant's substantive rights under the Eighth Amendment.

(Order 2/10/09).[2] Additionally, this Court asked counsel for the United States to address "whether this issue is properly preserved for en banc consideration," and "any other issues that might bear on the separation-of-powers question that counsel determines appropriate" (Order 2/10/09).

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[1] The Court's memorandum is attached hereto as Exhibit A.

[2] The Court's order is attached hereto as Exhibit B.

STATEMENT OF THE CASE

On January 24, 2007, a federal grand jury in the Southern District of Mississippi returned an indictment charging the defendant, James Ford Seale, with two counts of kidnaping, in violation of 18 U.S.C. 1201(a), and one count of conspiracy to kidnap, in violation of 18 U.S.C. 1201(c), for his role, as a member of the White Knights of the Ku Klux Klan of Mississippi, in abducting and killing two young, African-American men on May 2, 1964.

The defendant moved to dismiss the indictment, arguing that the prosecution was barred by the five-year statute of limitations applicable to non-capital crimes, 18 U.S.C. 3282, because: (1) in 1968, the Supreme Court in *United States* v. *Jackson*, 390 U.S. 570, struck down the death penalty provision of 18 U.S.C. 1201; and (2) in 1972, Congress repealed it. The United States argued that the prosecution was timely because in 1964, at the time of the offense, kidnaping was a capital crime subject to no limitation on prosecution, pursuant to 18 U.S.C. 3281. The district court denied the motion. On June 14, 2007, a jury found the defendant guilty of all counts.

The defendant appealed. He raised numerous issues, including whether the district court erred in denying his motion to dismiss based on the statute of limitations. Oral argument was held on June 2, 2008, before Judges Davis, Smith,

and DeMoss.

On September 9, 2008, the panel issued a published opinion vacating the defendant's conviction and rendering a judgment of acquittal. See Slip Op. 20.[3] The panel held that the 1972 amendment to 18 U.S.C. 1201, which reclassified kidnaping as a non-capital crime, applied retroactively to make 18 U.S.C. 3282's five-year limitations period applicable to pre-1972 violations of the kidnaping statute. See *ibid*. The panel therefore concluded that the 2007 indictment of the defendant for his 1964 conduct was time-barred. See *ibid*. The panel did not address the effect of *Jackson* or any of the other issues raised on appeal.

On September 23, the United States petitioned this Court for panel rehearing and rehearing en banc, arguing that the panel's retroactive application of the 1972 amendment for limitations purposes conflicted with this Court's precedent on statutory interpretation, as set forth in *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146 (5th Cir. 1986).

On November 14, 2008, this Court granted the United States' petition for rehearing en banc. On December 15, 2008, this Court denied the defendant's motion for reconsideration of his renewed motion for release pending appeal.

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[3] The panel's opinion (Slip Op.) is published at 542 F.3d 1033 (5th Cir. 2008).

SUMMARY OF THE ARGUMENT

Prosecution of the defendant in 2007 for his 1964 violations of the federal kidnaping statute was not time-barred. At the time of the offense, kidnaping was "punishable by death" and thus subject to no limitation on prosecution under 18 U.S.C. 3281. In 1972, Congress amended the kidnaping statute to enlarge its scope, extend its geographic reach, and reduce the maximum penalty from death to life imprisonment. As a result of the change in punishment, kidnaping became a non-capital crime subject to a five-year limitation on prosecution, pursuant to 18 U.S.C. 3282. The defendant argues, as the panel held, that the 1972 amendment applies retroactively for statute-of-limitations purposes because changes in limitations periods are procedural changes that always apply on a retroactive basis. That argument fails.

Under rules of statutory interpretation and this Court's precedents, the 1972 amendment is substantive legislation and cannot be applied retroactively for any purpose. First, the presumption against retroactivity requires that the amendment apply prospectively, absent express congressional intent to the contrary. Because Congress did not express an intent to make any of the changes effected by the amendment retroactive, and because the *Ex Post Facto* Clause would prohibit retroactive application of the new crimes created by the amendment, it is presumed

to apply prospectively. Second, this presumption is not affected by the rule that procedural changes usually apply to pending cases, because the 1972 amendment is not a procedural statute. An examination of the amendment's text and legislative history confirms that the purpose of the amendment was to affect substance, not procedure. Moreover, the fact that Congress set out to expand criminal liability under 18 U.S.C. 1201 belies the argument that Congress intended to shorten the limitations period for prosecuting violations of the statute. Finally, even if Congress intended to change the applicable limitations period with its passage of the 1972 amendment, that change still cannot apply retroactively to the defendant's conduct because, as this Court held in *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146 (5th Cir. 1986), legislation that is both procedural and substantive cannot be applied partially on a retroactive basis, absent express congressional intent to sever the procedural and substantive applications. There is no evidence of such intent in this case. Because the 1972 amendment does not apply retroactively for any purpose, the general saving clause, 1 U.S.C. 109, permitted the United States to prosecute the defendant in 2007 under the law in effect at the time of the offense, which includes the 1964 version of the kidnaping statute and 18 U.S.C. 3281.

The defendant's alternative argument, that the Supreme Court's decision in

United States v. *Jackson*, 390 U.S. 570 (1968), retroactively reclassified kidnaping as a non-capital crime for statute-of-limitations purposes, also fails. Guided by separation-of-powers concerns, the Court in *Jackson* invalidated the death penalty provision of the federal kidnaping statute, but left intact the statute's basic operation. Every court of appeals to address the issue has held that judicial invalidation of the death penalty has no effect on the applicability of 18 U.S.C. 3281 in cases charging offenses "punishable by death" because statutes of limitations are tied to the serious nature of capital crimes, not to the imposition of capital punishment. Consequently, this Court's decisions in *United States* v. *Hoyt*, 451 F.2d 570 (5th Cir. 1971) (per curiam), cert. denied, 405 U.S. 995 (1972), and *United States* v. *Kaiser*, 545 F.2d 467 (5th Cir. 1977), are inapposite because those cases addressed the applicability of Federal Rule of Criminal Procedure 24(b) and 18 U.S.C. 3432, which are tied to the death penalty, not to the offense, because they provide additional protections for capital defendants at trial. *Hoyt* and *Kaiser* did not address the statute-of-limitations issue presented in this case. Accordingly, *Jackson* did not retroactively affect the limitations period governing prosecution of the defendant's 1964 conduct.

ARGUMENT

THE STATUTE OF LIMITATIONS DID NOT BAR PROSECUTION OF THE DEFENDANT IN 2007 FOR HIS 1964 CONDUCT

The defendant argues (Br. 10-17) that the 2007 indictment in this case is time-barred under 18 U.S.C. 3282, which provides a five-year limitation on prosecution of non-capital crimes, because in 1972, Congress repealed the death penalty provision of the federal kidnaping statute, 18 U.S.C. 1201. The defendant contends, as the panel held (Slip Op. 20), that the 1972 amendment's impact on the statute of limitations effected a procedural change that applies retroactively to pre-1972 conduct. The defendant also argues (Br. 18-27), in the alternative, that the Supreme Court's decision in *United States* v. *Jackson*, 390 U.S. 570 (1968), which invalidated the death penalty provision of the kidnaping statute, retroactively shortened the limitations period in this case. As set forth below, the defendant's arguments lack merit.

A. Standard Of Review

This Court reviews *de novo* the district court's legal conclusions in relation to the statute of limitations. See *United States* v. *Gunera*, 479 F.3d 373, 376 (5th Cir. 2007).

B. Statutory Scheme

This case was brought under the 1964 version of the federal kidnaping statute, 18 U.S.C. 1201, which provided, in pertinent part:

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.
>
> * * * * *
>
> (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a).

Thus, in 1964, violations of the kidnaping statute were punishable "by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend." 18 U.S.C. 1201(a)(1) (1964). Prosecution of such violations was governed by 18 U.S.C. 3281 (1964), which provided that "[a]n indictment for any offense punishable by death may be found at any time without limitation."

In 1972, Congress passed the Act for the Protection of Foreign Officials and

Official Guests of the United States, Pub. L. No. 92-539, 86 Stat. 1072,[4] which amended 18 U.S.C. 1201 as follows:

> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:
>
> (1) the person is willfully transported in interstate or foreign commerce;
>
> (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
>
> (3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32)); or
>
> (4) the person is a foreign official as defined in section 1116(b) or an official guest as defined in section 1116(c)(4) of this title,
>
> shall be punished by imprisonment for any term of years or for life.
>
> * * * * *
>
> (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any terms of years or for life.

As set forth above, Congress in 1972 made several substantive changes to the federal kidnaping statute. See Pub. L. No. 92-539, § 201, 86 Stat. 1072. First, Congress extended the statute's geographic reach to include acts committed within the special maritime, territorial, and aircraft jurisdiction of the United States. See *ibid*. Next, Congress expanded the scope of the statute to include acts committed

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[4] The Act is attached hereto as Exhibit C.

against foreign officials and official guests, regardless of where those acts were committed. See *ibid*. Finally, Congress substituted the maximum sentence of death with a term of life imprisonment. See *ibid*. As a result of the change in the maximum penalty, kidnaping became a non-capital offense and violations of the amended statute were subject to a five-year limitation on prosecution, pursuant to 18 U.S.C. 3282 (1972).

C. Congress's 1972 Amendment To The Federal Kidnaping Statute Does Not Apply Retroactively For Statute-Of-Limitations Purposes

Under rules of statutory interpretation and this Court's precedents, the 1972 amendment is substantive legislation that applies prospectively only. Accordingly, the change in the applicable statute of limitations does not govern pre-1972 violations of 18 U.S.C. 1201.

1. The 1972 Amendment Applies Prospectively Because Congress Did Not Express A Contrary Intent

On the issue of retroactive application of statutes, this Court has repeatedly recognized that "the first rule of construction is that legislation must be considered as addressed to the future, not to the past," and that "a retrospective operation will not be given to a statute which interferes with antecedent rights absent the clearly expressed intention of Congress." *United States* v. *Vanella*, 619 F.2d 384, 385 (5th Cir. 1980) (quoting *Greene* v. *United States*, 376 U.S. 149, 160 (1964))

(internal quotation marks omitted); accord *Griffon* v. *United States Dep't of Health & Human Servs.*, 802 F.2d 146, 153 (1986); see also *Landgraf* v. *USI Film Prods*., 511 U.S. 244, 280 (1994) ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."). Indeed, "[i]t would be most presumptuous for a court to presume Congress meant to allow retroactivity by indirection, in the face of the established presumption which requires that only prospective operation be given every statute which changes established rights unless retroactive application is the unequivocal and inflexible import of the terms of the legislation and the manifest intention of the legislature." *United States* v. *Winters*, 424 F.2d 113, 116 (5th Cir. 1970).

There is no indication in either the statutory text or the legislative history that Congress intended any part of the 1972 amendment to apply retroactively. On the contrary, the amendment enlarged both the scope and geographic reach of the kidnaping statute, thereby criminalizing conduct that did not violate federal law before it was enacted. Such changes affect substantive rights and could not, pursuant to the *Ex Post Facto* Clause of the Constitution, U.S. Const. Art. I, § 9, Cl. 3, apply to acts committed before the amendment's date of enactment. Accordingly, the 1972 amendment is substantive legislation that is presumed to

apply prospectively because Congress did not express a contrary intent. See *e.g.*, *Landgraf*, 511 U.S. at 266 (explaining that "the antiretroactivity principle finds expression in several provisions of our Constitution," including the "*Ex Post Facto* Clause[, which] flatly prohibits retroactive application of penal legislation"); *United States* v. *Haines*, 855 F.2d 199, 200-201 (5th Cir. 1988) (Where "[a] contrary interpretation would lead to open and obvious violations of the *ex post facto* prohibition in the Constitution," courts presume that "[s]uch clearly was not the intent of Congress.").

2. Congress Did Not Intend To Shorten The Limitations Period Applicable To Pre-1972 Violations Of The Kidnaping Statute

This Court has also recognized, however, that the presumption against retroactivity "must yield to the rule * * * that changes in statute law relating only to procedure or remedy are usually held immediately applicable to pending cases." *Vanella*, 619 F.2d at 386 (quoting *Turner* v. *United States*, 410 F.2d 837, 842 (5th Cir. 1969)); accord *Griffon*, 802 F.2d at 154. Because "it is often said that statutes of limitation go to matters of remedy rather than to fundamental rights, * * * the canon of statutory construction mandating a presumption against retroactivity has been said to apply with less force, or not at all, to changes in limitations periods." *United States* v. *Flores*, 135 F.3d 1000, 1004 n.11 (5th Cir. 1998), cert. denied,

525 U.S. 1091 (1999) (citations omitted). Thus, an amendment that simply changes a limitations period but does not affect substantive rights applies retroactively in the absence of clear congressional intent to the contrary. See *Friel* v. *Cessna Aircraft Co.*, 751 F.2d 1037, 1039-1040 (5th Cir. 1985).

