115TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
115–116

THIN BLUE LINE ACT

MAY 11, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 115]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 115) to amend title 18, United States Code, to provide additional aggravating factors for the imposition of the death penalty based on the status of the victim, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

69–006

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Thin Blue Line Act".

SEC. 2. AGGRAVATING FACTORS FOR DEATH PENALTY.

Section 3592(c) of title 18, United States Code, is amended by inserting after paragraph (16) the following:

"(17) KILLING OR TARGETING OF LAW ENFORCEMENT OFFICER.—

"(A) The defendant killed or attempted to kill, in the circumstance described in subparagraph (B), a person who is authorized by law—

"(i) to engage in or supervise the prevention, detention, investigation, or prosecution, or the incarceration of any person for any criminal violation of law;

"(ii) to apprehend, arrest, or prosecute an individual for any criminal violation of law; or

"(iii) to be a firefighter or other first responder.

"(B) The circumstance referred to in subparagraph (A) is that the person was killed or targeted—

"(i) while he or she was engaged in the performance of his or her official duties;

"(ii) because of the performance of his or her official duties; or

"(iii) because of his or her status as a public official or employee.".

Purpose and Summary

H.R. 115, the "Thin Blue Line Act," amends Federal law to add the killing of a state or local law enforcement officer as an aggravating factor for a jury to determine during the sentencing phase of a trial, when the jury is considering whether a sentence of death is justified.

Background and Need for the Legislation

Current law provides a list of sixteen aggravating factors a jury is required to consider when deciding whether a death sentence is warranted for a federal crime.[1] Forty-one Federal offenses, or classes of offenses, are punishable by the death penalty,[2] and as of January 2017, there are 62 Federal prisoners on death row.[3]

The aggravating factors in current law include: whether death occurred while the defendant was committing one of a list of specific offenses; whether the defendant acted in an especially heinous, cruel, or depraved manner; whether the defendant engaged in substantial planning and premeditation; whether the victim was particularly vulnerable; or whether the victim was a "high public official."[4] In this case, "high public official" includes a litany of high-ranking public persons, from the President to a foreign head of state to a judge or law enforcement officer.[5] Under 3592(14), the law enforcement officers in question are required to be Federal officers. There is no provision covering a defendant who kills a state or local law enforcement officer.

It is likely that a provision covering a state or local law enforcement officer would apply in a limited number of cases, both because the vast majority of capital cases are prosecuted at the state

[1] 18 U.S.C. § 3592(c).
[2] https://deathpenaltyinfo.org/federal-laws-providing-death-penalty?scid=29&did=192.
[3] https://deathpenaltyinfo.org/federal-death-row-prisoners#list.
[4] 18 U.S.C. § 3592(c)(1); (c)(6); (c)(9); (c)(14).
[5] 18 U.S.C. § 3592(14).

level, and because the circumstances where a defendant killed a state or local law enforcement officer during the commission of a Federal capital offense are probably limited. However, in the cases in which it would apply, the provision would be very important. For example, it would likely apply in many terrorism cases, including the Boston bombing case, where the Tsarnaev brothers killed an officer from the Massachusetts Institute of Technology during their flight following the attack. It would likely also apply to a case involving the death of a state or local law enforcement officer who is serving as a member of a Federal task force (e.g., a Joint Terrorism Task Force).

Hearings

The Committee on the Judiciary held no hearings on H.R. 115.

Committee Consideration

On April 27, 2017, the Committee met in open session and ordered the bill H.R. 115 favorably reported, with an amendment, by a roll call vote of 19 to 12, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 115.

1. An Amendment offered by Mr. Buck to clarify that the aggravating factor established by the bill applies where the victim was killed "or targeted" because of his or her status as a police officer. Approved by a roll call vote of 12 to 11.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)			
Mr. Chabot (OH)	X		
Mr. Issa (CA)			
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)	X		
Mr. DeSantis (FL)			
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Ms. Roby (AL)	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Gaetz (FL)			
Mr. Johnson (LA)	X		
Mr. Biggs (AZ)	X		
Mr. Conyers, Jr. (MI), Ranking Member.		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Mr. Swalwell (CA)		X	
Mr. Lieu (CA)		X	
Mr. Raskin (MD)		X	
Ms. Jayapal (WA)		X	
Mr. Schneider (IL)		X	
Total	12	11	

