

United States House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Legislative Hearing on the Death Penalty Reform Act of 2006
March 30, 2006

Statement of Kent Scheidegger
Legal Director, Criminal Justice Legal Foundation

Mr. Chairman, thank you for the opportunity to address the committee today on this important legislation. I am here today on behalf of the Criminal Justice Legal Foundation, which has for the last twenty-four years fought for the right of victims of crime and the law-abiding public to a fair and effective system of criminal justice. In no other area of the law is this right more routinely violated than in capital punishment.

The Death Penalty Reform Act of 2006 presently before the committee would make a number of worthwhile changes in the federal death penalty law. In particular, the bill will make the pretrial notice requirements fair. This bill will require the defendant to give notice of mitigating circumstances, just as the government is required to give notice of aggravating circumstances. However, the bill as presently drafted fails to correct and arguably codifies the most glaring defect in existing federal death penalty law, which I call the Embassy Bomber Loophole.

In July 2001, followers of Osama bin Laden were tried and convicted for their role in the conspiracy to bomb America's embassies in Africa. On the question of penalty, most of the jurors believed that death was the appropriate punishment. Yet three jurors held out for a life sentence, and the result was that the decision of the three trumped the decision of the nine, and the terrorists received a life sentence.

How can this be, when the law clearly states that the jury's choice of sentence must be unanimous? Three-to-nine is not unanimous. In the guilt phase of the trial, everyone understands that "unanimous" means unanimous one way or the other. If a jury deadlocks at eleven for guilt and one for acquittal, the judge does not enter a verdict of acquittal. That would be preposterous. The jury must deliberate until it is unanimous, and if the jury is truly deadlocked, the judge declares a mistrial and empanels a new jury. That is also how the penalty phase works in California, and, in my opinion, what the federal statute provides if correctly interpreted.

Unfortunately, the federal death penalty law was poorly drafted in this regard and does not expressly state what happens when the jury cannot agree. In the case of *Jones v. United States*, 527 U.S. 373 (1999), the Supreme Court decided that this silence, combined with

ambiguous language about lesser sentences, meant that the failure of the jury to agree results in a lesser sentence. This effective abrogation of the unanimity requirement makes the death penalty less fair and more arbitrary, and it prevents the jury from serving its function as representing the conscience of the community.

In 1972, the Supreme Court declared the system of unbridled discretion in choosing between death and life in prison to be unconstitutional because it was arbitrary and capricious. The system of guided discretion that replaced it was not for the purpose of reducing the number of death sentences rendered. The purpose was to make capital sentencing more consistent and less arbitrary. It is important that the death penalty not be arbitrarily imposed, and it is just as important that it not be arbitrarily withheld. If one murderer gets the death penalty, and another, equally culpable murderer gets a life sentence on the random chance that his jury includes a single juror who refuses to impose the punishment where it was warranted, that is arbitrary. A discretionary system can never be completely uniform, but we should strive to make it as evenhanded as possible. Requiring the jury to come to a unanimous agreement one way or the other reduces the chance of arbitrariness in either direction.

The jury is supposed to express the conscience of the community. To perform that function, the jury must be required to come to agreement. If a single juror knows that he can impose his will over the objection of the rest of the jury simply by holding out, then the jury fails to perform its representative function.

I ask the Congress to restore the requirement of a truly unanimous jury to the federal capital punishment law. Doing so will make the death penalty more fair and evenhanded, and it will reduce the chance of miscarriages of justice such as we saw in the Embassy Bomber case. Thank you.

Suggested Amendment to Federal Death Penalty Statutes

(a) Amend 18 U.S.C. § 3593(b)(2) to redesignate present paragraph (D) as paragraph (E) and insert a new paragraph (D):

“(D) the jury that determined defendant’s guilt was unable to reach unanimous agreement on the sentence;”

(b) Amend 18 U.S.C. § 3593(e) to add at the end:

“If the jury is unable to agree unanimously on a sentence, the court shall impanel a new jury for retrial of the penalty hearing; provided, that if the government withdraws its notice under subsection (a), the court shall sentence the defendant as if the notice had not been given.”