Although the 1972 kidnaping amendment indirectly affected the applicable statute of limitations due to its repeal of the death penalty, that result did not render the amendment itself "procedural" for retroactivity purposes. "Where the question is whether a statutory change affects 'penalty' or 'procedure,'" this Court consults the "statutory language and legislative intent * * * in search of implications that Congress was either making a procedural change or reassessing the substance of criminal liability or punishment." *United States* v. *Blue Sea Line*, 553 F.2d 445, 449 (5th Cir. 1977); see also *Griffon*, 802 F.2d at 154 ("Characterization of a statute [as substantive or procedural] does not depend on its particular application, but on its very nature."). Here, the plain meaning of the amendment was to broaden the reach of the federal kidnaping statute and to change the maximum available punishment, not to change the limitations period. The language makes no reference to the statute of limitations, or to any other remedy or procedure.

By contrast, when Congress intends to change the limitations period for a

particular offense, it usually does so explicitly. See, *e.g.*, 18 U.S.C. 3286 (extending the statute of limitations for certain terrorism offenses); 18 U.S.C. 3294 (providing a 20-year limitation on prosecution of violations of 18 U.S.C. 668, prohibiting theft of major artwork); 18 U.S.C. 3295 (providing a ten-year limitation on prosecution of certain non-capital arson offenses); 18 U.S.C. 3298 (providing a ten-year limitation on prosecution of certain non-capital trafficking-related offenses). Indeed, in 2006, Congress enacted a separate limitations statute for violations of the kidnaping statute that involve a minor victim. See 18 U.S.C. 3299 ("[A]n indictment may be found or an information instituted at any time without limitation for any offense under section 1201 involving a minor victim."). Absent *ex posto facto* concerns, these provisions, which are clearly procedural, may be applied retroactively. See *United States* v. *Brechtel*, 997 F.2d 1108, 1112-1113 (5th Cir.), cert. denied, 510 U.S. 1013 (1993); cf. *Stogner* v. *California*, 539 U.S. 607, 632-633 (2003). The fact that Congress in 1972 did not expressly change the statute of limitations for kidnaping, however, indicates that Congress did not intend to make a procedural change.

Indeed, the legislative history confirms that Congress's intent was to "make a number of substantive changes in the * * * kidnaping law," S. Rep. No. 1105,

92d Cong., 2d Sess. 17 (1972),[5] not to change procedures. The amendment was passed as part of legislation aimed at expanding protection of certain foreign nationals in the United States. See Pub. L. No. 92-539, 86 Stat. 1072. Consistent with that purpose, Congress initially set out to "restore[] the death penalty for kidnaping by correcting the defect in the present provision disclosed in *United States* v. *Jackson*, 390 U.S. 570 (1968)." Letter from the Secretary of State and Attorney General, contained in S. Rep. No. 1105, 92d Cong., 2d Sess. 14 (1972). Before Congress voted on final passage of the bill, however, the Court decided *Furman* v. *Georgia*, 408 U.S. 238 (1972), which effectively invalidated the federal death penalty as it existed at that time. In response, Congress removed the death penalty language from the final version "to avoid facial invalidity." 118 Cong. Rec. 27116 (Aug. 7, 1972) (statement of Rep. Poff).[6] There is no evidence that, in removing that language, Congress intended to change, or was even aware of the resulting indirect impact on, the applicable statute of limitations for kidnaping.[7]

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[5] The Senate Report is attached hereto as Exhibit D.

[6] The cited portion of the Congressional Record is attached hereto as Exhibit E.

[7] The legislative history also suggests that Congress felt pressure to pass the bill quickly following the "Munich Massacre" at the 1972 Summer Olympics. See Letter from the Secretary of State, contained in S. Rep. No. 1105, 92d Cong., 2d

(continued...)

On the contrary, the fact that Congress wanted to restore capital punishment for kidnaping and expand criminal liability under the statute not only confirms that the amendment's purpose was to affect substance rather than procedure,[8] but undermines any argument that Congress intended to *shorten* the limitations period for prosecuting violations of the statute.[9]

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[7](...continued)
Sess. 15 (1972).

[8] Compare *Blue Sea Line*, 553 F.2d at 450 (concluding that statutory amendment was procedural because "Congress's singular concern" was to improve "the means of enforcing existing monetary sanctions under the Shipping Act"), and *Vanella*, 619 F.2d at 386 (concluding that amendment to Speedy Trial Act was procedural because its sole purpose was to affect procedure by which the Act, a procedural statute itself, was enforced), with *United States* v. *Safarini*, 257 F. Supp. 2d 191, 203 (D.D.C. 2003) ("In view of the [Act's] creation of new substantive crimes, * * * it would be a fiction to describe the statute as merely 'procedural.'").

[9] The rule that "criminal limitations statutes are to be liberally interpreted in favor of repose," *Toussie* v. *United States*, 397 U.S. 112, 115 (1970), is inapposite here because, as explained above, the 1972 amendment is not a limitations statute. "Even the liberal policy in favor of repose can not overcome the plain meaning of an unambiguous statute." *United States* v. *Bland*, 458 F.2d 1, 5 (5th Cir.), cert. denied, 409 U.S. 843 (1972). As set forth above, the plain meaning of the 1972 amendment, confirmed by the legislative history, is to expand criminal liability for federal kidnaping and also to substitute a maximum penalty of death with a term of life imprisonment, not to change the statute of limitations.

3. Even If Congress Intended To Change The Statute Of Limitations In 1972, The Amendment Remains "Substantive" For Retroactivity Purposes Under Griffon

Even if Congress intended to change the statute of limitations with its passage of the 1972 amendment, that change cannot apply retroactively under this Court's precedent. In *Griffon*, this Court held that legislation that affects both substance and procedure is "substantive" for retroactivity purposes and, therefore, cannot apply retroactively for any purpose absent express congressional intent to sever the legislation's substantive and procedural applications. See 802 F.2d at 155; cf. *Friel*, 751 F.2d at 1039 ("It is a rule of construction that statutes are ordinarily given prospective effect. But when a statute is addressed to remedies or procedures *and does not otherwise alter substantive rights*, it will be applied to pending cases." (emphasis added)); *Vanella*, 619 F.2d at 386 (explaining that the presumption against retroactivity may not apply to statutory changes that relate "*only* to procedure or remedy" (emphasis added)).

The statute at issue in *Griffon* was the Civil Monetary Penalties Law (CMPL), 42 U.S.C. 1320a-7a (1983), which imposes fines on individuals who submit false Medicare or Medicaid claims. See 802 F.2d at 146. This Court first examined the act's text and legislative history to determine whether the CMPL was a substantive or procedural statute, and concluded that it was predominately

procedural because most of the act's provisions affected procedures and remedies by providing a civil, administrative alternative to the criminal prosecution of false claims. See *id*. at 151. The Court noted, however, that the CMPL also enlarged the scope of substantive liability, allowing prosecution for the first time of people who had "reason to know that their claims were not provided for." *Ibid*. Because there was no evidence that Congress intended that the CMPL be applied retroactively, or that it be severed to avoid the constitutional issues that would arise from retroactive application of the statute's substantive provisions, this Court held that the CMPL was a substantive statute for retroactivity purposes, and that it could not be applied partially on a retroactive basis. See *id*. at 154-155.[10]

In so holding, this Court invalidated a regulation promulgated by the Secretary of the Department of Health and Human Services (HHS) that permitted retroactive application of the CMPL's procedural provisions. See *Griffon*, 802 F.2d at 146-147. This Court explained:

> Because Congress has failed to provide adequate indicators of its intent regarding retroactivity, severability, or the nature of the CMPL, regulatory severance of the procedural and substantive

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[10] Compare *Bernstein* v. *Sullivan*, 914 F.2d 1395, 1398-1400 (10th Cir. 1990) (concluding that a 1987 amendment to the CMPL, which expressly extended the statute of limitations for false claims to six years, and which expressly applied to proceedings commenced after the amendment's effective date, governed a post-amendment proceeding based on pre-amendment conduct).

> provisions creates congressional intent out of whole cloth. The Secretary initially purports to infer a general retroactive intent of Congress, by characterizing the statute as procedural. She then attributes congressional cognizance of the inferred Due Process concerns raised by the first and second canons to subsequently infer that Congress would sever the statute, rather than apply it prospectively.
>
> Such bootstrapping by progressively linked inferences is beyond the reach of any reasonable, interpretive powers. Although the power of an administrator to *interpret* the sources of her authority in order to effect congressional purposes is extremely broad, she cannot fictitiously create purposes to achieve specific results. Some degree of interpretive contortion has a therapeutic effect on the law; too much contortion has a crippling effect. The Secretary here cannot simply fabricate a congressional intent to avoid concerns that otherwise would require inferred prospective application of a statute. We therefore nullify this administrative usurpation of the legislative prerogative to think clearly or not at all.

Id. at 147.

Similarly, here, to conclude that the 1972 kidnaping amendment applies retroactively for statute-of-limitations purposes only would be to "create[] congressional intent out of whole cloth" based upon "progressively linked inferences" and "fictitiously create[d] purposes to achieve specific results." *Griffon*, 802 F.2d at 147. As in *Griffon*, there is no basis to conclude that Congress intended to treat the changes in 18 U.S.C. 1201 one way and the resulting change in the applicable statute of limitations another way. Congress is presumed to have understood that its creation of new crimes and other substantive

changes in the kidnaping statute could apply prospectively only. Consequently, it is also presumed to have understood that any changes to remedies or procedures effected by the 1972 amendment could also apply prospectively only.

In fact, the case against retroactive application is even stronger here than in *Griffon*. Unlike the CMPL, the 1972 kidnaping amendment contained no provisions that were expressly procedural. Moreover, the purpose of the amendment was predominately substantive, given Congress's clear and unequivocal intent to expand criminal liability for certain kidnapings. Finally, unlike in *Griffon*, this Court need not apply a deferential standard of review to the interpretation advocated by the defendant. Compare 802 F.2d at 148 (applying *Chevron* deference to the Secretary's interpretation of the CMPL). Accordingly, under *Griffon*, the 1972 amendment is substantive legislation that applies prospectively only for all purposes.[11]

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[11] See also, *e.g.*, *Landgraf*, 511 U.S. at 280-281, 293 (concluding that the procedural right to a jury trial under an employment discrimination statute, which accompanied a new substantive right to recover damages, could not apply retroactively because the right to recover damages applied prospectively and because Congress had not expressed a contrary intent); *Safarini*, 257 F. Supp. 2d at 201 (relying on *Landgraf* to hold that, in the absence of clear congressional intent, the procedural provisions of the 1994 federal death penalty law could not apply retroactively where the law also created new crimes that constitutionally could operate on a prospective basis only).

4. This Court Should Reject Reliance On Provenzano *Because That Case Was Wrongly Decided*

The reliance of the defendant (Br. 13-15) and the panel (Slip Op. 9-10, 14-15) on *United States* v. *Provenzano*, 423 F. Supp. 662 (S.D.N.Y. 1976), aff'd, 556 F.2d 562 (2d Cir. 1977) (unpublished table decision), should be rejected. The district court in *Provenzano* held that the 1972 amendment retroactively shortened the limitations period applicable to pre-amendment violations of the kidnaping statute, thus barring prosecution of defendants in that case for their 1961 conduct. See 423 F. Supp. at 669. The court concluded that the amendment was procedural rather than substantive because "statutes of limitation * * * are not considered 'substantive,'" and because "the direct effect of the [amendment's] repeal [of the death penalty] is to terminate the applicability of 18 U.S.C. § 3281, the no limit statute of limitations." *Ibid*. In so concluding, the court ignored the first rule of statutory interpretation that establishes a presumption against retroactivity and also failed to examine the amendment's text and legislative history for evidence of congressional intent to change the statute of limitations. Had the *Provenzano* court engaged in the correct analysis, applying the rules as this Court did in *Griffon*, it would have concluded that the 1972 amendment was a substantive statute that applies prospectively for all purposes.

Indeed, consistent with this Court's approach in *Griffon*, the court in *United States* v. *Owens*, 965 F. Supp. 158, 165 n.6 (D. Mass. 1997), properly rejected *Provenzano*'s holding to conclude that a change in penalty does *not* retroactively change the applicable statute of limitations. In *Owens*, the court considered the 1994 Violent Crime Act, Pub. L. No. 103-322, §§ 60003(a)(11), (12), 330016(2)(c), 108 Stat. 1796, which amended the murder and murder-for-hire statutes by increasing the maximum penalty from a term of life imprisonment to death, making them capital. See 965 F. Supp. at 162. As a result, the applicable statutes of limitations also changed. See *ibid*. (citing 18 U.S.C. 3281). Like the 1972 amendment to the kidnaping statute, however, the 1994 Act did not expressly change the limitations period for previously committed offenses still subject to prosecution. See *id*. at 164. Rather, it changed the punishment, "thereby only indirectly implicating the applicable statute of limitations." *Ibid*. The court noted that "Congress fully understood that the added punishment constitutionally could operate only prospectively," *ibid*. (citations omitted), and therefore concluded that, "absent a contrary expression of Congressional intent, the same holds true for the statute's indirect impact on the statute of limitations," *id*. at 165.

