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S. HRG. 110–743

OVERSIGHT OF THE FEDERAL DEATH PENALTY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

JUNE 27, 2007

Serial No. J–110–43

Printed for the use of the Committee on the Judiciary

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OVERSIGHT OF THE FEDERAL DEATH PENALTY

WEDNESDAY, JUNE 27, 2007

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:32 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senators Feingold and Leahy.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. I call the Committee to order. Good morning. Welcome to this hearing of the Constitution Subcommittee entitled "Oversight of the Federal Death Penalty." We are honored to have with us this morning some very distinguished witnesses, and I appreciate the effort they have made to be here today.

Let me start by making a few opening remarks, and then we will turn to the representative from the Department of Justice who will be our sole witness on our first panel.

This is the first oversight hearing on the Federal death penalty that the Senate Judiciary Committee has held in 6 years. Until recently, Congress has asked few questions about how the Federal death penalty is being implemented, and we received little information as a result. Indeed, it is fitting that we will hear from some of the same organizations that testified at that last hearing in June 2001. That is because in some respects, we know little more today than we did 6 years ago.

That said, I do appreciate that the Justice Department has responded to written questions that I sent in advance of the hearing. Those responses begin the process of Congress obtaining the information it needs to conduct oversight in this area.

And we do have a lot of ground to cover. There have been many developments in the last 6 years. In 2001, the Justice Department made controversial changes to the protocols for Justice Department review of death-eligible cases. The new protocols required U.S. Attorneys for the first time to get Attorney General approval to enter into plea bargains that take the death penalty off the table. This resulted, in one New York case, in Attorney General Ashcroft nullifying a plea agreement in which a defendant had agreed to cooperate with the Government in exchange for pleading guilty to a non-capital murder charge. This action was heavily criticized for

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jeopardizing future cooperation agreements, and Ashcroft finally reversed his decision more than a year later.

Those protocol changes also reversed the presumption against seeking the Federal death penalty in a local jurisdiction that has already chosen to outlaw capital punishment, and instead stated that a lack of "appropriate punishment" in the local jurisdiction should be a factor in deciding whether to bring a Federal capital case.

And just this week, we received another set of newly revised death penalty protocols, which contain broad new confidentiality rules that appear to pull the curtain on how the DOJ death penalty review process is working. I am troubled by this trend toward secrecy. These are public prosecutions brought by the United States of America. Congress and the American people give immense power to the Department of Justice to act in our name and for our protection. We are entitled to know how decisions to seek the ultimate punishment are made. So I will pursue this topic with our witness today to better understand the scope and necessity of these new rules.

What else has happened since 2001? A National Institute of Justice study ordered by Attorney General Reno at the end of the Clinton administration was delayed for years. It was supposed to examine whether there were racial disparities in application of the Federal death penalty, but when it was finally released in 2006, it did not tell us much. In addition to being criticized by a number of experts for a faulty peer review process, the report left out the most important part of the decisionmaking process: the point where defendants are brought into the Federal system in the first place. And, of course, that study only covered the years 1995 to 2000, so no study has been conducted to evaluate these issues from 2001 forward.

And now this Committee's investigation into the Department of Justice's firing of a number of well-respected, experienced U.S. Attorneys has revealed the inappropriate politicization of some of the Department's most important functions.

The American people should be able to trust fully the ability of the Justice Department, and the Attorney General, to make difficult and nuanced decisions about whether the Federal Government should pursue the ultimate sentence of death. We should be able to trust that the Attorney General seeks input from all sides and takes very seriously his decision whether to use the full weight of the U.S. Government to seek to put a person to death.

That is why we are holding this hearing—because that trust has been shaken. We need to know whether these responsibilities are being treated with the seriousness they deserve.

In particular, I am concerned that in the course of deciding whether to seek death in a case, neither the Deputy Attorney General nor the Attorney General meet personally with their own internal review committee that examines each case in detail. And according to what the Attorney General himself told this Committee earlier this year, a U.S. Attorney was fired, at least in part, because he asked the Attorney General to reconsider the decision to seek the death penalty.

I oppose the death penalty, but I recognize that reasonable people can differ on the question of capital punishment. And different administrations can take different views about when it is appropriate to seek the Federal death penalty. But I hope we can all agree that the decision whether to charge someone with a capital crime and seek to impose the death penalty is one of the most profound decisions our Government officials can make. That power must be wielded carefully and judiciously. If carefully considered, law enforcement-based judgments are not winning the day, we need to know about it, and we need to know why. The stakes are simply too high.

