

# **Secret Panel Decides if a Federal Case Becomes a Capital Case**

Roberto Suro

January 11, 1998

Every few weeks a secret committee gathers in a conference room on the second floor of the Justice Department to decide which federal defendants should face the death penalty.

The four anonymous federal lawyers who usually sit on the panel must explore relatively unknown legal territory as they apply new laws that have greatly expanded the federal crimes in which the death penalty can be imposed. In recommending who should be tried under the death penalty, they must often respond to public demands for vengeance even as they build cases that can survive the scrutiny of juries and appeals courts.

A decision to go forward with a death penalty prosecution means that the federal government will have to invest far more resources – usually millions of dollars more – in the case than if it sought life imprisonment – given the nature of the prosecution and the appeals process.

Last week, the Justice Department's efforts to secure death penalties appeared to go awry in two of the most important federal capital cases undertaken in decades.

In Denver, a jury deadlocked in the sentencing phase of Terry Lynn Nichols's trial for his role in the Oklahoma City bombing, meaning that he cannot receive the death penalty for his conviction.

In Sacramento, developments in the trial of accused Unabomber Theodore J. Kaczynski heightened criticism of the Justice Department's decision to reject a last-minute plea bargain from Kaczynski that would have sent him to prison for life.

After that, the opening of his trial was delayed last week as Kaczynski first sought to replace his lawyers, then asked to represent himself. The judge ordered a mental evaluation of Kaczynski, who reportedly attempted suicide.

"The prosecution could have secured a perfectly acceptable sentence that would have ensured that this man would never have harmed anyone else without risking a travesty of justice if Kaczynski ends up defending himself," said David Cole, a professor at Georgetown University law school.

Last week's developments prompted even some Justice Department officials to question privately whether, as a practical matter, it would have been better to take the deal and avoid the risks of a mistrial or a successful appeal that are inherent in the trial of such a complex individual.

Moreover, Anthony Bisceligie – a Washington attorney representing David Kaczynski, the defendant's brother who turned him in to the FBI – has repeatedly protested the government's insistence on the death penalty, claiming David Kaczynski never intended to sign a death warrant for his brother when he cooperated with investigators.

The Justice Department declined any comment on the death sentence decisions in the Nichols and Kaczynski cases because they are pending matters. Moreover, the department declined to make officials available to discuss the general workings of the death penalty review committee, nor would it identify its members.

"Because death penalty cases sometimes lead to threats against public officials, the department does not identify the members of the review committee," said department

spokesman Bert Brandenburg. Federal prosecutors who argue these cases in court are not afforded that protection.

Typically, the committee is made up of senior officials from the Office of the Deputy Attorney General and the Criminal Division and as many as six or eight people can take part in its deliberations, according to defense attorneys who have appeared before the panel.

The committee's role has expanded substantially in recent years. The federal death penalty was rarely invoked for a quarter century until Congress in 1994 responded to public outrage over drug-related killings and acts of terrorism by authorizing capital punishment for dozens of new and existing federal crimes.

In 1994, the year before the law went into effect, seven federal cases were considered for capital punishment. Since the law took effect, 243 cases have been reviewed by the committee, which recommended seeking the death penalty in 69 of them. Last year, of the 136 cases considered, the committee approved a death penalty prosecution 32 times.

"Federal prosecutors have virtually unlimited discretion in these decisions, and they exercise that discretion with complete freedom to avoid ever explaining why they go forward in some cases and not in others," said Jack Greenberg, a professor at the Columbia University law school. According to procedures set up in 1995, prosecutors must submit comprehensive reports to the committee on both the alleged crime and the defendant and analyze the evidence, the grounds for prosecution and the individual's background.

Defense lawyers can come before the committee to argue for leniency, and the crime's victims also can make their sentiments known. The committee then renders an opinion on whether it is appropriate to seek the death penalty and the attorney general makes the final decision.

Because there is so much new law in this area, the officials who sit on the death penalty committee often must establish their own standards for deciding whether capital punishment is appropriate in a particular case, according to federal officials and legal experts.

"Rather than leaving it up to individual U.S. attorneys around the country, the committee ensures that there is as much consistency as possible on an issue of unparalleled sensitivity," said a former member of the review committee, who asked not to be identified because he helped evaluate cases that are pending.

As part of its decision making, the committee must weigh aggravating factors, such as whether the crime caused indiscriminate harm to bystanders, and mitigating factors, such as whether the defendant has a past criminal record.

These factors are outlined for each crime by Congress, yet with virtually every case the committee is dealing with new combinations of circumstances. As a result, "there are no mathematical formulas to determine how all the factors should be balanced against each other," said a former Justice Department official.

This lack of precise guidelines has been a major factor in the committee's consideration of the Unabomber case.

When it first evaluated the case last May, the committee considered David Kaczynski's role in turning in his brother a mitigating factor but had no precedents to help it decide how much weight to give it. The committee decided to seek the death penalty.

The committee reevaluated the case, including David Kaczynski's pleas for his brother's life, last month after Theodore Kaczynski offered to plead guilty in exchange for a life sentence. The Justice Department lawyers could have concluded that Kaczynski's disputes with his lawyers, which had already become apparent, clouded the prospects for a successful prosecution enough to take the deal. But that argument was not a major issue in their deliberations and ultimately they rejected the offer, according to sources familiar with the case.

Most of the deliberations focused on arguments presented by Kaczynski's lawyers, who cited a diagnosis of paranoid schizophrenia by their experts to support their claim that the committee should reevaluate his mental illness as a mitigating factor sufficient to spare him the death penalty.

But, because thousands of individuals are diagnosed similarly every year, Justice Department officials concluded that Kaczynski's mental state should not cause them to change their mind, given the cold and calculating nature of the murders he allegedly committed and the strong case that had been built against him. It was a decision without obvious precedents, but it was nearly unanimous, the sources said.

In the Oklahoma City bombing case, Reno vowed to seek the death penalty even before Nichols and his co-conspirator, Timothy McVeigh, had been identified. And, all along, Justice officials have said the sheer horror of the crime in Oklahoma City and the calculating manner of its execution left little doubt that this was the kind of case that deserved the most severe of punishments.

Like the Unabomber's alleged murders, Oklahoma City fell into a category that one Justice Department official called "the top tier" of death penalty cases. Said the official: "The crimes involved in these cases were so cold and so brutal that they make you ask yourself: If not now, then when will you ever ask for the death penalty."

## The Ted K Archive

Roberto Suro

Secret Panel Decides if a Federal Case Becomes a Capital Case

January 11, 1998

Washington Post, January 11, 1998. Page A14. <[washingtonpost.com/wp-srv/  
national/longterm/unabomber/bkgrdstories/fedcase0111.htm](http://www.washingtonpost.com/wp-srv/national/longterm/unabomber/bkgrdstories/fedcase0111.htm)>

**[www.thetedkarchive.com](http://www.thetedkarchive.com)**