2. Motion by Mr. Sensenbrenner, to table the appeal of the ruling of the chair that Richmond Amendment #5 is not germane. Passed by a roll call vote of 16 to 15.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)			
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)			
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Ms. Roby (AL)	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Gaetz (FL)			
Mr. Johnson (LA)	X		
Mr. Biggs (AZ)	X		
Mr. Conyers, Jr. (MI), Ranking Member.		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Deutch (FL)		X	
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Mr. Swalwell (CA)		X	
Mr. Lieu (CA)		X	
Mr. Raskin (MD)		X	
Ms. Jayapal (WA)		X	
Mr. Schneider (IL)		X	
Total	16	15	

3. Motion to report H.R. 115 favorably to the House. Agreed to by a roll call vote of 19 to 12.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)			
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Ms. Roby (AL)	X		
Mr. Gaetz (FL)			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Johnson (LA)	X		
Mr. Biggs (AZ)	X		
Mr. Conyers, Jr. (MI), Ranking Member.		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Deutch (FL)			
Mr. Gutiérrez (IL)			
Ms. Bass (CA)		X	
Mr. Richmond (LA)			
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)		X	
Mr. Raskin (MD)		X	
Ms. Jayapal (WA)		X	
Mr. Schneider (IL)		X	
Total	19	12	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 115, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

MAY 8, 2017.

Hon. BOB GOODLATTE,
Chairman.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 115, the Thin Blue Line Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Robert Reese who can be reached at 226–2860.

Sincerely,

KEITH HALL.

Enclosure

cc:

Honorable John Conyers Jr.
Ranking Member

H.R. 115—Thin Blue Line Act

H.R. 115 would require federal courts to consider the murder, attempted murder, or targeting of a law enforcement official or first responder as an aggravating circumstance when determining if a death sentence is warranted for a convicted felon.

Based on an analysis of information provided by the Administrative Office of the U.S. Courts about the number of trials the bill would probably affect, CBO estimates that implementing H.R. 115 would have no significant effect on the federal budget.

Enacting H.R. 115 could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. Enacting the bill could increase the number of federal appeals filed for people who have been sentenced to death under the bill. Such increased filings would increase the collection of court filing fees, which are recorded in the budget as revenues; a portion of which can be spent without further appropriation. However, such fees are waived for defendants represented by public defenders. Because the number of additional appeals is probably very small and because the majority of such appeals would have defendants with public defenders, CBO estimates that enacting the bill would have an insignificant effect on revenues and associated direct spending in any year; the net effect on the deficit would be negligible.

CBO estimates that enacting the legislation would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 115 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Robert Reese. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 115 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 115 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 115, the "Thin Blue Line Act," amends Federal law to add the killing of a state or local law enforcement officer as an aggravating factor for a jury to determine during the sentencing phase of a trial, when the jury is considering whether a sentence of death is justified.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 115 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short Title. This section cites the short title of the legislation as the "Thin Blue Line Act."

Section 2. Aggravating Factors for Death Penalty. This section adds the following provision to 18 U.S.C. 3592(c):

"(17) Killing of Law Enforcement Officer.—

(A) The defendant killed or attempted to kill, in the circumstance described in subparagraph (B), a person who is authorized by law—

(i) to engage in or supervise the prevention, detention, investigation, or prosecution, or the incarceration of any person for any criminal violation of law;

(ii) to apprehend, arrest, or prosecute an individual for any criminal violation of law; or

(iii) to be a firefighter or other first responder.

(B) The circumstance referred to in subparagraph (A) is that the person was killed—

(i) while he or she was engaged in the performance of his or her official duties;

(ii) because of the performance of his or her official duties; or

(iii) because of his or her status as a public official or employee.".

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART II—CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 228—DEATH SENTENCE

* * * * * * *

§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

(a) MITIGATING FACTORS.—In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

(1) IMPAIRED CAPACITY.—The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) DURESS.—The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) MINOR PARTICIPATION.—The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) EQUALLY CULPABLE DEFENDANTS.—Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(5) NO PRIOR CRIMINAL RECORD.—The defendant did not have a significant prior history of other criminal conduct.

(6) DISTURBANCE.—The defendant committed the offense under severe mental or emotional disturbance.