There are no other Senators expected at this point. I was going to turn to the Ranking Member, but there is not one. So we will start with our first panel. Our first witness will be Deputy Assistant Attorney General Barry Sabin. A Federal prosecutor since 1990, Mr. Sabin is now responsible for the Fraud Section, Criminal Section, Gang Squad, and Capital Case Unit of the Criminal Division.

Mr. Sabin, welcome, and thank you for taking the time to be here this morning. I would ask that you limit your remarks to approximately 5 minutes. Your full written statement will be included in the record. And if you would please rise. Do you swear or affirm that the testimony you are about to give the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SABIN. I do.

Chairman FEINGOLD. Thank you, sir, and you may be seated, and you may proceed with your testimony.

STATEMENT OF BARRY SABIN, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. SABIN. Good morning. Thank you, Mr. Chairman. I am pleased to appear before you today to testify about the Department of Justice's implementation of the Federal death penalty statutes. The Justice Department relies upon rigorous procedural safeguards and highly experienced personnel to ensure a uniform decision-making structure that is respectful to victims and defendants.

In connection with my written testimony, I emphasize the paramount importance the Department attaches to the review of capital cases and key elements that define this review process. These elements include: the capital case review process is centralized and the decision in every case is ultimately made by the Attorney General of the United States; second, the review of a capital matter is designed to respect the Federal law; third, the review of a capital matter treats each defendant as an individual, even as it evaluates the case within a national framework; fourth, discrimination and bias play no role in the capital review process; and, fifth, each review of a capital matter respects victims' and defendants' rights.

I am a career prosecutor. I have served in the Justice Department for 17 years. I served as a trial prosecutor in South Florida and in a variety of supervisory positions in Miami. I ultimately served as the Criminal Chief and First Assistant United States Attorney. In those positions, I also served as a member of the district's Death Penalty Review Committee. Although I was lead pros-

ecutor on over 50 Federal felony trials, many of them involving violent offenses, none of these matters involved capital offenses.

In my present position, I have had the opportunity to work with experienced capital litigation practitioners in the Capital Case Unit. Thus, I have had the honor and privilege to work with dedicated, committed prosecutors, both in the field and at headquarters, on capital litigation. I want to underscore that the prosecutors at the Justice Department understand that implementation of the death penalty is the ultimate sanction, reserved for the worst offenders, and must only be applied in a fair and uniform manner.

Pursuant to the Federal Death Penalty Act of 1994, Congress has authorized the Department of Justice to seek the death penalty for more than 50 serious Federal offenses. Consistent with congressional intent, the Justice Department strives to enforce Federal capital sentencing laws fairly and evenhandedly, uninfluenced by the locations of prosecutions or the races or ethnicities of defendants and victims.

With the goal of fair and consistent application in mind, in June 2001, the Justice Department implemented a protocol which further harmonized the capital review process. Earlier this week, the Department issued a revised protocol. Mr. Chairman, we appreciated the opportunity to discuss the protocol with members of your staff these past few days.

The Department relies upon a core group of prosecutors experienced in capital litigation to effectuate the Department's protocol. In addition to the extensive and considered review in the United States Attorney's Office, these veteran prosecutors are located in the Criminal Division's Capital Case Unit and the Attorney General's Review Committee on Capital Cases. These entities are integral to ensuring the proper review of potential death penalty cases.

The Attorney General, the committee, and other Department personnel involved in reviewing protocol submissions are not advised of the race or ethnicity of defendants or victims. The submissions are sanitized of any references to the races of victims or defendants. The result is a review process that is blind to the race and ethnicity of victims and defendants.

There are multiple opportunities for defense counsel to provide information favorable to their client and argue against the Government seeking the death penalty.

The death penalty protocol also advises the United States Attorney to consult with the family of the victim. There is, thus, a robust review with multiple procedural safeguards to ensure a fully informed decisionmaking process.

The Justice Department's review of capital cases is not aimed at maximizing or minimizing capital cases; it aims to apply the most faithful reading of Federal law to cases. Unless specified intent factors and aggravating circumstances can be found beyond a reasonable doubt, the death penalty is not authorized. The Attorney General will not authorize seeking the death penalty unless these statutory requirements are met. If they are met, the Department must follow the law and consider the death penalty as a possible sanction for these crimes. The Federal Government has an obligation to evenhandedly enforce Federal law, and the Department of Justice's capital case review process ensures this outcome.