The court then examined the legislative history and found "not a scintilla of evidence * * * suggesting that Congress intended that there be no limitation period

for murder and murder for hire offenses committed prior to September, 1994." *Owens*, 965 F. Supp. at 165. "To the contrary, the enactment of what is nothing more than a sentencing statute, *without any reference to the statute of limitations*, is a strong indicator that Congress intended to remove the limitations period *only* as to crimes covered by the enhanced sentencing scheme, *i.e.*, crimes committed *after* the effective date of the Violent Crime Act." *Ibid*. (emphasis partially added). In a footnote, the court rejected *Provenzano*'s contrary holding, explaining that, "[a]bsent a clear Congressional intent to change the statute of limitations, courts apply the statute that was in effect at the time of the offense–even if the potential penalty is subsequently changed." *Id*. at n.6. *Owens*, therefore, not *Provenzano*, is consistent with this Court's precedent, and thus provides persuasive authority for concluding that the 1972 amendment does not apply retroactively for statute-of-limitations purposes.[12]

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[12] The court in *Owens* assumed for purposes of deciding the defendant's motion to dismiss that the limitations period that governed his conduct had not expired when Congress amended the murder and murder-for-hire statutes in 1994. See 965 F. Supp. at 164. Because Congress may constitutionally extend an unexpired statute of limitations without running afoul of the *Ex Post Facto* Clause, the *Owens* court focused solely on principles of statutory interpretation to determine whether the Act could apply retroactively for statute-of-limitations purposes. See *ibid*. For all the reasons set forth in *Owens*, the 1994 Act, which also restored capital punishment for kidnaping, see Pub. L. No. 103-322, § 60003(a)(6), 108 Stat. 1969, did not retroactively affect the statute of limitations

(continued...)

5. Because The 1972 Amendment Does Not Apply Retroactively, The Saving Clause Preserves The 1964 Version Of The Kidnaping Statute For Purposes Of This Prosecution

Because the 1972 amendment does not apply retroactively for any purpose, the defendant was properly prosecuted under the 1964 version of the kidnaping statute, pursuant to the general saving clause, 1 U.S.C. 109. Congress enacted the saving clause to address precisely this situation. The common law recognized a presumption that repeals and re-enactments of criminal statutes abated all prosecutions that had not reached final disposition. See *Blue Sea Line*, 553 F.2d at 447. Because the *Ex Post Facto* Clause barred retroactive application of amendments increasing criminal penalties, individuals who violated the law before it was amended could, as a result of abatement and legislative inadvertence, avoid prosecution. See *ibid*. Congress, therefore, enacted the saving clause to eliminate such "pitfalls." *Ibid*. The saving clause provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. 109. As already explained, Congress did not express its intent to apply

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[12](...continued)
applicable in this case, either.

the 1972 amendment retroactively; nor did it express its intent to extinguish liability under the federal kidnaping statute for pre-1972 conduct. Accordingly, the saving clause permits prosecution of the defendant under the law in effect at the time of the offense, which includes the 1964 version of 18 U.S.C. 1201, as governed by 18 U.S.C. 3281.

The defendant's argument (Br. 15-16), and the panel's conclusion (Slip Op. 11-16), that the saving clause does not apply in this case must be rejected because it is premised upon the incorrect conclusion that the 1972 amendment is not a substantive amendment. The defendant and the panel consider only the amendment's repeal of the death penalty, ignoring the amendment's other substantive changes, and conclude that such provision did not substantively change the kidnaping statute because the death penalty was unenforceable following the Supreme Court's 1968 decision in *Jackson*. Under *Griffon*, of course, the amendment must be construed in its entirety to determine whether it is substantive or procedural. But even considering the penalty provision alone, the argument that the change in punishment was not a substantive change lacks merit for two reasons.

First, it is well-settled that the saving clause saves repealed penalties, including "criminal sentencing laws repealing harsher ones in force at the time of

the commission of an offense." *Warden, Lewisburg Penitentiary* v. *Marrero*, 417 U.S. 653, 661 (1974); accord *Blue Sea Line*, 553 F.2d at 448. The amendment's substitution of a maximum penalty of death with a term of life imprisonment thus falls plainly and clearly within the scope of the saving clause.

Second, to determine whether the amendment substantively affected the maximum penalty for kidnaping, the amendment must be compared to the law in effect at the time of the offense, not to the maximum penalty that was constitutionally available after *Jackson*. See *Dobbert* v. *Florida*, 432 U.S. 282, 297-298 (1977) (comparing new death penalty statute with death penalty statute in effect at the time of the offense, but which was subsequently invalidated and held unenforceable, to conclude that new statute did not substantively increase punishment); accord *Smith* v. *Johnson*, 458 F. Supp. 289, 292 (E.D. La. 1977), aff'd, 584 F.2d 758 (5th Cir. 1978). A comparison of the 1972 amendment with the kidnaping statute in effect in 1964 clearly shows a substantive change in the maximum punishment authorized by Congress.

Accordingly, the saving clause preserves the death penalty provision in the 1964 version of 18 U.S.C. 1201, for purposes of applying 18 U.S.C. 3281. See *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 389 (1953) ("By the General Savings Statute Congress did not merely save from extinction a liability incurred

under the repealed statute; it saved the statute itself."); see also *Dobbert*, 432 U.S. at 298 ("The actual existence of a statute, prior to such a determination [that it is unconstitutional], is an operative fact, and may have consequences which cannot justly be ignored." (citation omitted)).[13]

D. Kidnaping Remained A Capital Offense For Statute-Of-Limitations Purposes After Jackson

The Supreme Court's decision in *Jackson* did not reclassify kidnaping as a non-capital offense for purposes of applying 18 U.S.C. 3281. Every court of appeals to address this issue has concluded that judicial invalidation of the death penalty has no effect on the applicable statute of limitations.

1. The Court In Jackson *Invalidated The Death Penalty For Kidnaping But Did Not Change The Statute's Basic Operation*

In 1968, the Supreme Court decided *Jackson*, which invalidated the death penalty provision of the federal kidnaping statute. The Court held that the provision, which authorized only a jury to recommend punishment by death, was unconstitutional because it discouraged assertion of the Fifth and Sixth

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[13] The defendant (Br. 15-16) and panel (Slip Op. 11-12) both point out that the saving clause cannot save repealed statutes of limitations, but that is not the position urged here. The applicable statute of limitations in this case, 18 U.S.C. 3281, has not been repealed. Rather, the saving clause preserves the substantive law in effect at the time of the offense, 18 U.S.C. 1201 (1964), which triggers application of 18 U.S.C. 3281.

Amendment rights to trial by jury. See *Jackson*, 390 U.S. at 583-585. Rather than striking down the entire statute, the Court concluded that "the clause authorizing capital punishment [was] severable from the remainder of the kidnaping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole." *Id.* at 586. The Court explained that the death penalty's "elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." *Ibid.*

The Court made clear that the only impact its decision had was that capital punishment could no longer be imposed for violations of the kidnaping statute; everything else remained the same:

> Thus the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose–that of making interstate kidnaping a federal crime. By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the statute an operative whole, free of any constitutional objection. The appellees may be prosecuted for violating the Act, but they cannot be put to death under its authority.

Jackson, 390 U.S. at 591.

The Court's narrow holding was clearly guided by separation-of-powers concerns and principles of judicial restraint.[14] In severing the death penalty

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[14] The question whether the Supreme Court lacks constitutional authority based upon separation of powers to transform a capital crime into a non-capital

(continued...)

provision from the rest of the statute, the Court explained that, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *Jackson*, 390 U.S. at 585 (citation omitted). The Court reviewed the statute's legislative history and found it "quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnaping cases would have chosen to discard the entire statute if informed that it could not include the death penalty clause now before us." *Id*. at 586. Consistent with the limits on judicial power under the Constitution, the Court opted to "leave the statute an operative whole" in order to avoid "total frustration of Congress' basic purpose." *Id*. at 591.

2. Judicial Invalidation Of The Death Penalty Has No Effect On The Applicable Statute Of Limitations

Soon after the Supreme Court decided *Jackson*, the Eighth Circuit

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[14](...continued)
crime for all purposes was not raised below by either party; nor was it briefed on appeal or addressed by the panel. Although the separation-of-powers issue is somewhat related to, and perhaps a "sub-issue" of, *Jackson*'s effect on the statute of limitations (an issue that the panel did not address), it is not preserved for en banc consideration, despite this Court's request for briefing. See *United States* v. *Brace*, 145 F.3d 247, 255-261 (5th Cir.) (en banc), cert. denied, 525 U.S. 973 (1998). Nonetheless, as explained above, separation-of-powers principles clearly guided the Court's decision in *Jackson*.

considered what effect, if any, that decision had on the statute of limitations. See *United States* v. *Coon*, 411 F.2d 422, 424-425 (8th Cir. 1969). The court concluded that *Jackson* did not affect the statute of limitations, explaining:

> [T]he scope of the *Jackson* decision is limited to the constitutional infirmities attending imposition of the death penalty. Here we are concerned not with a constitutional issue, but with the statute of limitations. Generally speaking, limitation of the time for commencing the prosecution of a criminal charge is purely a matter of statute. Thus in deciding which limitation is applicable, we must look directly to the statute. And in interpreting the statute of limitations, the statute must be considered in light of the situation as it existed and presumably was known to Congress at the time of the passage of the statute.

Id. at 425 (internal quotation marks and citations omitted). The court thus concluded that 18 U.S.C. 3281, not 18 U.S.C. 3282, was the controlling statute of limitations because "[t]o hold otherwise would be to give a perverted reading to the statutory scheme in existence at all pertinent times." *Ibid*.

Three years later, the Supreme Court decided *Furman*, which held that imposition of the death penalty in two rape cases and a murder case from Georgia and Texas "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. at 240. As this Court has recognized, *Furman* effectively voided the federal death penalty as it existed at that time. See *United States* v. *Kaiser*, 545 F.2d 467, 471 (5th Cir. 1977).

Since then, courts of appeals have unanimously held, as the Eighth Circuit did after *Jackson*, that judicial invalidation of the death penalty does not change the statute of limitations applicable to capital cases. See *United States* v. *Manning*, 56 F.3d 1188, 1196 (9th Cir. 1995); *United States* v. *Edwards*, 159 F.3d 1117, 1128 (8th Cir. 1998), cert. denied, 528 U.S. 825 (1999); *United States* v. *Ealy*, 363 F.3d 292, 296-297 (4th Cir.), cert. denied, 543 U.S. 862 (2004); *Willenbring* v. *Neurauter*, 48 M.J. 152, 179-180 (C.A.A.F. 1998). This is because statutes of limitations "derive their justification from the serious nature of the crime rather than from a concern about, for example, what procedural protections those who face a penalty as grave as death are to receive." *Manning*, 56 F.3d at 1196; accord *Edwards*, 159 F.3d at 1128.

Consequently, offenses "punishable by death" are still considered "capital crimes" for statute-of-limitations purposes, even if the death penalty is unenforceable. See, *e.g.*, *Ealy*, 363 F.3d at 296-297 (affirming district court holding that "the limitations period depends on the capital nature of the crime, and not on whether the death penalty is in fact available for defendants in a particular case"); see also *United States* v. *Martinez*, 505 F. Supp. 2d 1024, 1031 (D.N.M. 2007) (distinguishing "capital sentence" from "capital offense" to conclude that offense "punishable by death" is capital for statute-of-limitations purposes despite

law prohibiting enforcement of the death penalty in Indian Country), appeal dismissed, 272 F. App'x. 658 (10th Cir. 2008). Accordingly, an offense that is "punishable by death" remains subject to no limitation on prosecution under 18 U.S.C. 3281, even if the death penalty cannot be imposed, because that statute reflects Congress's "judgment that some crimes are so serious that an offender should always be punished if caught." *Manning*, 56 F.3d at 1196; accord *Willenbring*, 48 M.J. at 180.