(7) VICTIM'S CONSENT.—The victim consented to the criminal conduct that resulted in the victim's death.

(8) OTHER FACTORS.—Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

(b) AGGRAVATING FACTORS FOR ESPIONAGE AND TREASON.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) PRIOR ESPIONAGE OR TREASON OFFENSE.—The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.

(2) GRAVE RISK TO NATIONAL SECURITY.—In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.

(3) GRAVE RISK OF DEATH.—In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(c) AGGRAVATING FACTORS FOR HOMICIDE.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall

consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) DEATH DURING COMMISSION OF ANOTHER CRIME.—The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 37 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2245 (offenses resulting in death), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy).

(2) PREVIOUS CONVICTION OF VIOLENT FELONY INVOLVING FIREARM.—For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

(3) PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED.—The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(4) PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES.—The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(5) GRAVE RISK OF DEATH TO ADDITIONAL PERSONS.—The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) HEINOUS, CRUEL, OR DEPRAVED MANNER OF COMMITTING OFFENSE.—The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) PROCUREMENT OF OFFENSE BY PAYMENT.—The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(8) PECUNIARY GAIN.—The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(9) SUBSTANTIAL PLANNING AND PREMEDITATION.—The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

(10) CONVICTION FOR TWO FELONY DRUG OFFENSES.—The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(11) VULNERABILITY OF VICTIM.—The victim was particularly vulnerable due to old age, youth, or infirmity.

(12) CONVICTION FOR SERIOUS FEDERAL DRUG OFFENSES.—The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(13) CONTINUING CRIMINAL ENTERPRISE INVOLVING DRUG SALES TO MINORS.—The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

(14) HIGH PUBLIC OFFICIALS.—The defendant committed the offense against—

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution—

(i) while he or she is engaged in the performance of his or her official duties;

(ii) because of the performance of his or her official duties; or

(iii) because of his or her status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an

offense, and includes those engaged in corrections, parole, or probation functions.

(15) PRIOR CONVICTION OF SEXUAL ASSAULT OR CHILD MOLESTATION.—In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

(16) MULTIPLE KILLINGS OR ATTEMPTED KILLINGS.—The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

(17) KILLING OR TARGETING OF LAW ENFORCEMENT OFFICER.—

(A) The defendant killed or attempted to kill, in the circumstance described in subparagraph (B), a person who is authorized by law—

(i) to engage in or supervise the prevention, detention, investigation, or prosecution, or the incarceration of any person for any criminal violation of law;

(ii) to apprehend, arrest, or prosecute an individual for any criminal violation of law; or

(iii) to be a firefighter or other first responder.

(B) The circumstance referred to in subparagraph (A) is that the person was killed or targeted—

(i) while he or she was engaged in the performance of his or her official duties;

(ii) because of the performance of his or her official duties; or

(iii) because of his or her status as a public official or employee.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(d) AGGRAVATING FACTORS FOR DRUG OFFENSE DEATH PENALTY.—In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED.—The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

(2) PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES.—The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(3) PREVIOUS SERIOUS DRUG FELONY CONVICTION.—The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in sec-

tion 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

(4) USE OF FIREARM.—In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

(5) DISTRIBUTION TO PERSONS UNDER 21.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substances Act (21 U.S.C. 859) which was committed directly by the defendant.

(6) DISTRIBUTION NEAR SCHOOLS.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.

(7) USING MINORS IN TRAFFICKING.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.

(8) LETHAL ADULTERANT.—The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

* * * * * * *

DISSENTING VIEWS

Though troubled and saddened by the recent attacks on law enforcement officials, we believe that H.R. 115, the "Thin Blue Line Act," is counterproductive to ensuring public safety and only serves to exacerbate concerns with the unfair and unjust federal death penalty. As demonstrated by the robust discussion of the amendments proposed to this legislation during the Committee's markup, the bill is both unnecessary and constitutionally problematic. The failure to hold a hearing on death penalty legislation also sets a troubling precedent given the many legal and policy concerns present in capital sentencing.