The review allows each potential case to be viewed in context of all other such cases, protecting against arbitrary decisionmaking. The review also ensures that individual characteristics are highlighted during this review. The Justice Department's decision turns on what the defendant has done and the relevant aggravating and mitigating circumstances. Factors that are arbitrary or impermissible, such as race, ethnicity, gender, or religion, are not considered. In this way, the Justice Department is able to effectuate Congress' intent that the death penalty be sought against the worst offenders, while simultaneously respecting statutory and constitutional principles that all defendants must be given individualized consideration.

In conclusion, the Justice Department has established rigorous safeguards to ensure that capital cases are reviewed in a fair, transparent, and uniform manner. We have dedicated tremendous efforts and resources to ensure fairness in Federal capital litigation. I appreciate the opportunity to testify today and I look forward to your questions.

Chairman FEINGOLD. Thank you very much, Mr. Sabin, for that testimony, and I want you to know that amid all the controversy currently embroiling the Department, I know that there are good and honorable people who work there every day and do their best to serve the interests of justice, and I do appreciate that. But, of course, as you have indicated as well, the issue of the death penalty is extremely important, and this Committee needs to ask tough questions to understand how it has been implemented in the last 6 years.

Last week, the Department provided me with answers to questions I had sent in April in anticipation of this hearing, and I will put those responses in the record of this hearing, along with the revised protocols you provided earlier this week. I appreciate the effort that went into these responses.

Mr. SABIN. Thank you, Senator.

Chairman FEINGOLD. However, a lot of the data was difficult to decipher without more information. So I am sure I will have followup questions after this hearing, and I hope DOJ will do its best to respond expeditiously to those followup questions as well.

Mr. SABIN. Yes. Absolutely, Mr. Chairman.

Chairman FEINGOLD. Thank you.

Prior to my asking for that information that I just mentioned, had the Department undertaken any effort to review its implementation of the Federal death penalty to look at issues like the total number of cases per year, U.S. Attorney overrule rates, and the race of defendants and victims?

Mr. SABIN. We had not done a rigorous review of the data until the Congress had—you had posed the questions.

Chairman FEINGOLD. Until you received our questions.

Mr. SABIN. Correct.

Chairman FEINGOLD. Do you think it has been a helpful process to look at these statistics?

Mr. SABIN. Yes.

Chairman FEINGOLD. Has the Department done any number-crunching beyond what I specifically asked for?

Mr. SABIN. We wanted to get the information to you and the Subcommittee as expeditiously as possible. Obviously, in preparation for the hearing, I have had discussions with the capital case litigation attorneys so that I could be prepared to answer any questions that you may ask regarding those statistics. But it is an ongoing process, and as time passes, I am sure we will have more considered understanding of the data that we provided to you and that we now have at our disposal.

Chairman FEINGOLD. Well, I would hope whatever efforts to engage in number-crunching that could not be done in time for this hearing would be done now, and that the fact that the hearing is over does not stop the process of getting the additional information.

Mr. SABIN. We are in full agreement with that, Mr. Chairman.

Chairman FEINGOLD. And would you be willing to share those additional statistics as you complete them?

Mr. SABIN. To the extent that it is responsive to your questions or your followup questions, absolutely.

Chairman FEINGOLD. All right. Do you think the Department should have considered looking at these statistical breakdowns and some of these issues earlier?

Mr. SABIN. Should we have looked at—

Chairman FEINGOLD. Should you have looked at some of these issues earlier?

Mr. SABIN. We have a lot of operational activities relating to individual cases, and the staff was focused upon making sure that the matters proceeded in considered and thoughtful determination. It is helpful. Certainly we welcome the oversight, and I think it is a process that we can be more informed and take a step back to understand what we are doing over the last few years, compare that to what had occurred between 1995 and 2000, and then get a larger perspective. So I think it is helpful.

Chairman FEINGOLD. I would suggest that these statistics are necessary for what you have described as "thoughtful determination." So I think you agree, but—

Mr. SABIN. I don't disagree with that. I agree.

Chairman FEINGOLD. As I am sure you know, in 2000 Attorney General Reno publicly issued a nearly 400-page report with every conceivable piece of data about Federal death penalty-eligible cases down to the district level. This included a breakdown by district of what the U.S. Attorney and Review Committee recommended and what the Attorney General decided. It also included breakdowns by race of the defendant and by race of each of the victims in a case. This comprehensive report was extremely helpful back in 2000.