Offenses "punishable by death" are also considered "capital offenses" for purposes of applying other statutes tied to the serious nature of capital crimes, even if the death penalty is unavailable. See, *e.g.*, *United States* v. *Kennedy*, 618 F.2d 557, 559 (9th Cir. 1980) (upholding applicability 18 U.S.C. 3148, which allows a court to deny bail in capital cases if the defendant poses a danger to others because "[t]he reasons for allowing a court to consider the dangerousness of the defendant exist regardless of whether the death penalty can be imposed"); *United States* v. *Kostadinov*, 721 F.2d 411, 412 (2d Cir. 1983) (same); *United States* v. *Watson*, 496 F.2d 1125, 1128 (4th Cir. 1973) (upholding applicability of 18 U.S.C. 3005 because the court was "unable to say, absent a clear legislative expression, that the possibility of imposition of the death penalty was the sole reason why Congress gave an accused the right to two attorneys"); see also *Smith*

v. *Johnson*, 584 F.2d 758 (5th Cir. 1978) (per curiam) (concluding that district court correctly upheld applicability of Louisiana statute requiring certain juveniles charged with capital crimes to be treated as adults, even though the death penalty was subsequently held unconstitutional), aff'g 458 F. Supp. 289 (E.D. La. 1977).[15]

By contrast, where statutes and rules applicable to capital cases are designed to protect defendants from an erroneous death sentence, there is no reason to apply them when there is no possibility that the defendant can actually be put to death. See *United States* v. *Steel*, 759 F.2d 706, 710 (9th Cir. 1985) (explaining that protections for capital defendants do not apply where the death penalty is not available because their purpose "derives from the severity of the punishment rather than from the nature of the offense"). Thus, in *United States* v. *Hoyt*, 451 F.2d

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[15] As set forth above, an offense remains capital for statute-of-limitations purposes regardless of whether its death penalty provision is held to violate the Fifth and Sixth Amendments, as in *Jackson*, or the Eighth Amendment, as in *Furman*. See, *e.g.*, *Willenbring*, 48 M.J. at 179-180 (concluding that rape case was "capital" for statute-of-limitations purposes even though imposition of the death penalty for rape would be unconstitutional under the Eighth Amendment). This is because statutes of limitations are tied to the nature of the offense, not to the severity of the punishment. In both instances, however, courts have recognized the separation-of-powers issues that would arise if they invalidated all statutes and rules tied to the nature of a capital case, simply because the death penalty could not be constitutionally imposed. In a post-*Furman* murder case, for example, the Fourth Circuit upheld the continued classification of murder as a capital offense for purposes of applying 18 U.S.C. 3005, explaining that "[c]ourts are very naturally hesitant about drawing solely upon their own authority to repeal pro tanto Congressional enactments." *Watson*, 496 F.2d at 1128.

570, 571 (5th Cir. 1971) (per curiam), cert. denied, 405 U.S. 995 (1972), this Court treated a post-*Jackson* kidnaping case as non-capital for purposes of applying Federal Rule of Criminal Procedure 24(b), which provides twenty peremptory challenges to defendants charged with a crime "punishable by death," and 18 U.S.C. 3432, which requires the prosecution to turn over witness and jury lists to capital defendants before trial. Relying on *Hoyt*, this Court again held that 18 U.S.C. 3432 was inapplicable in a post-*Furman* murder case. See *Kaiser*, 545 F.2d at 475 (Where "the capital punishment provision of [the federal murder statute] is unconstitutional and void, * * * the strict procedural guarantees of § 3432 were not properly applicable to this trial.").

Contrary to the defendant's argument (Br. 21-23), therefore, *Hoyt* and *Kaiser* are entirely consistent with the treatment of this case as a capital case for statute-of-limitations purposes. Indeed, the same circuits that have upheld the continued applicability of 18 U.S.C. 3281 to cases charging "offenses punishable by death" after *Jackson* and *Furman* have also held such cases to be "non-capital" for purposes of applying Rule 24(b) and 18 U.S.C. 3432. See, *e.g.*, *United States* v. *McNally*, 485 F.2d 398, 407 (8th Cir. 1973) (concluding that case charging defendant with hijacking offense, for which Congress authorized the death penalty, lost its capital nature after *Furman* for purposes of applying Rule 24(b)),

cert. denied, 415 U.S. 978 (1974); *United States* v. *Goseyun*, 789 F.2d 1386, 1387 (9th Cir. 1986) (relying on *Hoyt* and *McNally* to deny defendant in post-*Furman* murder case benefit of Rule 24(b) because that rule "is tied to the penalty formerly possible"); *Steel*, 759 F.2d at 709-710 (relying in part on *Kaiser* to conclude that invalidation of the death penalty also invalidates the right to a witness list under 18 U.S.C. 3432 because "the purpose of the witness list right is to reduce the chance that an innocent defendant would be put to death by providing a pretrial safeguard not available in nonpcapital criminal prosecutions").

Hoyt and *Kaiser* are also consistent with the approach this Court and other courts follow when the death penalty is constitutionally available, but the government has agreed not to seek it. See *United States* v. *Crowell*, 498 F.2d 324, 325 (5th Cir. 1974) (concluding that district court did not err in refusing to apply Rule 24(b) and 18 U.S.C. 3432 in case charging capital offense where there was an agreement prior to trial not to seek the death penalty); accord *Hall* v. *United States*, 410 F.2d 653, 660-661 (4th Cir.), cert. denied, 396 U.S. 970 (1969); *United States* v. *Maestas*, 523 F.2d 316, 319 (10th Cir. 1975); *United States* v. *Grimes*, 142 F.3d 1342, 1347 (11th Cir. 1998), cert. denied, 525 U.S. 1088 (1999). By contrast, cases in which the death penalty is available but has been waived are still considered capital cases for statute-of-limitations purposes. See, *e.g.*, *United*

States v. *Johnson*, 270 F. Supp. 2d 1060, 1064 (N.D. Iowa 2003) ("[T]he government's decision not to *seek* the death penalty, even though 'capital offenses' are charged in the indictment, does not amount to a reduction of the offenses, for statute of limitations purposes, to 'non-capital offenses' subject to a five-year statute of limitations.").

In sum, the prosecution of the defendant in 2007 for his 1964 conduct under the law in effect at the time of his offense was not time-barred because neither the 1972 amendment, nor the Supreme Court's decision in *Jackson*, retroactively shortened the limitations period that Congress authorized for violations of the kidnaping statute where, as here, the victims were not liberated unharmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the defendant's conviction.

Respectfully submitted,

LORETTA KING
Acting Assistant Attorney General

_____
JESSICA DUNSAY SILVER
TOVAH R. CALDERON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4142

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2009, two copies and one diskette containing an electronic copy of the foregoing EN BANC BRIEF FOR THE UNITED STATES AS APPELLEE were served by overnight carrier on the following counsel of record:

Kathryn Neal Nester, Esq.
George Lowery Lucas, Esq.
Federal Public Defender's Office
Southern District of Mississippi
200 South Lamar Street
Suite 200-N
Jackson, MS 39201

_____

TOVAH R. CALDERON
Attorney

FORM 6. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

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(s) _____

Attorney for: **United States of America**

Dated: **April 16, 2009**

ADDENDUM

EXHIBIT A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 19, 2008

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 07-60732 USA v. Seale
USDC No. 3:07-CR-9-1

Dear Counsel:

Although the entire case on appeal is before the en banc court, counsel are well-advised to limit their briefing and oral argument exclusively or primarily to the issue addressed by the panel. The issue raised for reconsideration en banc is whether the change in the statute of limitations for the federal kidnaping statute, which was effected by the 1972 amendment to the federal kidnaping statute, applies retroactively to Seale's 1964-1966 conduct.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Geralyn Maher
Geralyn Maher
Calendar Clerk
504-310-7630

Ms Kathryn Neal Nester
Ms Tovah R Calderon

EXHIBIT B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

February 10, 2009

Ms Tovah R Calderon
US Department of Justice
Civil Rights Div - Appellate Section
PO Box 14403
Washington, DC 20044

No. 07-60732 USA v. Seale

Dear Ms Calderon:

At least one judge requests that appellee's counsel brief the separation-of-powers question in this case. That is, address: (1) whether the Supreme Court lacks constitutional authority to transform a capital crime into a non-capital crime for all purposes when Congress has exercised its constitutional prerogative to classify the crime as capital and that classification is consonant with the Eighth Amendment; and (2) whether, consequently, federal kidnaping remained a capital crime for statute-of-limitations purposes after *United States v. Jackson*, 390 U.S. 570 (1968), because the Court held that 18 U.S.C. § 1201's death-penalty provisions violated a defendant's procedural rights under the Fifth and Sixth Amendments but did not hold that the provisions violated the defendant's substantive rights under the Eighth Amendment. Appellee's counsel also should address whether this issue is properly preserved for en banc consideration. Additionally, counsel should address any other issues that might bear on the separation-of-powers question that counsel determines appropriate.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Geralyn A. Maher
Geralyn A. Maher
Calendar Clerk
504-310-7630

cc: Ms Kathryn N Nester

EXHIBIT C

Public Law 92-538

October 23, 1972
[H.R. 13694]

AN ACT

To amend the joint resolution establishing the American Revolution Bicentennial Commission, as amended.

American Revolution Bicentennial Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the joint resolution entitled "Joint resolution to establish the American Revolution Bicentennial Commission, and for other purposes", approved July 4, 1966 (80 Stat. 259), as amended, is further amended as follows:

Appropriation.
Ante, p. 43.

Section 7(a) is amended to read as follows:

"SEC. 7. (a) There is hereby authorized to be appropriated to carry out the purposes of this Act until February 15, 1973, $3,356,000, of which not to exceed $2,400,000 shall be for grants-in-aid pursuant to section 9(1) of this Act."

Grants-in-aid.

SEC. 2. Section 9 is amended by the addition of the following new subsections:

"(2) make grants to nonprofit entities including States, territories, the District of Columbia, and the Commonwealth of Puerto Rico (or subdivisions thereof) to assist in developing or supporting bicentennial programs or projects. Such grants may be up to 50 per centum of the total cost of the program or project to be assisted;

"(3) in any case where money or property is donated, bequeathed, or devised to the Commission, and accepted thereby for purposes of assisting a specified nonprofit entity, including States, territories, the District of Columbia, and the Commonwealth of Puerto Rico (or subdivisions thereof), for a bicentennial program or project, grant such money or property, plus an amount not to exceed the value of the donation, bequest, or devise: *Provided*, That the recipient agrees to match the combined value of the grant for such bicentennial program or project."

Approved October 23, 1972.

Public Law 92-539

October 24, 1972
[H.R. 15883]

AN ACT

To amend title 18, United States Code, to provide for expanded protection of foreign officials, and for other purposes.

Act for the Protection of Foreign Officials and Official Guests of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Act for the Protection of Foreign Officials and Official Guests of the United States".

STATEMENT OF FINDINGS AND DECLARATION OF POLICY

SEC. 2. The Congress recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnaping, and assault has resided in the several States, and that such power should remain with the States.

The Congress finds, however, that harassment, intimidation,

obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States or against official guests of the United States adversely affect the foreign relations of the United States.

Accordingly, this legislation is intended to afford the United States jurisdiction concurrent with that of the several States to proceed against those who by such acts interfere with its conduct of foreign affairs. Jurisdiction.

TITLE I—MURDER OR MANSLAUGHTER OF FOREIGN OFFICIALS AND OFFICIAL GUESTS

SEC. 101. Chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following new sections: 62 Stat. 756. 18 USC 1111.

"§ 1116. Murder or manslaughter of foreign officials or official guests

"(a) Whoever kills a foreign official or official guest shall be punished as provided under sections 1111 and 1112 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life. Penalty.

"(b) For the purpose of this section 'foreign official' means— Definitions.

"(1) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

"(2) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

"(c) For the purpose of this section:

"(1) 'Foreign government' means the government of a foreign country, irrespective of recognition by the United States.

"(2) 'International organization' means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288). 59 Stat. 669.

"(3) 'Family' includes (a) a spouse, parent, brother or sister, child, or person to whom the foreign official stands in loco parentis, or (b) any other person living in his household and related to the foreign official by blood or marriage.

"(4) 'Official guest' means a citizen or national of a foreign country present in the United States as an official guest of the government of the United States pursuant to designation as such by the Secretary of State.

"§ 1117. Conspiracy to murder

"If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life." 62 Stat. 756; 65 Stat. 721; *Supra.*

SEC. 102. The analysis of chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"1116. Murder or manslaughter of foreign officials or official guests.
"1117. Conspiracy to murder."

TITLE II—KIDNAPING

62 Stat. 760; 70 Stat. 1043.

SEC. 201. Section 1201 of title 18, United States Code, is amended to read as follows:

"§ 1201. Kidnaping

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

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

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

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

84 Stat. 921.

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

Ante, p. 1071.

Penalty.

shall be punished by imprisonment for any term of years or for life.

"(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

"(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life."

SEC. 202. The analysis of chapter 55 of title 18, United States Code, is amended by deleting

"1201. Transportation.",

and substituting the following:

"1201. Kidnaping."

TITLE III—PROTECTION OF FOREIGN OFFICIALS AND OFFICIAL GUESTS

78 Stat. 610.

SEC. 301. Section 112 of title 18, United States Code, is amended to read as follows:

"§ 112. Protection of foreign officials and official guests

Offenses and penalties.

"(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official or official guest shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

"(b) Whoever willfully intimidates, coerces, threatens, or harasses a foreign official or an official guest, or willfully obstructs a foreign official in the performance of his duties, shall be fined not more than $500, or imprisoned not more than six months, or both.

Demonstrations.

"(c) Whoever within the United States but outside the District of Columbia and within one hundred feet of any building or premises belonging to or used or occupied by a foreign government or by a foreign official for diplomatic or consular purposes, or as a mission to

an international organization, or as a residence of a foreign official, or belonging to or used or occupied by an international organization for official business or residential purposes, publicly—

"(1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound, or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties, or

"(2) congregates with two or more other persons with the intent to perform any of the aforesaid acts or to violate subsection (a) or (b) of this section,

shall be fined not more than $500, or imprisoned not more than six months, or both.