In recognition of the serious concerns raised by this legislation, organizations committed to the protection of civil rights and civil liberties have written letters in opposition, particularly noting that the Thin Blue Line Act, "is an unnecessary and misguided attempt to politicize the unfortunate deaths of law enforcement officers and could ultimately exacerbate existing tension between law enforcement and the communities they serve." [1]

[1] Leadership Conference on Civil and Human Rights, Letter Opposing H.R. 115, the Thin Blue Line Act of 2017, April 27, 2017. See also Letter to Chairman Goodlatte and Ranking Member Conyers, Opposing H.R. 115, the Thin Blue Line Act of 2017, April 26, 2017 (signed by 10 orga-

Continued

For these reasons and those discussed below, we respectfully dissent and urge our colleagues to oppose this legislation.

DESCRIPTION AND BACKGROUND

H.R. 115 would amend the federal criminal code to expand the list of statutory aggravating factors in federal death penalty cases to also include killing or targeting a law enforcement officer, firefighter, or other first responder. Aggravating factors are intended to narrowly define the group of offenders who are eligible for the death penalty by providing specific factors that judges and juries should consider in determining whether a sentence of death is justified.[2] Passage of this bill would add a 17th statutory aggravating factor for federal death penalty eligible offenses.[3]

As explained below, the addition of a 17th 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 and the bill does not provide a stiffer penalty than can be had in state court. The measure is also unwise because it raises constitutional concerns of arbitrariness, risking the finality of convictions and sentences.

CONCERNS WITH H.R. 115

I. H.R. 115 DUPLICATES FEDERAL AND STATE LAWS THAT ENHANCE SENTENCES OF PERSONS CONVICTED OF CRIMES OF VIOLENCE AGAINST LAW ENFORCEMENT

H.R. 115 needlessly duplicates federal and state laws that already impose heightened punishments on persons found guilty of violent crimes against law enforcement. For example, the very law that the bill seeks to amend, 18 U.S.C. 3592, already states that a crime against a high public official, including "a judge, a law enforcement officer, or an employee of a United States penal or correctional institution," is an aggravating factor that may be considered in determining whether a death sentence should be imposed.[4] Other federal laws also impose a life sentence or death on persons convicted of killing state and local law enforcement officers or other employees assisting with federal investigations,[5] as well as officers of the U.S. courts.[6]

Given the large number and broad reach of the existing aggravating factors in section 3592, most, if not all such killings of law enforcement or first responders already meet one or more of the existing aggravating factors that permit application of the federal death penalty. Significantly, however, the existing 16 factors do not

---

nizations, including the ACLU, NAACP, Sentencing Project, Constitution Project and National Association of Criminal Defense Lawyers and five additional faith organizations); Letter to Chairman Goodlatte and Ranking Member Conyers, Law Enforcement Opposition to H.R. 115, April 26, 2017 (signed by members of Public Safety Officials on the Death Penalty) and NAACP Legal Defense and Educational Fund, Letter Opposing H.R. 115, the Thin Blue Line Act of 2017, April 27, 2017.

[2] *See Godfrey* v. *Georgia*, 446 U.S. 420 (1980) (aggravating factors must give jurors clear standards for determining who receives the death penalty).

[3] *See* 18 U.S.C. 3592(c) (2006). Examples of existing statutory aggravating factors include previous conviction of a violent felony including a firearm; previous conviction of an offense for which a sentence of death or life imprisonment was authorized; heinous, cruel, or depraved manner of committing offense; and vulnerability of the victim due to old age, youth, or infirmity.

[4] 18 U.S.C. 3592(c)(14) (2006).

[5] 18 U.S.C. 1121(a)(1) (1996).

[6] 18 U.S.C. 1503 (1996).

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 or 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:

- *U.S.* v. *Ronell Wilson, E.D.N.Y.*—two New York City detectives were killed during a gun sting operation. The defendant was sentenced to death.
- *U.S.* v. *Donzell McCauley,* D. D.C.—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*, S.D. Fla—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*, E.D. Okla.—a state law enforcement officer was killed during a drug raid. The defendant was sentenced to death.
- *LaShaun Casey*, D. P.R.—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. Mass.—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.