Now, I do appreciate that it would be a lot of work if the Department would issue a report, but a current report in the detailed form that was issued in 2000 would give this Committee and others an opportunity to understand how the Federal death penalty is implemented, and would give the Department an opportunity to demonstrate its commitment to transparency about its death penalty work.

I would like the Department to prepare such a report, and I will ask that you get back to me in writing with the Department's response to my request.

Mr. SABIN. I will get back to you in writing with respect to that request, sir.

Chairman FEINGOLD. New Department protocols for reviewing death penalty cases go into effect next week. As I mentioned earlier, they contain a lengthy recitation of new confidentiality rules forbidding anyone at DOJ from disclosing their views on whether capital punishment should be sought in a case or any aspect of the review process, even within the Department.

Now, I do understand the need for DOJ to be able to deliberate internally. But given the stakes in these cases, shouldn't there be some level of transparency in how the decision is made whether to seek the death penalty?

Mr. SABIN. Certainly we would welcome the opportunity to have transparency in the process, and we also, as you recognize, have internal deliberative processes to respect so that the robust and informed debate is not chilled, that all levels of the review can have frank and candid interaction, so that they can make the most informed decisions regarding the most severe of sanctions.

So we want to ensure, as I stated in my written testimony, that we are accountable for those actions while protecting the ability of the considered decision makers and the reviewers to have a dialog that is full and frank.

Chairman FEINGOLD. Well, the previous protocols, I assume, provided that opportunity. For some reason, these new protocols cloak the process in greater secrecy. Can you understand how some people might look at these new rules and think that the Department must be trying to hide something by changing these protocols?

Mr. SABIN. And the Department is here today to say that we are not trying to hide something either from this Subcommittee or the American people. We are just trying to ensure that the debate in the Department is robust and considered and that individual opinions are not chilled as a result of congressional oversight or other factors.

Chairman FEINGOLD. I appreciate that statement. This certainly has nothing to do with you, but we have had a lot of problems with the Department of Justice saying "Trust us" on other issues where there has not been sufficient openness, and it has led to very serious problems, such as the abuses in the area of national security letters. So I think you can see why there might be some concern when things become more closed rather than more open. And I want to ensure that these new rules will not be used to thwart legitimate oversight efforts. Do you agree that they would not cover the type of statistical information that I requested in advance of this hearing and that Congress might request in the future?

Mr. SABIN. We certainly want to provide that transparency as to the statistical information that we have provided to you in response to your questions, and we continue to believe we have the trust of the American people and want to maintain that trust. So—

Chairman FEINGOLD. But these new rules in no way specifically prohibit or stop you from giving me the information I have asked for, correct? The statistical information.

Mr. SABIN. Correct. That is not the intent of the Section 9–10.040. It is to ensure that—

Chairman FEINGOLD. Or any other part of the protocols?

Mr. SABIN. Correct.

Chairman FEINGOLD. Specifically, would Attorney General Reno have been able to issue her 2000 report if these new confidentiality requirements had been in place?

Mr. SABIN. Yes, I believe that that is consistent with what Attorney General Reno had published and what we consider to be in effect today.

Chairman FEINGOLD. OK. I have another—

Mr. SABIN. As of July 1st when the protocol goes into effect.

Chairman FEINGOLD. I am sorry?

Mr. SABIN. And as of next week when the protocol goes into effect on July 1st.

Chairman FEINGOLD. Attorney General Reno could have issued a similar report under the new protocols?

Mr. SABIN. Yes, that is my understanding.

Chairman FEINGOLD. I have another question about the revised capital case protocols. These new protocols appear to delete the longstanding prohibition against seeking or threatening to seek the death penalty "solely for the purpose of obtaining a more desirable negotiating position."

Has the Department changed its policy on this issue?

Mr. SABIN. Absolutely not. The sentence that you are referring to, the portion relating to plea agreements was expanded. The fact relating to prosecutors using the death penalty as some kind of threat or coercive manner is inconsistent with our prosecutorial ethics. And other portions of the U.S. Attorney's manual which prosecutors are bound by, specifically 9–27.00 and going forward, capture that aspect.

Chairman FEINGOLD. Then why was this provision removed from the protocols?

Mr. SABIN. Because it was referenced elsewhere in the U.S. Attorney's manual. It was not as a means to undermine or say that that portion of the ability for prosecutors to use it in any improper means is sanctioned.

Chairman FEINGOLD. Well, I do not like redundancy in Government, but when we are talking about taking away somebody's life, it seems to me a little certainty in keeping this in the protocols makes sense. Wasn't this part of the protocols since they were first written in 1995?