"(d) For the purpose of this section 'foreign official', 'foreign government', 'international organization', and 'official guest' shall have the same meanings as those provided in sections 1116 (b) and (c) of this title. Definitions. *Ante*, p. 1071.

"(e) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States." USC prec. title 1.

SEC. 302. The analysis of chapter 7 of title 18, United States Code, is amended by deleting

"112. Assaulting certain foreign diplomats and other official personnel."

and adding at the beginning thereof the following new item:

"112. Protection of foreign officials and official guests."

TITLE IV—PROTECTION OF PROPERTY OF FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

SEC. 401. Chapter 45 of title 18, United States Code, is amended by adding at the end thereof the following new section: 62 Stat. 743. 18 USC 951.

"§ 970. Protection of property occupied by foreign governments

"(a) Whoever willfully injures, damages, or destroys, or attempts to injure, damage, or destroy, any property, real or personal, located within the United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than $10,000, or imprisoned not more than five years, or both. Offenses and penalties.

"(b) For the purpose of this section 'foreign official', 'foreign government', 'international organization', and 'official guest' shall have the same meanings as those provided in sections 1116 (b) and (c) of this title." Definitions. *Ante*, p. 1071.

SEC. 402. The analysis of chapter 45 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"970. Protection of property occupied by foreign governments."

SEC. 3. Nothing contained in this Act shall be construed to indicate an intent on the part of Congress to occupy the field in which its provisions operate to the exclusion of the laws of any State, Commonwealth, territory, possession, or the District of Columbia on the same subject matter, nor to relieve any person of any obligation imposed by any law of any State, Commonwealth, territory, possession, or the District of Columbia.

Approved October 24, 1972.

EXHIBIT D

Calendar No. 1048

92D CONGRESS
2d Session

SENATE

REPORT
No. 92-1105

PROTECTION OF FOREIGN OFFICIALS AND OFFICIAL GUESTS OF THE UNITED STATES

SEPTEMBER 8, 1972.—Ordered to be printed

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

REPORT

[To accompany H.R. 15883]

The Committee on the Judiciary, to which was referred the act (H.R. 15883) to amend title 18, United States Code, to provide for expanded protection of foreign officials, and for other purposes, having considered the same, reports favorably thereon with amendments, and recommends that the bill as amended do pass.

AMENDMENTS

(1) Page 1, line 4, strike the quotation mark and the period and insert "and Official Guests of the United States.".

(2) Page 2, line 3, following the words "United States" insert "or against official guests of the United States".

(3) Page 2, line 10, following the word "Officials" insert the words "and official guests".

(4) Page 2, line 14, add the words "or official guests".

(5) Page 2, line 15, following the word "official" insert the words "or official guest".

(6) Page 3, between lines 23 and 24 insert the following new subsection:

"(4) 'Official guest' means a citizen or national of a foreign country present in the United States as an offical guest of the government of the United States pursuant to designation as such by the Secretary of State."

(7) Page 4, following line 7, strike "1116. Murder or manslaughter of foreign officials." and insert in lieu thereof "1116. Murder or manslaughter of foreign officials or official guests."

(8) Page 5, line 2, following "1116(b)" insert "or an official guest as defined in section 1116(c)(4)".

(9) Page 5, line 19, following the word "officials" insert the words "and official guest".

(10) Page 5, line 22, add the words "and official guests".

(11) Page 6, line 1, following the word "official" insert "or official guest".

(12) Page 6, strike lines 6, 7, 8 and 9 (subsection (b)) and insert in lieu thereof the following:

"(b) Whoever willfully intimidates, coerces, threatens, harasses, or willfully obstructs a foreign official or an official guest shall be fined not more than $500, or imprisoned not more than six months, or both."

(13) Page 7, line 4, strike the word "and", and following the words "'international organization'" insert "and 'official guest'".

(14) Page 7, between lines 6 and 7 insert the following:

"(e) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States."

(15) Page 7, following line 9, strike "112. Protection of foreign officials" and insert in lieu thereof "112. Protection of foreign officials and official guests."

(16) Page 7, line 22, strike the word "or" and following the word "official" insert "or official guest".

(17) Page 8, line 4, strike the word "and", and following the words "'international organization'" insert "and 'official guest'".

(18) Page 8, between lines 9 and 10 insert the following:

TITLE V. FOREIGN SERVICE GRIEVANCE PROCEDURE

SEC. 501(a). Title VI of the Foreign Service Act of 1946 is amended by adding at the end thereof the following new part:

"PART J—FOREIGN SERVICE GRIEVANCES

"STATEMENT OF PURPOSE

SEC. 691. It is the purpose of this part to provide officers and employees of the Service and their survivors, a grievance procedure to insure the fullest measure of due process, and to provide for the just consideration and resolution of grievances of such officers, employees, and survivors.

"REGULATIONS OF THE SECRETARY

"SEC. 692. The Secretary shall, consistent with the purposes stated in section 691 of this Act, implement this part by promulgating regulations, and revising those regulations when necessary, to provide for the consideration and resolution of grievances by a board. No such regulation promulgated by the Secretary shall in any manner alter or amend the provisions for due process established by this section for grievants. The regulations shall include, but not be limited to, the following:

"(1) Informal procedures for the resolution of grievances in accordance with the purposes of this part shall be established by agreement between the Secretary and the organization accorded recognition as the exclusive representative of the officers and employees of the Service. If a grievance is not resolved under such procedures within sixty days, a grievant shall be entitled to file a grievance with the board for its consideration and resolution. For the purposes of the regulations—

"(A) 'grievant' shall mean any officer or employee of the Service, or any such officer or employee separated from the Service, who is a citizen of the United States, or in the case of the death of the officer or employee, a surviving spouse or dependent family member of the officer or employee; and

"(B) 'grievance' shall mean a complaint against any claim of injustice or unfair treatment of such officer or employee arising from his employment or career status, or from any actions, documents, or records, which could result in career impairment or damage, monetary loss to the officer or employee, or deprivation of basic due process, and shall include, but not be limited to, actions in the nature of reprisals and discrimination, actions related to promotion or selection out, the contents of any efficiency report, related records, or security records, and actions in the nature of adverse personnel actions, including separation for cause, denial of a salary increase within a class, written reprimand placed in a personnel file, or denial of allowances.

"(2)(A) The board considering and resolving grievances shall be composed of independents, distinguished citizens of the United States well known for their integrity, who are not officers or employees of the Department, the Service, the Agency for International Development, or the United States Information Agency. The board shall consist of a panel of three members, one of whom shall be appointed by the Secretary, one of whom shall be appointed by the organization accorded recognition as the exclusive representative of the officers and employees of the Service, and one who shall be appointed by the other two members from a roster of twelve independent, distinguished citizens of the United States well known for their integrity who are not officers or employees of the Department, the Service, or either such agency, agreed to by the Secretary and such organization. Such roster shall be maintained and kept current at all times. If no organization is accorded such recognition at any time during which there is a position on the board to be filled by appointment by such organization or when there is no such roster since no such organizaton has been so recognized, the Secretary shall make any such appointment in agreement with organizations representing officers and employees of the Service. If members of the board (including members of additional panels, if any) find that additional panels of three members are necessary to consider and resolve expeditiously grievances filed with the board, the board shall determine the number of such additional panels necessary, and appointments to each such panel shall be made in the same manner as the original panel. Members shall (i) serve for two-year terms, and (ii) receive compensation, for each day they are performing their duties as members of the board (including traveltime), at the daily

rate paid an individual at GS–18 of the General Schedule under section 5332 of title 5, United States Code. Whenever there are two or more panels, grievances shall be referred to the panels on a rotating basis. Except in the case of duties, powers, and responsibilities under this paragraph (2), each panel is authorized to exercise all duties, powers, and responsibilities of the board. The members of the board shall elect, by a majority of those members present and voting, a chairman from among the members for a term of two years.

"(B) In accordance with this part, the board may adopt regulations governing the organization of the board and such regulations as may be necessary to govern its proceedings. The board may obtain such facilities and supplies through the general administrative services of the Department, and appoint and fix the compensation of such officers and employees as the board considers necessary to carry out its functions. The officers and employees so appointed shall be responsible solely to the board. All expenses of the board shall be paid out of funds appropriated to the Department for obligation and expenditure by the board. The records of the board shall be maintained by the board and shall be separate from all other records of the Department.

"(3) A grievance under such regulations is forever barred, and the board shall not consider or resolve the grievance, unless the grievance is filed within a period of eight months after the occurrence or occurrences giving rise to the grievance, except that if the grievance arose prior to the date the regulations are first promulgated or placed into effect, the grievance shall be so barred, and not so considered and resolved, unless it is filed within a period of one year after the date of enactment of this part. There shall be excluded from the computation of any such period any time during which the grievant was unaware of the grounds which are the basis of the grievance and could not have discovered such grounds if he had exercised, as determined by the board, reasonable diligence.

"(4) The board shall conduct a hearing in any case filed with it. A hearing shall be open unless the board for good cause determines otherwise. The grievant and, as the grievant may determine, his representative or representatives are entitled to be present at the hearing. Testimony at a hearing shall be given by oath or affirmation, which any board member shall have authority to administer (and this paragraph so authorizes). Each party (A) shall be entitled to examine and cross-examine witnesses at the hearing or by deposition, and (B) shall be entitled to serve interrogatories upon another party and have such interrogatories answered by the other party unless the board finds such interrogatory irrelevant or immaterial. Upon request of the board or grievant, the Department shall promptly make available at the hearing or by deposition any witness under the control, supervision, or responsibility of the Department, except that if the board determines that the presence of such witness at the hearing would be of material importance, then the witness shall be made available at the hearing. If the witness is not made available in person or by deposition within a reasonable time as determined by the board, the facts at issue shall be construed in favor of the grievant. Depositions of witnesses (which are hereby authorized, and may be taken before any official of the United States authorized to administer an oath or affirmation, or in the case witnesses overseas, by deposition on notice before an American consular officer) and hearings shall be recorded and transcribed verbatim.

"(5) Any grievant filing a grievance, and any witness or other person involved in a proceeding before the board, shall be free from any restraint, interference, coercion, discrimination, or reprisal. The grievant has the right to a representative of his own choosing at every stage of the proceedings. The grievant and his representatives who are under the control, supervision, or responsibility of the Department shall be granted reasonable periods of administrative leave to prepare, to be present, and to present the grievance of such grievant. Any witness under the control, supervision, or responsibility of the Department shall be granted reasonable periods of administrative leave to appear and testify at any such proceeding.

"(6) In considering the validity of a grievance, the board shall have access to any document or information considered by the board to be relevant, including, but not limited to, the personnel and, under appropriate security measures, security records of such officer or employee, and of any rating or reviewing officer (if the subject matter of the grievance relates to that rating or reviewing officer). Any such document or information requested shall be provided promptly by the Department. A rating officer or reviewing officer shall be informed by the board if any report for which he is responsible is being examined.

"(7) The Department shall promptly furnish the grievant any such document or information (other than any security record or the personnel or security records of any other officer or employee of the Government) which the grievant requests to substantiate his grievance and which the board determines is relevant and material to the proceeding.

"(8) The Department shall expedite any security clearance whenever necessary to insure a fair and prompt investigation and hearing.

"(9) The board may consider any relevant evidence or information coming to its attention and which shall be made a part of the record of the proceeding.

"(10) If the board determines that (A) the Department is considering any action (including, but not limited to, separation or termination) which is related to, or may affect, a grievance pending before the board, and (B) the action should be suspended, the Department shall suspend such action until the board has ruled upon such grievance.

"(11) Upon completion of the proceedings, if the board resolves that the grievance is meritorious—

"(A) and determines that relief should be provided that does not directly relate to the promotion, assignment, or selection out of such officer or employee, it shall direct the Secretary to grant such relief as the board deems proper under the circumstances, and the resolution and relief granted by the board shall be final and binding upon all parties; or

"(B) and determines that relief should be granted that directly relates to any such promotion, assignment, or selection out, it shall certify such resolution to the Secretary, together with such recommendations for relief as it deems appropriate and the entire record of the board's proceedings, including the

transcript of the hearing, if any. The board's recommendations are final and binding on all parties, except that the Secretary may reject any such recommendation only if he determines that the foreign policy or security of the United States will be adversely affected. Any such determination shall be fully documented with the reasons therefor and shall be signed personally by the Secretary, with a copy thereof furnished the grievant. After completing his review of the resolution, recommendation, and record of proceedings of the board, the Secretary shall return the entire record of the case to the board for its retention. No officer or employee of the Department participating in a proceeding on behalf of the Department shall, in any manner, prepare, assist in preparing, advise, inform, or otherwise participate in, any review or determination of the Secretary with respect to that proceeding.