Additionally, all 50 states have laws in place that enhance penalties for crimes against peace officers, and in some instances, crimes against first responders.[7] For example, in Colorado, a person convicted of killing a peace officer, fire fighter or emergency medical service provider may be sentenced to life without the possibility of parole or death.[8]

II. H.R. 115 RAISES NEW CONSTITUTIONAL CONCERNS OF ARBITRARINESS, LEADING TO LENGTHIER DELAYS AND CONFUSION IN CAPITAL CASES

H.R. 115 would generate additional constitutional issues in an already complex area of law, creating grounds for appellate reversals

[7] *See* Anti-Defamation League, Statutes Providing Enhanced Penalties for Crimes Against Police, Fifty States Against Hate, Washington, DC (2016).
[8] Colo. Rev. Stat. 18–3–107 (2014).

and prolonging appeals in capital cases.[9] To address the arbitrary results in capital cases that rendered it unconstitutional, the Supreme Court in *Furman* v. *Georgia*[10] and *Gregg* v. *Georgia*[11] arrived at the doctrine of "narrowing" which allowed states to specify aggravating circumstances or factors for a jury to determine whether any eligible defendant was particularly worthy of the death penalty. These long lists of aggravating factors give prosecutors and courts broad discretion in imposing the death penalty, allowing for substantial arbitrariness in the capital punishment system.[12] A proliferation of aggravators as envisioned in this legislation undermines the narrowing function required by Furman and Gregg, thus risking the constitutionality of the federal death penalty. The ultimate impact of such an ever-expanding death penalty is that almost all murders become eligible for the death penalty, a result that is inconsistent with the Eighth Amendment.[13]

In addition, a statutory aggravator based solely on a victim's status as a law enforcement officer or first responder risks inviting arguments of comparable worth, weighing the defendant's life against the victim's, and inviting unconstitutional and improper testimony concerning the impact of the crime on law enforcement.[14] Finally, general principles of federalism and appropriate deference to state decisions should discourage (if not prevent) Congress from legislating so as to effectively override considered state policy decisions to not employ the death penalty.[15]

III. H.R. 115 DOES NOT ADDRESS DOCUMENTED AND SYSTEMIC UNFAIRNESS AND RACIAL DISPARITY IN THE IMPOSITION OF THE DEATH PENALTY

During the markup of H.R. 115, Members raised numerous concerns related to racial disparity in application of capital punishment, the lack of qualified counsel and sufficient resources to represent those facing the death penalty, and faulty forensic "science" testimony offered in support of convictions in death penalty cases. Members offered amendments to study and address these issues

---

[9] *See* Kirchmeier, Jeffrey L., Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States. Pepperdine Law Review, Vol. 34, No. 1, 2006. Available at SSRN: https.

[10] 408 U.S. 238 (1972).

[11] 428 U.S. 153 (1976).

[12] *See* Jeffrey L. Kirchmeier, Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme, 6 WM. & MARY BILL RTS. J. 345, 395–96 (1998).

[13] *See* Carol S. & Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment (2016).

[14] *See, e.g,* Zant v. Stephens, 462 U.S. 862, 877 (1983) (noting that death penalty statutes must "genuinely narrow the class of persons eligible for the death penalty . . . .").

[15] In addition, H.R. 115 does not have a *mens rea* requirement with respect to the victim's status as a law officer, unlike the other specific intent elements found in the federal death penalty sentencing statute. In other words, it applies to a homeowner who returns fire, in the dark, during a police no-knock search. *See, e.g.*, Kevin Sack, *Door Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES, Mar. 18. 2017 (documenting the instances in which police have been shot at or killed in the violent execution of a no-knock warrant), *https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html?*_r=0. Thus, the death penalty would apply to a homeowner who, in the middle of the night and in the dark, without knowing that the person invading their home is a police officer, shoots and kills who they believe is an intruder.

through standards for attorney training,[16] provision of resources,[17] and examination of forensic science.[18] These amendments were dismissed as non-germane even though they were directly related to the death penalty subject matter of the bill.

The statistics concerning the pervasive racial disparities found in the imposition of the death penalty are staggering and would clearly impact the application of any additional aggravating factor. African Americans comprise 42% of death-row prisoners,[19] but only 13% of the Nation's population. Between 1976 and 2016, 77% of the victims of executed prisoners were white, while only 15% of the victims were African American,[20] even though almost half of all homicide victims overall are African American.[21] Alarmingly, since 1976, only 20 white prisoners were executed for the murder of an African-American victim, while 286 African-American prisoners have been executed for the murder of a white victim.[22]