Mr. SABIN. Yes, it was part of it, and I am here today to say that it is not—that point has not been retracted or in any way undermined by the present protocol.

Chairman FEINGOLD. I do not see why it should not be put back in the protocols.

Mr. SABIN. I am sorry?

Chairman FEINGOLD. I do not see why it should not be returned to the protocols, and I am submitting that to you as something to think about.

Mr. SABIN. Yes, sir. Thank you.

Chairman FEINGOLD. It just isn't consistent with what you are saying.

Two Federal judges have argued—one in a law review article and another in an op-ed—that pursuing a capital case takes a great deal of prosecutorial resources, so that bringing a capital case can

mean bringing fewer prosecutions overall. When evaluating whether to decide to seek the death penalty, does the Department consider these additional costs, in actual expenditures and staff, of pursuing a capital case? And is that a factor in the decisionmaking process?

Mr. SABIN. The cost of a criminal prosecution is not a factor as to whether the prosecution should be going forward or not.

Chairman FEINGOLD. Does the Department track the monetary costs of the death penalty in any way?

Mr. SABIN. I am not aware of those numbers being tracked, to my knowledge.

Chairman FEINGOLD. That surprises me. Can you tell me anything about the cost of maintaining the Capital Case Unit or the Internal Review Committee and the other staff who work on the internal DOJ review process?

Mr. SABIN. You mean in terms of their salaries and the amount of—

Chairman FEINGOLD. Overall costs of having that Capital Case Unit or the Internal Review Committee.

Mr. SABIN. I mean, certainly you could compile the individual salaries of the trial attorneys in the Capital Case Unit as a slice of the overall expenditure of what the Department provides for its budget for capital litigation. But I did not understand that to be the nature of the question.

As to an individual matter, what a U.S. Attorney—what the investigatory costs would be by the FBI agent and the like, that is the kind of information we thought that you were questioning whether the Department captures.

Chairman FEINGOLD. Well, I would be interested in both types of information. I think it is relevant to this.

Do you have any sense of what it costs—and this sort of gets to your last answer—an individual U.S. Attorney's Office to pursue capital charges?

Mr. SABIN. Do I, sitting here today? No, I do not.

Chairman FEINGOLD. Do you think the DOJ should track these types of costs so that both DOJ and individual U.S. Attorney's Offices understand what they are doing when they undertake to seek the death penalty?

Mr. SABIN. I believe that we should spend the taxpayers' money wisely. I believe that we should provide full support and resources for the prosecutions as they move forward in order to prove each and every element beyond a reasonable doubt.

To the extent that that information can be captured, we will see if we can compile it. But I am not promising that that information is readily ascertainable.

For example, a U.S. Attorney's Office can submit a request to the Executive Office of United States Attorneys for complex matters if they need additional budget to pursue, you know, a large case, whether it is capital litigation or not capital litigation. So there is a mechanism for providing supplementary funding through the Executive Office.

Chairman FEINGOLD. I think in making the overall decisions on how to most effectively use the Department's limited resources to fight crime, that this cost of seeking the death penalty should be

a factor. It may be not the most important factor, but when you are looking at a series of factors, I would think that these costs would be something the Department should start to consider. And I hope you will take that back to the Department.

Mr. SABIN. Yes, Mr. Chairman, I will.

Chairman FEINGOLD. Let me ask you about a few of the statistics that we were able to extract from the data the Department provided us last week. It appears that one third of the total cases in which the Federal Government sought the death penalty from 2001 to 2006 were the result of the Attorney General overruling a U.S. Attorney's recommendation against seeking the death penalty.

Now, does that percentage seem high to you?

Mr. SABIN. In terms of the overruling, this is my understanding of the relevant statistics. And, again, this is an ongoing process, and we are happy to work with you and other members of the Subcommittee to have an informed understanding of what these numbers mean and what the answers are to your followup questions in regard to that.

But as I understand it, between 1995 and 2000, U.S. Attorney's Offices requested authorization to seek the death penalty for 27 percent of the defendants that were submitted, and that between 2001 and 2006 U.S. Attorney's Offices requested authorization to seek the death penalty for approximately 13 percent—the total number of 1,200, approximately, where 156 requested authorization, or 13 percent.

Between 1995 and 2000, the Attorney General authorized the death penalty for 27 percent of the defendants that were submitted, and then between 2001 and 2006, the Attorney General authorized the death penalty for approximately 13.6 percent of the defendants submitted.