"(12) The Board shall have authority to insure that no copy of the Secretary's determination to reject a board's recommendation, no notation of the failure of the board to find for the grievant, and no notation that a proceeding is pending or has been held, shall be entered in the personnel records of such officer or employee to whom the grievance relates or anywhere else in the records of the Department, other than in th records of the board.

"(13) A grievant whose grievance is found not to be meritorious by the board may obtain reconsideration by the board only upon presenting newly discovered relevant evidence not previously considered by the board and then only upon approval of the board.

"(14) The board shall promptly notify the Secretary, with recommendations for appropriate disciplinary action, of any contravention by any person of any of the rights, remedies, or procedures contained in this part or in regulations promulgated under this part.

"RELATIONSHIP TO OTHER REMEDIES

"SEC. 693. If a grievant files a grievance under this part, and if, prior to filing such grievance, he has not formally requested that the matter or matters which are the basis of the grievance be considered and resolved, and relief provided, under a provision of law, regulation, or order, other than under this part, then such matter or matters may only be considered and resolved, and relief provided, under this part. A grievant may not file a grievance under this part if he has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered and resolved, and relief provided, under a provision of law, regulation, or order, other than under this part.

"JUDICIAL REVIEW

"SEC. 694. Notwithstanding any other provision of law, regulations promulgated by the Secretary under section 692 of this Act, revisions of such regulations, and actions of the Secretary or the board pursuant to such section, may be judicially reviewed in accordance with the provisions of chapter 7 of title 5, United States Code."

(b) The Secretary of State shall promulgate and place into effect the regulations provided by section 692 of the Foreign Service Act of 1946 (as added by subsection (a) of this section), and establish the board and appoint the member of the board which he is authorized to appoint under, as provided by such section 692, not later than 90 days after the date of enactment of this Act.

PURPOSE OF BILL AS AMENDED

H.R. 15883 as it passed the House of Representatives recognized the international obligations of the United States to resident diplomatic, consular and other foreign government personnel and their families present within our borders by the establishment of Federal criminal sanctions covering violations against their person and property. The first series of committee amendments extend this umbrella of Federal protection to other "official guests" of the United States as designated by the Secretary of State so as to authorize expanded protective, investigative and other law enforcement services for the benefit of private foreign citizens visiting our country pursuant to official recognition by the United States.

The second series of committee amendments would add a new part to title VI of the Foreign Service Act of 1946, as amended, relating to personnel administration. The stated purpose of the new part is "to provide officers and employees of the Service and their survivors, a grievance procedure to insure the fullest measure of due process, and to provide for the just consideration and resolution of grievances of such officers, employees, and survivors." (Sec. 691)

STATEMENT

Acts of physical violence against members of the diplomatic corps and other foreign officials and official guests in our country are alarming and can pose a real threat to the free intercourse between the United States and other nations of the world.

During the period between January through October 1971, there were seventy-nine major documented incidents against foreign diplomatic, consular, and semi-official officers and personnel in the United States.[1]

A review of existing criminal sanctions has disclosed that the Federal Government is currently without a criminal jurisdictional nexus over such matters.

Provisions for increased protection of diplomatic, consular and other foreign government personnel and their families would permit a direct discharge by the United States of its international obligations as a host country, whereas presently, in most instances of interference with such persons, the Federal Government can only encourage local enforcement of the law.

Of course, the prime responsibility to investigate, prosecute and punish common law crimes such as murder, kidnapping and assault should remain in the several States. This legislation will extend to the

[1] Letter to Hon. John L. McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures, from David M. Abshire, Assistant Secretary of State, and supporting documents, which are in the files of the Subcommittee.

United States jurisdiction, concurrent with that of the States, to proceed against only those acts committed against foreign officials which interfere with its conduct of foreign affairs.

In broad terms, the instant measure would—

(1) Make murder or manslaughter of a foreign official, a member of his family, or an official guest, or conspiracy to murder such individual, a Federal offense punishable as a felony.

(2) Make the kidnapping of a foreign official, a member of his family, or an official guest, or conspiracy to kidnap such an individual, a Federal felony if committed anywhere in the United States.

(3) Make the assaulting, striking, wounding, imprisoning or offering of violence to a foreign official or an official guest a Federal offense punishable as a felony.

(4) Make the intimidation, coercion, threatening, harassment or willful obstruction of a foreign official or an official guest a Federal offense punishable as a misdemeanor.

(5) Prohibit certain demonstrations within one hundred feet of foreign government buildings for the purpose of intemidating, coercing, threatening or harassing any foreign official or official guest, or willfully obstructing such individual, and make this punishable as a misdemeanor.

(6) Make the willful injury, damaging or destruction, or attempted injury, damaging or destruction, of real or personal property within the United States belonging to or used or occupied by a foreign government, foreign official, international organization, or official guest, a Federal offense punishable as a felony.

(7) Make several changes in the Federal kidnapping law as it will apply generally. In this regard, the law is amended to make the thrust of the offense the kidnapping itself rather than the interstate transporting of the kidnapped person. This effort to clearly differentiate the question of what is criminal from the question of what criminal behavior falls within Federal jurisdiction not only makes the sanction more rational but also has the practical effect of assuring that a kidnapping which occurs in a hijacking situation is an extraditable offense from a country which does not recognize an offense keyed to interstate transportation.

H.R. 15883 passed the House of Representatives on August 7, 1972, by a vote of 380–2. It has its genesis in companion bills H.R. 10502 and S. 2436, introduced in accordance with an executive communication (*infra*). These bills, as introduced, covered not only foreign officials, but also public officials of the United States. After considering the legislation the House Committee on the Judiciary concluded that the changes in the law proposed as to Federal officials and employees should be considered separately from that proposed for foreign officials and diplomatic personnel. Thus, the present bill, H.R. 15883, was subsequently introduced to cover foreign officials in this manner, including provisions recommended by the executive communication as to foreign officials and omitting the provisions relating to public officials of the United States. It should be noted that the penalty provisions in the reported bill differ from those proposed in the executive communication.

On September 7, 1972, Senator McClellan introduced Amendment No. 1488 for himself and Senator Hruska to H.R. 15883 and observed:

Mr. PRESIDENT: I send to the desk a proposed amendment to H.R. 15883, an "Act for the Protection of Foreign Officials". This amendment is rooted in my profound concern for the tragic events of Munich during the past week.

The bill under consideration recognizes that the United States as a host country has a particular responsibility to protect the person and property of "foreign officials", including ambassadors, agents, employees and their families, while such persons are present within our territorial confines. However, the measure would not offer any expanded protection for foreign citizens, who might visit our shores as official guests of our country as members of an Olympic contingent. Thus, had the situs of the kidnapping and subsequent murder of the Israeli standard-bearers been Milwaukee rather than Munich, our response would have been limited to state law enforcement resources. No federal jurisdiction would exist despite the fact that our responsibilities would at least parallel those which exist vis-a-vis visiting diplomatic personnel.

It is still too early to judge the actions of West Germany in response to this Arab terroristic lunacy. However, it is at least clear that the state governments of West Germany now realize that their federal government cannot be limited to a mere consultative role with regard to such matters. State governments simply cannot cope alone with crimes involving international politics and diplomacy.

Hopefully, we will never again witness the political assassination of visiting athletes in any country. Nonetheless, our criminal laws must recognize such behavior as a violation of Federal as well as state law and authorize the use of Federal law enforcement resources in such cases.

The amendment I propose will extend the umbrella of Federal protection to cover "official guests" of the United States as designated by the Secretary of State so as to include visiting athletes in international competition.

The committee finds merit in Senator McClellan's observations and proposal and notes that it will also operate to protect the rights of visiting artists, academic and scientific groups, and other groups and individuals who ought not be beyond the pale of Federal concern. Accordingly, Amendment No. 1488 has been incorporated in the reported bill, H.R. 15883.

The committee has also amended the House measure to deal with personnel administration. Pursuant to the provisions of section 692 of the bill, the Secretary of State is required to promulgate regulations providing for the consideration and resolution of grievances which do not "in any manner alter or amend the provisions for due process." This section also provides that informal procedures for the resolution of grievances shall be established by agreement between the Secretary of State and the organization accorded recognition as the exclusive representative of the officers and employees of the Foreign Service. In the event a grievance is not resolved under the informal procedures

within 60 days, the grievant shall be entitled to file a grievance with the Grievance Board.

Under the terms of the bill, the Grievance Board is to be composed of "independent, distinguished citizens of the United States well known for their integrity, who are not officers or employees of the Department, the Service, the Agency for International Development, or the U.S. Information Agency." One of the members shall be appointed by the Secretary of State; another by the organization "accorded recognition as the exclusive representative of the officers and employees of the Service"; and the third shall be appointed by the other two members from a roster of 12 "independent, distinguished citizens of the United States * * *" agreed to by the Secretary and the organization representing the officers and employees of the Foreign Service. This roster is required ot be maintained and kept current at all times. Provision is also made for the establishment of additional panels of three members as may be necessary "to consider and resolve expeditiously grievances filed with the board * * *."

All expenses of the Board, including compensation for such officers and employees as the Board considers necessary to carry out its functions, are to be paid out of funds appropriated to the Department of State.

A grievance shall be barred unless it is filed within a period of 8 months after the occurrence or occurrences giving rise to the grievance, except that if the grievance arose prior to the date the regulations are first promulgated or placed into effect, and not considered and resolved, it may be filed within a period of 1 year after the date of enactment of this new part.

The Board is required to conduct a hearing on any case filed with it and such hearings shall be open unless the Board determines otherwise. The grievant and his representative are entitled to be present at the hearing, testimony is given by oath or affirmation, parties are entitled to examine and cross-examine witnesses unless the Board finds such interrogatory irrelevant, requested witnesses must be made available by the Department in person or by deposition, or the facts at issue shall be construed in favor of the grievant, and hearings shall be transcribed verbatim.

Any grievant, witness or other person involved in a proceeding before the Board "shall be free from any restraint, interference, coercion, discrimination or reprisal."

In considering a grievance, the Board shall have access to "any document or information considered by the Board to be relevant," including security records "under appropriate security measures."

If the Board resolves that a grievance is meritorius (in any case that does not relate directly to promotion, assignment or selection out of an officer or employee), it shall direct the Secretary to grant such relief as the Board determines proper and "the resolution and relief granted by the Board shall be final and binding upon all parties." In the case of a grievance directly related to any promotion, assignment or selection out, the Board shall certify its resolution to the Secretary of State together with such recommendations for relief as it deems appropriate. The Board's recommendations are to be final and binding on all parties, except that the Secretary may reject a recommendation "only if he determines that the foreign policy or security of the United States will be adversely affected" and fully documents his reasons therefor.

Section 693 provides that a grievant may not file a grievance under this new part if he has formally requested (prior to filing a grievance) that his grievance be considered under a provision of a law, regulation or order other than those provided under this part.

Any actions taken by the Secretary of State or the Board pursuant to this title are subject to judicial review and the Secretary is required to promulgate and place into effect regulations to establish and appoint members of the Board not later than 90 days after the date of enactment of the pending bill.

During the past year the Congress has received many complaints regarding alleged shortcomings in the grievance procedures in the Department of State. Some complaints have come from individuals who have servered their relationship with the Department, others from individuals who are still within the Department.

In recognition of many of these complaints on October 6, 1971, Senator Bayh (for himself and Senators Beall, Brooke, Case, Church, Cooper, Cranston, Hart, Hartke, Humphrey, Kennedy, Moss, Muskie, Pastore, Scott, Stevenson, Tower and Tunney) introduced S. 2659 as a substitute for a bill (S. 2023) which he had introduced earlier that year. A similar bill (S. 2662) was introduced by Senator Moss (for himself and Senator Miller). The Committee on Foreign Relations held public hearings on these gievance bills on October 7 and 18, 1971. The hearings have been printed and are available to the Congress and the general public.

These hearings documented persuasively many of the charges about the shortcomings in the grievance procedures of the Department of State. To give but a few examples, it was shown that: until 1971, under a procedure which supposedly guaranteed the right to a hearing, the State Department had permitted only one hearing in fifteen years despite hundreds of complaints; the Department's response to legislation, the "Interim Grievance Procedures", authorized a Board which consists of nine members, all of whom were chosen by the Secretary after perfunctory consultation with employee groups; the procedures themselves put numerous obstacles in the grievant's path to a hearing and further obstruct his effort to obtain relevant documents and witnesses. Since conclusion of the hearings, numerous letters to the Chairman of the Foreign Relations Committee as well as court cases have indicated that the Department has "interpreted" the Interim Grievance Procedures to suit its own needs. For these reasons, simple explicit legislation is needed to provide an independent standard of due process.

A modified version of S. 2659 was reported by the Committee on Foreign Relations as an amendment to the Foreign Relations Authorization Act of 1972. In its report to the Senate (Senate Report 92–754 on S. 3526), the Committee commented as follows on the amendment:

"The committee is aware of the concern of the Department of State at the enactment of this provision. The Department has established an 'interim grievance' procedure system which it has expected in due course would be revised, depending upon agreements to be worked out between management in the Department and such organization as may be accorded recognition as the exclusive representative of officers and employees of the Foreign Service. There have been unavoidable delays

in selecting the organization to represent officers and employees and it may be anticipated that more time will elapse before representatives of such a group and the management of the Department will be able to develop mutually acceptable grievance procedures. Accordingly, the committee decided to adopt compromise language worked out by various sponsors of S. 2659.

