Testimony of

The Honorable Strom Thurmond

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Mr. Chairman:

Thank you for holding this important hearing regarding the Illinois Commission on Capital Punishment. Today, we will discuss the capital punishment system in Illinois, which has come under considerable scrutiny after the exoneration of 13 people who had been sentenced to death. In March of 2000, following highly critical media reports, Illinois Governor George Ryan declared a moratorium on all executions. The Governor also directed the formation of the Commission on Capital Punishment and charged it with suggesting reforms that would ensure fairness and accuracy in the administration of the death penalty. In April of this year, the Commission issued a report that recommended a number of changes to the capital punishment system in Illinois.

Opponents of the death penalty have pointed to the state of Illinois as a sign of a criminal justice system gone bad. However, a close look at the facts reveals that while there were indeed problems in some Illinois capital cases, the system is far from broken. Despite reports to the contrary, many of the exonerated individuals have not been shown to be actually innocent and several of them were released due to procedural missteps.

Nevertheless, the prospect of the execution of an innocent person is unacceptable, and I am committed to preventing it. I want to assure my colleagues that I support due process and fundamental fairness for those facing capital charges. The finality of the death sentence requires extraordinary diligence, so that mistakes do not occur.

In addition to a discussion of the situation in Illinois, our hearing today provides the opportunity for a debate on the overarching question of whether the death penalty continues to be an appropriate punishment in the American system of justice. I believe that it is. Some crimes are so depraved and heinous that the imposition of a death sentence is warranted and necessary. Not only do I and other members of this committee support capital punishment, but most Americans do as well. According to a May 9, 2002, Gallup Poll, 72% of Americans favor the death penalty for persons convicted of murder.

During the 107th Congress, Chairman Feingold has introduced S. 233, the National Death Penalty Moratorium Act of 2001, that would place a moratorium on executions by the Federal government and urge states to do the same, while a National Committee reviews the administration of the death penalty. I do not support these efforts to place a moratorium on the death penalty, and I do not believe that the circumstances in Illinois have any relevance on a Federal moratorium. There is absolutely no evidence to indicate that there is one innocent person awaiting execution for a Federal offense. The few cases in Illinois state courts, while troubling, do not bear on the Federal system.

The fact remains that the administration of the death penalty at both the Federal and state levels is more accurate than ever. There is not one documented case of the execution of an innocent person since the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), resulted in the reform of state death penalty statutes. In addition, DNA testing is now widely available to

ensure the highest degree of accuracy. I have supported legislation in the past that would provide for post-conviction DNA testing in cases where a DNA test has the potential to exonerate the defendant. Furthermore, funding for appointed defense counsel has increased in recent years, and reports by both Attorneys General Reno and Ashcroft found that there is no racial bias in Federal death penalty cases.

Both the Reno and Ashcroft reports detail the close scrutiny that capital cases receive at the Federal level. It is a system designed to ensure that those who receive the ultimate punishment are truly deserving. In 1995, the Department of Justice developed the death penalty protocol. This protocol requires United States Attorneys to submit for review all cases in which a defendant is charged with a capital offense, even if the U.S. Attorney does not recommend seeking the death penalty. These submissions are then reviewed by the Capital Case Unit in the Criminal Division, followed by another review by the Attorney General's capital case review committee. Recommendations are then made to the Attorney General, and he makes the final determination.

To prevent any bias, the review is performed without revealing the race or ethnicity of the defendant to anyone reviewing the case in Washington, including the Attorney General. By all accounts, this process is working and minorities are not being targeted unfairly. At each stage of the review process, the death penalty is recommended for a higher percentage of whites than for blacks or Hispanics.

Death penalty critics often argue that despite this thorough process, there is an inherent racial bias because the percentage of minorities being charged for capital offenses is higher than that of the general population. However, as former Attorney General Reno noted, this argument holds for the entire criminal justice system. Unless we are willing to accuse both the Federal and state criminal justice systems of racial bias, it simply does not follow that the capital punishment system is discriminatory. In this context, it is important to note that the Reno report found that 70% of the victims of defendants charged with Federal capital crimes were minorities.

A Columbia University report known as the Leibman study is often cited as proof that capital punishment in this country is deeply flawed. This study, published in 2000, alleged that from 1973 to 1995, 70% of death penalty convictions were reversed on appeal. The implication is that 70% of the time, innocent people were sentenced to death. This study should be viewed carefully because during the time period addressed by this study, the Supreme Court issued a series of retroactive rules that nullified a number of verdicts. These reversals were not based on the actual innocence of defendants, but rather were based on procedural rules.

I would also like to stress the difference between the terms "exoneration" and "actual innocence." Media reports often confuse the two. If a defendant is exonerated based on a procedural misstep, that person has not been proven innocent. Even if one were to accept the assertion that some of the exonerated individuals were actually innocent, this does not prove that innocent people have been executed. On the contrary, it would only prove that the system is working and that in cases where the evidence of guilt is insufficient, executions do not take place.