So the percentage of requests and authorization from the Attorney General was the same: 13 percent requested from the U.S. Attorney's Office between 2001 and 2006, and the Attorney General authorizing the death penalty in 13 percent of the matters of total numbers submitted.

In terms of the overrules and the success rate, the numbers, as I understand it, are as follows: Between 1995 and 2000, 43 percent were sentenced to death, 20 of 46 individuals that had been submitted. In 2001 to 2006, 33 percent were sentenced to death—that is, 24 individuals out of the 72 defendants requested—where the Attorney General concurred with the request of the United States Attorney.

In terms of the overrules, between 1995 and 2000, 7.69 percent of the defendants were sentenced to death when the Attorney General overruled the United States Attorney request not to seek, so approximately 7 percent. In the 2001 to 2006 timeframe, 20 percent of the defendants were sentenced to death when the Attorney General overruled the U.S. Attorney's Office request not to seek.

So between the time period of 1995 to 2000, it was approximately 7 percent, where the Attorney General overruled and you had a success rate. And it was 20 percent between 2001 and 2006, and that number is 6 individuals of the 30 that had been within the total pool.

Chairman FEINGOLD. Well, getting back to the question of the greater frequency of the overruling, do I understand you to be saying that because there were less requests for the death penalty percentage-wise, the fact that there was greater overruling of the U.S. Attorneys is something that needs to be factored in? Is that what you were saying?

Mr. SABIN. No, I don't think that is the point I was trying to make. I think the total number has increased from 685 to 1,200—

Chairman FEINGOLD. Total number?

Mr. SABIN. Of defendants that are within the potential for seeking the death penalty, to determine whether to seek or not to seek. So the total number in the pool has increased, but I think the percentages with respect to the overruling the success rate of the past half dozen years is greater than it had been in the preceding years.

Chairman FEINGOLD. But isn't that a separate question from why the Attorney General would be more frequently overruling an initial decision not to seek the death penalty? You are talking about the success rate, but that is not the only issue here.

Mr. SABIN. Correct. That is true.

Chairman FEINGOLD. It was surprising to me that in one out of every three Federal capital cases, the Attorney General had overruled a local recommendation. It is a lot higher than under Attorney General Reno from 1995 to 2000 when overrule cases accounted for 16 percent of cases in which the death was authorized. And let us keep in mind that this Justice Department here is overruling Republican U.S. Attorneys, so this is not just a political matter.

So I am concerned about this. I would like to do some followup questions to further understand these statistics and what you just presented.

Mr. SABIN. We are happy to engage in that dialog regarding the nature and extent and the meaning of those statistics, sir.

Chairman FEINGOLD. Another striking statistic that emerged from that data is the difference in the Department's likelihood of obtaining a death penalty verdict from 2001 to 2006 depending on whether the case resulted from an overrule, which I think you were alluding to. It appears that the Government obtains a death sentence in 33 percent of cases where the Attorney General approved a U.S. Attorney recommendation to seek death, but it then drops to 20 percent—it is actually significantly lower—when the Attorney General overrules a U.S. Attorney recommendation not to seek death.

What is your explanation for that disparity?

Mr. SABIN. These are tough cases, and tough decisions need to be made, and we will continue to evaluate what the information means. But we look at the facts, we look at the law, and apply the appropriate intent factors and the aggravating and mitigating circumstances in order to reach a just determination. These are difficult cases, and juries have to wrestle with the most severe sanctions.

Chairman FEINGOLD. Now, let me suggest that U.S. Attorneys are a lot closer to the people in their area than Federal Government employees at the national level. The fact is that in the last few years a fair amount of skepticism has developed about the

death penalty, and this fact has an impact on how jurors feel about the death penalty. The deference to a U.S. Attorney's judgment about this may affect the success rate because U.S. Attorneys are in a better position in many cases to determine not only the overall feelings of a jurisdiction about the death penalty, but also the likelihood of success.

Mr. SABIN. Certainly it is a critical factor, the position of the line prosecutor and the United States Attorney in a particular community. There should be great respect and understanding of the particular position of those individuals that are most familiar with the facts and circumstances of the individual case, the co-defendants, and the local community. So that is considered as part of the thorough and robust review process. So that consistent with Federal law and the desire to have consistent and uniform application in a nationwide setting, you have that relationship and that dialog, which must be robust and considered, between the field office, where I had served, and headquarters. And you need to make sure that you get that balance and that dynamic correct. I absolutely agree with you in that, sir.