The language of S. 2659 was further modified during the debate in the Senate and this bill is the verbatim version which was incorporated in S. 3526 as it was passed by the Senate on May 31, 1972. In the conference which was held on S. 3526, the House conferees argued that they could not accept the language, since they had not held hearings on State Department grievance procedures. Accordingly, the Senate conferees reluctantly decided to recede. It should be noted, however, that the House conferees agreed that they would take up the subject of grievance procedures in the Department of State and hopefully act on legislation on the subject during this session of the Congress so that in due course there could be a conference on the House and Senate versions of the language appearing in the bill accompanying this report. With this in mind, the Committee on Foreign Relations met in executive session on June 13, 1972, and, by a voice vote, ordered S. 3722 reported favorably to the Senate.

The Senate debated and considered S. 3722 on June 22, 1972. It was passed by a record vote of 56–27 after a short debate.

After substantial delay, hearings are now being held in the House of Representatives. However—even before completion of House hearings—it became apparent that efforts were underway to prevent the full House from having an opportunity to debate and vote on this important matter, This subject has been before us for several years now. It has been studied by Committees in both Houses of Congress for more than enough time. Enough hearings have been held. Enough studies have been made. Until the Congress acts, these dedicated foreign service officers will continue to be routinely and systematically deprived of one of their most basic rights—their right to procedural due process in the resolution of their employment grievances. The State Department has failed to act to provide the rights for 26 years now it is time for Congressional action. For these reasons, the Committee adopted this amendment in order to allow the full House the opportunity to pass on this vital issue.

AGENCY VIEWS

Attached and made a part of this report is the joint letter of August 5, 1971, from the Attorney General and the Secretary of State to the Vice President transmitting a draft bill incorporating provisions of the reported bill for the consideration of the Senate; a letter of August 9, 1972, to the Chairman of the Committee on the Judiciary, from the Assistant Secretary of State for Congressional Relations; and a letter from the Deputy Attorney General to the Chairman, dated August 9, 1972. Despite the modifications represented by the House passed act, the Departments of State and Justice urge speedy enactment of H.R. 15883 as reported herein.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., August 5, 1971.

THE VICE PRESIDENT,
U.S. Senate,
Washington, D.C.

DEAR MR. VICE PRESIDENT: These is attached for your consideration and appropriate reference a draft bill, "To amend title 18, United States Code, to provide for expanded protection of public officials and foreign officials, and for other purposes", which is being submitted jointly by the Department of State and the Department of Justice.

Of late, express and implied threats of militant activists and terrorists to commit acts of physical violence against the persons of members of the diplomatic corps, other foreign officials, and officials of the United States have created grave concern in our respective Departments. The lesson from the recent distressful experiences of other nations with terrorist seizures of diplomatic and governmental officials for use as pawns in "political" disputes is clear.

Review of resources available to the Federal Government to meet these new and substantial threats to foreign and public officials has disclosed alarming omissions and inconsistencies in existing Federal criminal jurisdiction over such matters. Correction of these deficiencies need not and should not await the actual occurrence of a tragedy and response thereto on a category-by-category basis as was the case with the assassination of a President (18 U.S.C. 1751) and of a Senator (18 U.S.C. 351). Both history and the present public declarations and acts of individuals and groups who seek to achieve their ends through unlawful means call for the timely enactment of new criminal laws on this subject. Enactment of this legislation will provide protection against criminal acts which jeopardize both the domestic operations of our Government and its relations abroad.

Provision for increased protection of diplomatic, consular and other foreign government personnel and their families permits direct discharge by the United States of its international obligations as a host country. Presently, in most instances of interference with such persons, the Federal Government can only press for the cooperation of local authorities but has no way to guarantee that such cooperation will be forthcoming.

This legislation also extends to all Federal personnel and their families the same statutory protection against assults and murder which has been reserved for selected classes of Federal officers and employees. The rationale for previous limitation of Federal investigative and prosecutive jurisdiction in this area has long since been eroded. Now we find over thirty percent of all Federal civilian employees protected by Federal criminal statutes against physical abuse, with little to distinguish those within the protected classes from those without. The creation of identical statutory protection from physical abuse for all Federal employees will equitably provide for security of all Government departments and agencies.

This legislation also makes significant changes in the existing Federal kidnaping law. The revision of section 1201 of title 18, United

States Code, will provide Federal criminal jurisdiction for kidnapings committed within the special maritime and territorial jurisdiction and the special aircraft jurisdiction of the United States. Thus our Government will no longer be forced to rely upon the interstate transportation jurisdiction which, in airplane hijacking cases, has proved an inappropriate basis for the extradition of hijackers. The legislation also restores the death penalty for kidnaping by correcting the defect in the present provision disclosed in *United States* v. *Jackson*, 390 U.S. 570 (1968), but authorizes its imposition only if the victim dies as a consequence of the crime.

Whereas the prime responsibility to investigate, prosecute and punish common crimes such as murder, kidnaping and assault remains in the several States, this legislation will extend to the United States jurisdiction, concurrent with that of the States, to proceed against those acts committed against public and foreign officials which interfere with its conduct of domestic and foreign affairs.

We urge the prompt introduction and early enactment of this legislation.

The Office of Management and Budget has advised that enactment of this legislation is consistent with the objectives of this Administration.

Sincerely,

JOHN N. MITCHELL,
Attorney General.
WILLIAM P. ROGERS,
Secretary of State.

DEPARTMENT OF STATE,
Washington, D.C., August 9, 1972.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Department was gratified that the House of Representatives passed H.R. 15883 (with amendments contained in H. Rept. 92–1268), concerning the protection of foreign officials in the United States, by the overwhelming roll call of 380–2. This bill is the House Judiciary Committee's revision of H.R. 10502. A bill identical to H.R. 10502 is currently pending before your Committee, namely S. 2436. On August 5, 1971, the Secretary of State and the Attorney General transmitted to the Vice President a proposal identical to S. 2436 under a cover of a letter strongly urging its prompt enactment.

I am writing you now to inform you that the Department of State is entirely satisfied with the revision of the bill contained in H.R. 15883, as amended. Because the Department considers the enactment of this legislation during this session of Congress to be of vital importance, we urge your Committee promptly to report the bill passed by the House favorably, without any amendments.

Sincerely yours,

DAVID M. ABSHIRE,
Assistant Secretary for Congressional Relations.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., August 9, 1972.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: As you know, on Monday, August 7, the House of Representatives passed H.R. 15883, the proposed "Act for the Protection of Foreign Officials." The vote was an overwhelming 380 to 2.

In H.R. 15883 is an amended version of a draft bill submitted to the Congress jointly by the Department of State and the Department of Justice on August 5, 1971, and introduced in the Senate as S. 2436. As passed by the House, the bill would give the Federal Government jurisdiction, concurrent with the States, to punish certain offenses against the persons and property of foreign officials in this country, thus enabling the Federal Government to better carry out its international obligation as a host country to these officials.

Because of the importance of this legislation to the foreign relations of the United States, the Department of Justice urges prompt approval of H.R. 15883 by your Committee and early consideration by the Senate.

Sincerely,

RALPH E. ERICKSON,
Deputy Attorney General.

THE SECRETARY OF STATE,
Washington, September 7, 1972.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: This is further to my telephone call yesterday concerning the urgency of the bill now before your Committee that would make it a federal offense to commit certain crimes against foreign officials in the United States. This bill, H.R. 15883, was recently passed by a vote of 380–2 in the House of Representatives. Assistant Secretary Abshire has written to you to request prompt action on it.

The recent tragedy at the Olympics in Munich underlines the need for additional urgent action by the United States Government. I understand that Senators McClellan and Hruska are considering an amendment to H.R. 15883 which would extend its coverage to official guests of the United States. This would accord protection to foreign nationals who visit the United States for such special reasons as to compete in international sports events.

I fully agree with that aim and hope the Senate will act on this matter with the highest sense of urgency. To facilitate your consideration of the matter, my staff and that of the Department of Justice have developed language that would extend protection to official guests. A copy of the proposed amendment is enclosed. The effect of the amendment would be to make it a federal crime to murder, kidnap, or assault an official guest who is in the United States. The term "official guest" will apply to foreign nationals or citizens who are in the United

States but not permanent residents of the United States, and whom I have designated as official guests of the United States. This will allow me to designate individuals or groups of individuals who are here for important international sports or other events.

Sincerely,

WILLIAM P. ROGERS.

SECTION-BY-SECTION ANALYSIS

Section 1 sets forth the short title of the Act.

Section 2 is the statement of findings and declaration of policy.

TITLE I

MURDER OR MANSLAUGHTER OF FOREIGN OFFICIALS

Section 101 amends Chapter 51 of title 18 of the United States Code by adding thereto a new section 1116 which in Subsection (a) makes punishable under Federal law the murder or manslaughter of a foreign official or an official guest. The sentencing provisions of sections 1111 and 1112 of title 18 are incorporated by reference except that murder in the first degree is punishable by a mandatory sentence of life imprisonment.

Section 1116 affords Federal jurisdiction concurrent with State jurisdiction over these homicides which may be exercised whenever a homicide within the purview of the section is of sufficient interest to the United States to warrant Federal investigation or prosecution.

Although the Government must indicate the status of the victim in prosecutions brought under this section for the purpose of establishing a jurisdictional basis, knowledge of the victim's status on the part of his assailant is not an element of the offense which must be established at trial if the person is indeed a foreign official.

Subsection (b) of the section 1116 defines "foreign official", and the term covers two distinct categories of persons.

Paragraph (1) of subsection (b) includes a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of cabinet rank or above of a foreign government or the chief executive of an international organization or any persons who have previously served in such capacity. It also includes members of the families of such officers or former officers. These persons are protected while in the United States regardless of whether their presence relates to official or unofficial business.

Paragraph (2) of subsection (b) includes all persons of foreign nationality who are duly notified to the United States as officers or employees of foreign governments or international organizations and who are in the United States on *official business*, and members of their families who are in this country in connection with the presence of the officers or employees. The category of officers and employees of foreign governments includes those at embassies and consulates, those at missions of their governments to international organizations, and those at trade or commercial offices of foreign governments.

Subsection (c) of section 1116 defines three other terms for the purposes of this section:

Paragraph (1) of subsection (c) defines "foreign government" to include any government of a foreign country irrespective of recognition by the United States. Unlike 18 U.S.C. 11, which defines "foreign government" for other purposes of title 18, it does not restrict the term to nations with which the United States is at peace nor does it include a "faction, or body of insurgents within a country."

Paragraph (2) of subsection (c) defines "international organization" for the purposes of this section as it is defined in section 1 of the International Organizations Immunities Act. (22 U.S.C. 288.)

Paragraph (3) of subsection (c) defines "family" to include (a) a spouse, parent, brother or sister, child, or person to whom the foreign official stands in loco parentis, or (b) any other person living in his household and related to the foreign official by blood or marriage.

Paragraph (4) of subsection (c) defines "official guest" as meaning a citizen or national of a foreign country present in the United States as an official guest of the government of the United States pursuant to designation as such by the Secretary of State.

Section 101 also adds a new section 1117 to the same Chapter 51 of Title 18 referred to above. Section 1117 provides for punishment by imprisonment for any term of years or life for conspiracies to violate existing section 1111 (Murder within the special maritime or territorial jurisdiction of the United States); existing section 1114 (Murder or manslaughter of certain officers or employees of the United States); and new section 1116 (Murder or manslaughter of foreign officials).

Section 102 makes the necessary amendments to the chapter analysis of chapter 51 of title 18 to reflect the addition of new sections 1116 and 1117 to that chapter.

TITLE II

KIDNAPPING

Section 201 revises section 1201 of title 18, United States Code, to make a number of substantive changes in the present kidnaping law. In lieu of the sole jurisdictional base of transportation in interstate or foreign commerce, jurisdiction to punish kidnaping is provided when (1) the victim is transported in interstate or foreign commerce (as under existing law); (2) the kidnaping occurs within the special maritime and territoial jurisdiction of the United States, or (3) in the special aircraft jurisdiction of the United States; or (4) the victim is a foreign official within the purview of section 1116 of title 18.

Although the term "kidnaping" has acquired a general meaning sufficient to encompass the operative term "seizes", "confines", etc. (compare 18 U.S.C. 351), for clarity the present terminology of 18 U.S.C. 1202 is retained. The term "ransom or reward or otherwise" is intended to reflect the judicial construction developed under existing Federal law. See *Gooch* v. *United States*, 297 U.S. 124, 128 (1936).

The penalty authorized under section 1202 as amended is imprisonment for any term of years or for life.

Subsection 1201(b) retains in cases in which jurisdiction is based upon subsection (a)(1) the rebuttable presumption found in present law that a victim who has not been released in twenty-four hours of his abduction has been transported in interstate or foreign commerce.

