April 26, 2017

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Goodlatte and Ranking Member Conyers,

While some of our organizations take no view on whether jurisdictions should have the death penalty, each of us remains very concerned about its implementation. Accordingly, **we strongly oppose** H.R. 115**, the "Thin Blue Line Act."**

Like the sponsors of this bill, we, too, have been troubled and saddened by the attacks on law enforcement in recent memory. We believe, however, that this legislation is counterproductive to ensuring public safety and the fair and effective administration of the death penalty. As explained below, the bill is both unnecessary and constitutionally problematic. Moreover, if Congress is determined to legislate in this area it should only do so *after* holding hearings to address the many legal and policy concerns that doing so presents.

The Thin Blue Line Act would add to the federal death penalty statute's 16 existing statutory aggravating factors a 17th statutory aggravator for the killing or attempted killing of a law enforcement officer, firefighter or other first responder who dies either in the course of duty or because of his or her role as such. As explained below, the addition of this aggravating factor is unnecessary because it will not fill any gap in federal authority – federal prosecutors already can and do seek the death penalty for such killings – nor would it provide a stiffer penalty than can be had in state court. The proposal is also unwise because it raises constitutional concerns, risking the finality of convictions and sentences, as described below.

**The federal death penalty is already an available sentence for federal crimes involving the killing of state law enforcement/first responders.**

H.R. 115 would not expand the number of federal cases eligible for the death penalty nor would it allow more cases to be prosecuted federally. Rather, it would expand the number of specifically enumerated aggravating factors that the government may rely upon in urging a jury to choose a sentence of death rather than a sentence of life.[1] At present, 18 U.S.C. § 3592 lists 16 such factors. Given the large number and broad reach of the existing aggravating factors in § 3592, most, if not all such killings of law enforcement/first responders already meet one or more of the

[1] The sentencing determination may be made by either court or jury. For simplicity, this memo refers only to jury findings, but the same would be true if the decision-maker were the court.

existing aggravating factors that permit application of the federal death penalty.

Significantly, however, the existing 16 factors do not bind, limit or restrict the government from alleging other specific aggravating factors. In addition, the government is permitted to identify its own, "non-statutory" aggravating factors to justify application of the death penalty. Typically, the government alleges both statutory and non-statutory aggravating factors for the jury's consideration. The fact that the victim was a state law enforcement officer/first responder can be denominated a non-statutory aggravating factor and thus is fully addressed by the prosecution and considered by the jury. It is therefore virtually impossible to imagine a law enforcement/first responder killing that can be prosecuted in federal court in which the death penalty would not be available under existing law.

Recent federal prosecutions demonstrate that federal prosecutors already have the tools they need to seek the death penalty in cases involving the killing of state law enforcement officers/first responders. These include:

- *U.S. v. Ronell Wilson*, EDNY: two New York City detectives were killed during a gun sting operation. The defendant was sentenced to death.
- *U.S. v. Donzell McCauley*, D DC: a Washington, DC police officer was killed by a defendant who sought to avoid apprehension. The defendant received a sentence of life without the possibility of parole following a guilty plea.
- *U.S. v. Kenneth Wilk,* SD FL: a deputy sheriff was killed while attempting to serve a search warrant. Following a capital trial, the defendant was sentenced to life without the possibility of parole.
- *U.S. v. Kenneth Barrett*, ED OK: a state law enforcement officer was killed during a drug raid. The defendant was sentenced to death.
- *LaShaun Casey,* D PR: an undercover police officer was killed in a carjacking related to a drug transaction. A capital jury sentenced the defendant to life without the possibility of parole.
- *Dzhokhar Tsarnaev*, D MA: an on-duty MIT police officer was killed by the defendant and his brother during flight to avoid apprehension for the Boston Marathon Bombing. The defendant was found to be eligible for the death penalty for this murder; he was sentenced to life without the possibility of parole for this murder, and to death for two others.

**Stiff penalties for the killing of public safety officials are also readily available in state court.**

In states that permit capital punishment, the death penalty is already available for the killings of law enforcement/first responders. Those states that don't have the death penalty treat killings of law enforcement/first responders as they do their most highly aggravated offenses (e.g., providing for LWOP sentencing). And finally, it is our view that in non-death penalty states, principles of federalism and appropriate deference to state decisions should prevent Congress from legislating to encourage federal prosecutors to override the considered policy of non-death

penalty states.

**H.R.115 would create constitutional problems, creating grounds for appellate reversals and prolonging appeals in capital cases.**

A proliferation of aggravators as envisioned in H.R. 115 undermines the narrowing function required by *Furman* v. *Georgia* and *Gregg v. Georgia*, thus risking the constitutionality of the federal death penalty. In addition, a statutory aggravator based solely on a victim's status as a law enforcement officer/first responder risks inviting arguments of comparable worth, weighing the defendant's life against the victim's, again inviting constitutional challenge. Third, establishing a statutory aggravator that could encourage federal capital prosecution where the state itself has chosen not to employ the death penalty contravenes principles of federalism.

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Accordingly, we encourage you to oppose this legislation that will serve no public safety benefit, presents serious federalism concerns, and will invite numerous challenges on its constitutionality, unnecessarily consuming resources, and risking the finality of convictions and sentences.

Signed,

The Constitution Project
NAACP
National Association of Criminal Defense Lawyers
The Sentencing Project
Church of Scientology National Affairs Office
StoptheDrugWar.org
Friends Committee on National Legislation
The Kentucky Council of Churches
T'ruah: The Rabbinic Call for Human Rights
American Civil Liberties Association