Chairman FEINGOLD. Finally, there is a stark difference between the number of cases in which the Attorney General overruled U.S. Attorney recommendations not to seek the death penalty in 2005 versus 2006. In 2005, he overruled recommendations against the death penalty three times. In 2006, it jumped to 21 times.

Do you know why there was such a large jump?

Mr. SABIN. As I sit here today, I don't know and haven't evaluated the circumstances relating to those numbers, and we can get back to you if there is any reason to draw from them.

Chairman FEINGOLD. I would really appreciate that. I want to thank you for your patience and your responsiveness. It is not an accident that there has not been this kind of oversight for 6 years. Certainly it is obvious. It is because I was not Chairman of the Subcommittee. And as long as I am, there is going to be this kind of oversight.

Mr. SABIN. We welcome the oversight.

Chairman FEINGOLD. I look forward to it, and I appreciate your initial willingness to work with us.

Mr. SABIN. Yes, we absolutely will continue to work with you, sir.

Chairman FEINGOLD. Thank you very much.

[The prepared statement of Mr. Sabin appears as a submission for the record.]

Chairman FEINGOLD. We will go to the next panel. As the second panel comes forward, without objection, I will place some items in the hearing record. These include a 2007 letter from Professor David Baldus at the University of Iowa; a 2006 letter sent by Professor Baldus and several other researchers regarding the Rand study; and a report by the American Civil Liberties Union on racial disparities in the Federal death penalty.

Now that the witnesses have come forward, will you all rise? Please raise your right hand to be sworn. Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CHARLTON. I do.

Mr. SÁNCHEZ RAMOS. I do.
Mr. MULHAUSEN. I do.
Mr. SHELTON. I do.
Mr. OTIS. I do.
Mr. BRUCK. I do.

Chairman FEINGOLD. Thank you very much, and you may be seated. I want to welcome you and thank you for being here this morning. I ask that you each limit your remarks to 5 minutes, as we have a lot to discuss. Your full written statements will, of course, be included in the record. Our second panel begins with Paul Charlton, the former U.S. Attorney for the District of Arizona. Mr. Charlton served as U.S. Attorney from 2001 to January 2007. Before being a U.S. Attorney, he served as an Assistant U.S. Attorney in that office and worked in the Arizona Attorney General's office before that. He currently is in private practice at the law firm of Gallagher & Kennedy.

Mr. Charlton, you may proceed.

STATEMENT OF PAUL K. CHARLTON, FORMER U.S. ATTORNEY, DISTRICT OF ARIZONA, PHOENIX, ARIZONA

Mr. CHARLTON. Chairman Feingold, good morning, and thank you, sir, for the opportunity to speak with you about the death penalty and my experience with its implementation in the District of Arizona while I was the United States Attorney.

As you indicated, I was a career prosecutor before leaving the United States Attorney's Office in January of this year. I loved the job of being a prosecutor. It was a job that every morning gave you the opportunity to get up and know that you were going to do the right thing and every night go to bed with the understanding that you had done something to better society.

I know there are a number of jobs that give people that opportunity, but what makes prosecutors unique is that they have a power and responsibility that goes beyond what other professions have. They have the ability to alter an individual's career or reputation. When it is appropriate, they can take an individual from society and put them in prison for a number of years. But what perhaps is most unique about the profession of prosecution is their ability to seek the ultimate penalty.

In every case, it is important that a prosecutor not only do right but be right. And nowhere is that more important than when a prosecutor seeks to impose the death penalty.

Before a prosecutor seeks to impose the death penalty, a prosecutor should seek the input of all of those with special knowledge and take every factor into consideration. In order to illustrate that, Senator, I would like to talk about a case that I dealt with while United States Attorney, and that is the case of *United States* v. *Rios Rico*, which is currently set for trial.

The facts as alleged by the Government in that case are that a methamphetamine dealer killed his supplier. Now, the majority of the Government's case is based upon the testimony of individuals who have pled guilty in exchange for their testimony. The evidence is sufficient, I believe, that you can go forward in good faith and seek a conviction, and if you obtain a conviction, seek a sentence for a term of years or life.

But what removes this case from the arena of a death penalty case is the lack of forensic evidence. In this case, there is no ballistic evidence. In fact, there is no weapon. There is no DNA upon the defendant that matches the victim. There is no DNA upon the victim that matches the defendant. There are no hair samples. In fact, we do not have the body.