I would now like to address the report of the Illinois Commission on Capital Punishment. The Commission did not advocate abolishing the death penalty in Illinois but did make 85 recommendations concerning the imposition of the death penalty. Many of these recommendations are acceptable, and I would welcome their implementation at both the state and Federal levels. For example, the report calls for increased training and support for trial judges that hear capital cases. Another recommendation would provide for the dissemination of case law updates to trial judges. The Commission also calls for further training of both

prosecutors and defense lawyers and supports minimum qualification standards for defense counsel. Many states require defense attorneys to meet a certain level of qualification, and this is a positive development.

Unfortunately, many recommendations made by the Commission are problematic, and I would not support them at the Federal level or encourage their adoption at the state level. In fact, some of the recommendations severely restrict the use of the death penalty. Due to the fact that a majority of the Commission's members favor abolishing capital punishment, I cannot help but wonder if these recommendations are back-door ways to discourage the use of the death penalty. For example, the Commission recommends the videotaping of all interrogations of potential capital defendants at police facilities. The underlying rationale is that the entire interview will be on record, and this will discourage police officers from engaging in inappropriate activities to secure confessions. This recommendation would be very costly, would be impractical, and would not necessarily guard against abuse. Unless funding were provided, this requirement would be a high-priced mandate. Furthermore, it is often difficult for officers to know, at the early stages of an investigation, who might be a capital suspect. If investigators are still in the act of piecing the story together, they would have to videotape everyone they interview as a precaution. Additionally, the use of a videotape is open to abuse as well. If an officer were inclined to coerce a confession, there is nothing to prevent that officer from forcing the suspect to confess when the tape starts rolling.

The Commission also recommends that a statement of a homicide suspect that was not recorded should be repeated back to him on tape, so that his comments can be recorded. This recommendation is unwise. If a suspect unintentionally blurts out an incriminating statement on the way to the station, it is entirely possible that he will deny having made the statement when it is repeated back to him. At trial, a good defense attorney will no doubt use the one existing recording that disputes, rather than confirms, what the officer heard.

Another recommendation that I cannot support would significantly reduce the offenses for which the death penalty is available. The Commission would limit capital eligibility to the murder of two or more persons, the murder of a police officer or firefighter, the murder of an officer or inmate of a correctional institution, murder involving the use of torture, and murder committed to obstruct the justice system. While I agree that the death penalty should apply in all of these cases, the Commission has excluded other crimes that deserve capital status. For example, the Commission has failed to include felony murder as a capital-eligible offense. Therefore, the death penalty would not be available even if the defendant murdered someone in the course of another felony, such as rape. Also, in many circumstances, the death penalty would not be available for the murder of one person. This recommendation inexplicably and unwisely restricts the use of death penalty, and it should be rejected.

Yet another of the Commission's recommendations would prohibit the use of the death penalty in cases where conviction is based upon the testimony of a single eyewitness, without any corroboration. This suggestion is undoubtedly well-intentioned, but it should not be adopted because it interferes with the traditional role of the jury as the finder of fact. If the jury doubts the veracity of the statement and there is no other evidence to back up the claim, the jury may refuse to believe the testimony of the eyewitness. A similar recommendation would prohibit the use of the death penalty based on the uncorroborated testimony of an in-custody informant. Similarly, this recommendation would also interfere with the jury's role of determining the facts. However, I understand the concern about in-custody informants and other witnesses whose trustworthiness is questionable. It would be perfectly reasonable to require a trial judge to issue a

jury instruction that cautions jurors about reliance on the testimony of these witnesses. The instruction should not require witnesses to disregard the testimony. Rather, the instruction should make it clear that the decision to accept or reject the statement is entirely the jury's, but that this testimony should be viewed very carefully.

Mr. Chairman, I would like to make one last point about capital punishment. It saves lives. A January, 2002, Emory University study examined murder rates in the United States since 1977, when executions resumed after a period of nine years. The study found that each execution prevents an average of 18 murders. This finding demonstrates that if we are really interested in preventing the death of innocent people, capital punishment should be part of our criminal justice system.

To be sure, we should implement appropriate safeguards and closely monitor the administration of the death penalty at both the Federal and state levels. We should ensure that innocent people are not convicted and certainly not executed. But we should not overreact at the Federal level to problems that are unique to the state of Illinois. It is important to keep in mind that the very formation of this Commission demonstrates that the people of Illinois are committed to the improvement of their capital punishment system. Furthermore, not one innocent person has been executed.

The death penalty is simply too important a tool to be abandoned. Capital punishment provides prosecutors with a crucial negotiating tool and also exacts punishment for the most vile and heinous of crimes.

I welcome all of our witnesses today, and look forward to a spirited debate on this important matter.