The federal death penalty, in particular, is rife with troubling evidence of racial disparity: 36 of the 61 people on federal death row are African-American, Latino, Asian or Native-American. If you break this down by federal circuit, the results are even more disturbing: For example, 15 of 18 men who have received a federal death sentence in the 5th Circuit (Texas, Louisiana, and Mississippi) in the modern era have been people of color.[23]

These disparities should be troubling to anyone who believes in the fair administration of the rule of law. Researchers have posited that the reasons for racial disparities in the imposition of the death penalty include a perceived link between race and dangerousness, as well as implicit biases that result in a higher valuing of white victims over others.[24] Regardless of the explanation, sponsors of this legislation should study and understand the impact of any proposal that will likely exacerbate these disparities. To underscore this need, Representative Cedric Richmond (D–LA) offered amendments to H.R. 115 that would have attempted to gather more information on the question of racial disparities by requesting studies be conducted on disparities in the conviction and execution of capital punishment and on the disparities of individuals sentenced to death and thereafter exonerated. These amendments, however,

---

[16] Amendment offered by Rep. David N. Cicilline (D–RI) requiring the Attorney General to study the American Bar Association defense counsel guidelines and make recommendations for federal implementation. Unofficial Tr. of the Markup of H.R. 115 Before the H. Comm. on the Judiciary, 115th Cong. page 27 (Apr. 27, 2017) [hereinafter Markup Tr.].

[17] Amendment offered by Rep. Cicilline authorizing funds for the defense of persons indicted for capital crimes. *Id.* at 33.

[18] Amendment offered by Rep. Cicilline creating a commission to recommend standards for the use of forensic science in capital crimes cases. *Id.* at 42.

[19] *See* Death Penalty Information Center, *National Statistics on the Death Penalty and Race* (Apr. 2017), *https://deathpenaltyinfo.org/race-death-row-inmates-executed-1976?scid=5&did=184.*

[20] *Id.*

[21] *See* Alexia Cooper & Erica L. Smith, *Homicide in the U.S. Known to Law Enforcement, 2011*, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ243035, at 4 tbl.1 (Dec. 2013).

[22] *See* Death Penalty Information Center, *National Statistics on the Death Penalty and Race* (Apr. 2017), *https://deathpenaltyinfo.org/race-death-row-inmates-executed-1976?scid=5&did=184.*

[23] *See* Federal Capital Habeas Project, available at *http://www.capdefnet.org/2255/*.

[24] *See, e.g.*, Jennifer L. Eberhardt *et al.*, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes* 384 (Cornell L. Fac. Publ'ns 2006), *available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1040&context=lsrp_*papers (finding that after controlling for case and individual differences, "defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black").

were ruled non-germane and the Committee was therefore prevented from debating them on their merits.[25]

Ranking Member John Conyers, Jr. (D–MI) raised serious concerns at the markup regarding the use of procedural rulings to block the Committee from considering Democratic amendments that would have directly addressed these issues of racial disparity and systemic unfairness in the imposition of the death penalty. While the amendments may not have been technically germane under House Rules, they were very relevant to any serious discussion about the death penalty. He noted that by blocking these amendments on procedural grounds, the Committee failed to get to the "real heart of the concerns regarding the death penalty" and further noted that when we open this issue "we must be prepared to deal with it in its totality."[26]

IV. THERE IS NO EVIDENCE OF PUBLIC SUPPORT FOR THE EXPANSION OF THE DEATH PENALTY

Finally, H.R. 115 is under consideration at a time when Americans' support of the death penalty is at its lowest in over 40 years. According to the Pew Research Center, public support for the death penalty has dropped seven points, from 56% to 49%, and 42% of Americans oppose it.[27] The botched execution of Clayton Lockett by Oklahoma officials in 2014 may have caused many to reconsider their support of the death penalty.[28] The problems revealed by Mr. Lockett's execution led a bipartisan, blue ribbon Commission in Oklahoma to recently recommend that the state continue its present moratorium on executions due to concerns about the legality of the execution process, as well as myriad other problems revealed about Oklahoma's administration of the death penalty.[29]

Similarly, Arkansas' unprecedented rush to execute several men in April 2017 over the course of one week predictably resulted in signs of inhumane and tortuous executions. An Associated Press reporter who witnessed the execution of Kenneth Williams—the last of four inmates killed in the span of seven days—reported that Mr. Williams "'lurched' 15 times in quick succession, followed by five slower lurches, three minutes after . . . midazolam was introduced."[30] The reporter also stated that "Williams could be heard after the microphone to the death chamber was turned off."[31]

Without a hearing on the bill, the Committee was unable to consider the evidence of the dramatic decline in the use of capital punishment across the country. In fact, by the end of 2016, a majority of states had abandoned the death penalty in law or in practice.