Subsection 1201(c) maintains conspiracy to kidnap as an offense. However, the penalty has been modified to be commensurate with the penalty authorized for conspiracy to murder under section 1117 of title 18, United States Code, added by section 101 of this Act.

Section 202 makes appropriate amendments to the analysis of chapter 55 of title 18, United States Code.

TITLE III

PROTECTION OF FOREIGN OFFICIALS

Section 301 amends existing section 112 of title 18, United States Code, which proscribes assaults on specifically designated foreign officials, to make it co-extensive in coverage with new section 1116 of the title pertaining to homicides of foreign officials.

Subsection (a) of section 112 makes it a Federal offense to assault, strike, wound, imprison or offer violence to a foreign official or an official guest, subject to a fine up to $5,000 or imprisonment up to 3 years, or both. If a deadly weapon is used the fine may be increased to $10,000 and the term to 10 years. Identical penalties may be imposed under existing section 112.

Subsection (b) of section 112 makes it a misdemeanor to willfully intimidate, coerce, threaten, harass or willfully obstruct a foreign official or an official guest. There is no comparable Federal statute. However, a District of Columbia statute prohibits, among other things, the intimidation or harassment of representatives of foreign governments or interference with their peaceful pursuit of their duties. See D.C. Code, Sec. 22–1115; and *Frend* v. *United States*, 69 App. D.C. 281, 100 F.2d 691 (1938), *cert. den.*, 306 U.S. 640 (1939).

It is intended that such acts as the following could constitute harassment under this section, if done with intent to intimidate, alarm, or persecute a foreign official or an official guest:

1. Following him about in a public place or places after being requested not to do so;
2. Engaging in a course of conduct, including the use of abusive language, or repeatedly committing acts which alarm, intimidate or persecute him and which serve no legitimate purpose; or
3. Communicating with him anonymously by telephone, telegraph, written communication, or otherwise in a manner likely to cause annoyance or alarm, or making repeated telephone calls to him whether or not conversation ensues, with no purpose of legitimate communication.

See New York Penal Code section 240.25, 240.30. However, this list is not inclusive, since many ways can be contrived in which to intimidate, coerce, threaten, or harass. Certain of these acts would also be violations of Federal law under present 47 U.S.C. 223, concerning harassing telephone calls, and 18 U.S.C. 876–77, concerning the mailing of threats.

Subsection (c) of Section 112 provides a penalty of a fine of not more than $500 or imprisonment for not more than six months, or both, for any person who within the United States but outside the District of Columbia and within one hundred feet of any building or premises belonging to or used or occupied by a foreign government or by a foreign official for diplomatic or consular purposes, or as a mission to an international organization, or as a residence of a foreign official, or belonging to or used or occupied by an international organization for official business or residential purposes, publicly—

(1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound, or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties, or

(2) congregates with two or more other persons with the intent to perform any of the aforesaid acts or to violate subsection (a) or (b) of the section.

The purpose of the provision is to protect the peace, dignity and security of foreign officials and guests in their embassies, consulates, missions, residences and offices.

The provisions of subsection (c) are not made applicable to the District of Columbia because a District law of long standing affords similar protection to foreign officials in the Nation's Capital. (Section 22–1115, D.C. Code.)

Subsection (d) of section 112 defines "foreign official," "foreign government", "international organization" and "official guest" for the purpose of this section. These terms are given consistent meanings throughout the United States Code sections added or amended by this bill.

Subsection (e) of the section was added by the committee to express its deep concern to those judicial and executive officials to whom the administration has been entrusted to use all due care to see that legitimate expression and assembly has not been abridged. First amendment rights play an important role in a Free Society and care should always be exercised to see that their role is not diminished.

Section 302 amends the analysis of Chapter 7 of title 18 of the United States Code to reflect the change in the title of section 112 to read "Protection of foreign officials and official guests".

TITLE IV

PROTECTION OF PROPERTY OF FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

Section 401 adds a new section 970 to chapter 45 of title 18, United States Code, in which in subsection (a) makes it a Federal offense to wilfully injure, damage or destroy, or attempt to injure, damage or destroy, any real or personal property located within the United States and belonging to or utilized or occupied by any foreign government or international organization, or by a foreign official or an official guest. Thus embassies, consulates, missions to international organizations, the residences of foreign officials and trade or commercial offices of foreign governments would be covered. Violations are punishable by a fine up to $10,000 and imprisonment up to 5 years, or both. The provision covers real and personal property, including automobiles, and other vehicles, used for official or unofficial purposes.

There is no present law which generally proscribes malicious injury or destruction of property within the United States owned or occupied by foreign governments. But see 18 U.S.C. 844(i). Section 956 of title 18, United States Code which punishes certain conspiracies within United States jurisdiction to injure properties of foreign governments

situated within foreign countries. Chapter 65 of title 18, United States Code, deals with malicious mischief with respect to property owned by the United States, and to communications facilities, property located within the special maritime and territorial jurisdiction of the United States, and property intended for export in foreign commerce. (18 U.S.C. 1361–64.)

Subsection (b) of section 970 defines "foreign official", "foreign government", "international organization" and "official guest" in the same terms as elsewhere in the title.

Section 402 makes appropriate amendments to the analysis of chapter 45 of title 18 of the United States Code.

TITLE V

FOREIGN SERVICE GRIEVANCE PROCEDURE

For purposes of study, following is a section-by-section analysis of the provisions contained in H.R. 15883, compared with similar provisions of the original, so-called Bayh bill, S. 2659, and the State Department's Interim Grievance Procedures:

Title V of H.R. 15883	S. 2659	IGP
Title VI of Foreign Service Act (22 U.S.C. 981) is amended by adding at the end: "Part J—Foreign Service Grievances".	Same as title 22 of H.R. 15883.	No such section; IGP is not a statute.
	STATEMENT OF PURPOSE—SEC. 691	
The purpose of part J is to insure the fullest measure of due process and the just resolution of grievances of Foreign Service Officers, employees and survivors.	No statement of purpose.	The purpose is to establish uniform policies and procedures to consider and decide on grievances of Foreign Service Officers and employees. There is no mention of survivors.
	PROMULGATION AND REVISION OF REGULATIONS—SEC. 692	
The Secretary is allowed to promulgate and revise regulations consistent with the statement of purpose. These regulations may not alter or amend the statutory provisions for due process.	No provision for Secretary promulgating or revising regulations.	No such formal provision; Department may alter at will.

EXHIBIT E

peals for the District of Columbia, D.C. Circuit, has indicated that the Government has an affirmative duty to give diplomatic representatives of foreign nations a degree of protection from harassment which is greater than owed to its own citizens or officials of the United States.

The SPEAKER. The time of the gentleman from Massachusetts has expired.

Mr. POFF. Mr. Speaker, I yield myself 6 minutes.

Mr. Speaker, it has been said that the purpose of this legislation is to protect foreign officials. Perhaps it is more accurate to say that the purpose of this legislation is to promote the conduct of the foreign affairs of the United States by protecting the property and the personnel of foreign governments while they are present in this country. Such a purpose is not only the right of the Federal Government, it is not only within its proper constitutional domain and power, but such a purpose is also the responsibility of the Federal Government under the accepted law of nations.

The exercise of the power necessary to discharge that responsibility involves the use of police powers. Under our Constitution the police power resides permanently in the powers reserved to the States. Let me hasten to assure the Speaker that this bill leaves that power where it is. It does not preempt State power.

As the learned gentleman from Massachusetts so well explained, this legislation simply fixes in the Federal Government jurisdiction concurrent with that of the individual States.

I think it is important too, Mr. Speaker, to understand that this is not the first time the Congress has ventured into this legislative area.

It has long been a Federal crime to assault or wound certain high officials of foreign governments, even though such an assault would also constitute an offense against the laws of the particular State in which it is committed. H.R. 15883 would give the Federal Government a similar power, concurrent with that of the several States, to prosecute and punish other acts of violence directed against foreign officials or their property, including murder, manslaugster, kidnaping, willful harassment, and willful destruction of property.

In no case will the several States be ousted of whatever jurisdiction they may now exercise over such offenses. Rather, as in cases of assassination or attempted assassination of presidential candidates, the investigative and prosecutorial resources of the Federal Government may be brought to bear in apprehending and punishing the perpetrator whenever the Department of Justice, in consultation with the Department of State, deems such action to be in the national interest.

The principal differences between H.R. 15883, the bill before us today, and H.R. 10502, which I introduced a year ago along with several other members of the Committee on the Judiciary, as reported to the House this past June are to be found in the penalty provisions for murder and kidnaping. The same day that H.R. 10505 was reported, the Supreme Court of the United States rendered its decision in the case of Furman against Georgia. My reading of the nine separate opinions in that case convinces me that the Supreme Court would probably hold unconstitutional any death penalty provision, such as those contained in H.R. 10502, which vests in the sentencing authority an absolute discretion whether to impose the death penalty or some lesser offense in any particular case. I am informed that the Department of Justice shares this view.

Accordingly, I introduced H.R. 15883 as a clean bill, amending the penalty provisions to avoid facial invalidity and also incorporating other amendments to H.R. 10502 which had been made by the committee before reporting it favorably to the House in June.

The conforming of the penalty provisions of this bill to the apparent requirements of the Furman decision is nothing but a stopgap handling of the death penalty question. A more lasting determination of how, and whether, the death penalty might be prescribed for the offenses covered by this bill, or for any other Federal crime, is an important and complex matter in itself, and passage of this otherwise relatively noncontroversial measure should not await a permanent resolution of that issue.

The committee reported H.R. 15883 to the House with two amendments, both pertaining to the antipicketing provision of section 301 of the bill.

The first refines the definition of the premises to which the prohibition of harassing demonstrations relates. I accept and support that amendment, since it more clearly limits the coverage of the subsection to those premises which are ordinarily and regularly used to carry out the official business of the foreign government's embassy, consulate, or mission—whether those premises are annexed to or separated from the main consular building—or as official residential property. Of course, any premises which might be temporarily used on an emergency basis in substitution for the premises in which such diplomatic or consular activities are normally carried out would likewise be covered.

The second amendment struck from the subsection the flat, evenhanded prohibition against expression of views, whether critical or laudatory, about the policies or personnel of a foreign government by public picketing or demonstrations within 100 feet of that government's diplomatic or residential property. What remains is a proscription of demonstrations within that zone for the purpose of intimidating, coercing, threatening, or harassing a foreign official or of obstructing him in the performance of his duties. Congregations with the intent to conduct such a demonstration would likewise be prohibited.

To be frank, this limitation of the scope of the antipicketing provision leaves it scarcely more effective in creating a small area of sanctuary from political controversy for our foreign diplomatic guests than is the general prohibition against intimidation, coercion, threats or harassment, applicable anywhere, which is contained in the preceding subsection.

While I would much prefer to see the language deleted from this portion of H.R. 15883 restored, my objection to the committee amendment does not outweigh my sense of urgency that the House pass the bill today as reported. We can thereby make a major advance toward enactment in this session of Congress of legislation which both the Department of State and the Department of Justice consider necessary to meet a pressing national need.

Finally, title II of the bill reformulates the jurisdictional bases of the Federal kidnaping statute, making it more understandable to our foreign friends for purposes of extradition.

Mr. Speaker, H.R. 15883 provides the Federal Government with the means of avoiding the embarrassment and potentially dangerous repercussions which may arise from a foreign government's misunderstanding of our national government's motivations in failing to respond appropriately to some future incident involving one of its officials.

Because the headquarters of the United Nations organization was located on our shores at our request, this country plays host to an unusually large number of foreign diplomats to whom we owe a special duty of protection. This legislation is intended to benefit all of such guests, with neither favor nor slight to any of them. Those who today appear to need such added Federal protection least may tomorrow need it most, so swiftly do events move in today's world.

Mr. Speaker, this is a measure with strong bipartisan support. I urge the House to suspend the rules and pass H.R. 15883.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. POFF. I yield to the gentleman from Iowa.

Mr. GROSS. Mr. Speaker, section 112 of this bill is entitled "Protection of foreign officials." and it states, in part:

> Whoever . . . parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound, or noise, for the purpose of . . . intimidating, coercing, threatening, or harassing any foreign official . . .

Let me ask the gentleman this question: Do the same penalties apply for other demonstrations against the Government? Am I to understand that this section goes to violations and penalties outside the District of Columbia?

Would the same penalties apply for this same sort of thing on the Washington Monument grounds?

Mr. POFF. The gentleman first spoke of jurisdiction outside the District of Columbia.

Mr. GROSS. I could conjure up a situation or a site outside the District of Columbia, if that is important. I just want to know whether the same penalties apply across the country for the same acts, growing out of demonstrations, as contained in this bill.

The SPEAKER. The time of the gentleman from Virginia has expired.

Mr. POFF. Mr. Speaker, I yield myself 1 additional minute to respond to the gentleman.

I am candid to tell the gentleman I am not familiar with all the penalty clauses