---

[25] Amendments offered by Rep. Cedrick Richmond (1) requiring the Attorney General to study disparities in the conviction, and execution of capital punishment, Markup Tr. at 50, and (2) requiring the Attorney General to study disparities of individuals sentenced to death and thereafter exonerated, Markup Tr. at 57.

[26] Markup Tr. at 85.

[27] Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, Pew Research Ctr., Sept. 29, 2016, *http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/*.

[28] Greg Botelho and Dana Ford, *Oklahoma stops execution after botching drug delivery*, CNN, Oct. 9, 2014, *http://www.cnn.com/2014/04/29/us/oklahoma-botched-execution/*.

[29] *See* Report of the Oklahoma Death Penalty Review Commission, March 2017, available at *http://okdeathpenaltyreview.org/*.

[30] Rob Burgess, *Arkansas rushes 4 executions in just 7 days*, May 3, 2017, *http://www.kokomotribune.com/opinion/house_of_burgess/house-of-burgess-arkansas-rushes-executions-in-just-days/article_2e45ccde-2f69-11e7-b93a-4f2bca9c1d14.html.*

[31] *Id.*

This data provides significant indication that there is little public safety utility in the expansion of the death penalty. For example:

- Death sentences have reached a 40-year low. For example, Texas imposed just two new death sentences in 2015 while during the 1990's, Texas routinely had more than 30 new sentences per year and in 1999 they had 48.
- Executions are at a 20 year low, and only a handful of states have carried out an execution in the last year: five states in 2016, six in 2015, and seven in 2014.
- Four governors have declared moratoria and halted executions in their states (Pennsylvania, Oregon, Colorado, and Washington).

Even in those jurisdictions with the death penalty, its use is extremely rare. Only 2% of counties are responsible for the majority of executions. Further, out of 3,143 counties nationwide, only 16 counties returned five or more death sentences in the six-year period between 2010 and 2015.

CONCLUSION

We support measures that would actually protect our first responders, brave men and women who risk their lives every day to protect us. Unfortunately, H.R. 115 not only fails to do this, but would also exacerbate problems with the federal death penalty. Any consideration of the death penalty selection process implicates fundamental due process concerns[32] and it is incumbent on the Committee to fully consider those concerns. However, H.R. 115 was considered for markup, and will now be rushed to the House Floor, without a single hearing and without the opportunity to consider amendments directly relevant to whether our system of imposing the death penalty is fair, just, and reliable. Providing duplicative protections to law enforcement or first responders simply cannot counter-balance our sincere concerns about this flawed legislation.

Rather than advancing a bill that amounts to an empty gesture that is damaging at best, the Committee should focus on real reform measures that will protect law enforcement, first responders, and their communities. Over the years, well-documented, unconstitutional policing practices in communities of color across the United States have eroded trust between these communities and the law enforcement officials sworn to protect them.[33] We should be working to foster law enforcement reforms aimed at helping local jurisdictions meet their obligations to ensure law enforcement is acting in a constitutional manner instead of pursuing legislation, such as H.R. 115, that will sow seeds of division that ultimately undermine public safety.

Accordingly, we dissent and urge our colleagues to join us in opposing H.R. 115.

MR. CONYERS, Jr.
MR. NADLER.
MS. LOFGREN.
MS. JACKSON LEE.
MR. COHEN.
MR. JOHNSON, Jr.

---

[32] *See* Singleton v. Norris, 108 F.3d 872, 875 (8th Cir. 1997) (Heaney, J., concurring).

[33] *See, e.g.*, U.S. Dep't of Justice Civil Rights Division, *Investigation of the Baltimore City Police Department,* Aug. 10, 2016, *https://www.justice.gov/opa/file/883366/download.*

MR. DEUTCH.
MR. GUTIÉRREZ.
MR. RICHMOND.
MR. JEFFRIES.
MR. CICILLINE.
MR. LIEU.
MS. JAYAPAL.
MR. RASKIN.

○