Now, that in and of itself is for me sufficient to remove this case from consideration as a death penalty case because it is not only important to look at the aggravating factors and determine whether or not a case is a death penalty case or not. We should consider the quality of the evidence. And here that quality is lacking.

Now, what underscores that point is this additional fact: We know where the body is. In fact, for the price of between $500,000 and $1 million, we could go get the body. It is currently buried in a landfill in Mobile, Arizona.

When I was United States Attorney, we asked the Department of Justice for those funds to exhume the body. That request was denied. It is inappropriate to seek the death penalty in a case where you can literally put your arms around evidence that will either support your contention that this is an appropriate death penalty case and allow you in good conscience to go forward with that prosecution and seek the death penalty, or perhaps, and just as importantly, show evidence that is inconsistent with the Government's theory of the prosecution.

Now, with this information, we went to the Death Penalty Review Committee and asked them not to recommend that we seek the death penalty. The line assistant who is in charge of this case, who is most fluent with the facts of the case, appeared personally before that committee and argued this point. I submitted a memorandum and argued this point. And we awaited the decision.

Now, under Attorney General Ashcroft, I was notified along every step of the way—from the Review Committee to the Deputy Attorney General to the Attorney General—of their decisionmaking process. But in this instance, I was not. In fact, the first I heard of any inconsistency with my recommendation was a letter from the Attorney General "authorizing" me to seek the death penalty.

I immediately began steps to ask the Attorney General to reconsider that decision. I went to his staff. I went to the staff of the Deputy Attorney General. I went to the Assistant Attorney General in charge of the Criminal Division.

I spoke personally with the Deputy Attorney General, Paul McNulty, and I repeated the facts in greater detail than I have here about why it is I did not believe that this was a death penalty case.

Mr. McNulty then went to the Attorney General. The facts as then reported to me by his chief of staff, Mr. Elston, were these: Mr. Elston indicated that he wanted me to be aware of two important factors, that Paul McNulty had personally instructed Elston to make me aware of two facts: First, that McNulty and the Attorney General had spent a significant amount of time, perhaps as much as 5 to 10 minutes, on this issue discussing it. The second issue that he wanted me to be aware of was that Paul McNulty had remained completely neutral on whether or not the death penalty should be imposed or not.

Chairman FEINGOLD. I am going to have to ask you to conclude soon.

Mr. CHARLTON. I am sorry?

Chairman FEINGOLD. I am going to have to ask you to conclude soon.

Mr. CHARLTON. All right. My point is this, Senator: Before we seek to impose the death penalty, we need to consider the opinions of the line assistants. You need to consider the opinion of the United States Attorney. You need to consider the quality of the evidence that is involved. You cannot afford to be wrong in a death penalty case, because the ultimate decision in this case can never be corrected.

[The prepared statement of Mr. Charlton appears as a submission for the record.]

Chairman FEINGOLD. I thank you for your very interesting testimony.

Our next witness is Puerto Rico's Secretary of Justice, Roberto Sánchez Ramos, who is here today on behalf of the Governor of Puerto Rico. Secretary Sánchez Ramos has worked in the Department of Justice Civil Division and the Office of the Solicitor General for Puerto Rico. He holds degrees from MIT, the University of Puerto Rico, and Yale Law School.

Secretary, thank you for joining us, and you may begin.

STATEMENT OF HON. ROBERTO J. SÁNCHEZ RAMOS, SECRETARY OF JUSTICE, COMMONWEALTH OF PUERTO RICO, SAN JUAN, PUERTO RICO

Mr. SÁNCHEZ RAMOS. Good morning, Chairman Feingold. I am appearing on behalf of our Governor, Hon. Anibal Acevedo Vila, to express our view that the death penalty should be abandoned as punishment for Federal offenses or, at the very least, that Congress should establish a rule of deference barring the imposition of this penalty within jurisdictions, such as Puerto Rico, that do not allow it locally.

Puerto Rico's special relationship with the United States, our constitutional prohibition of capital punishment, and lack of local consent to the Federal law authorizing the imposition of this most extreme of penalties raises profound questions as to the legitimacy and wisdom of seeking such punishment in Puerto Rico.

The Commonwealth favors the total elimination of death as a form of punishment. As a democratic and developed society, we should demonstrate an absolute respect for human life, even for the life of a murderer. I believe that an overwhelming majority of Americans would strongly disapprove implementing the state-sanctioned torture of a torturer or rape of a rapist as forms of punishment. I see no reason why the moral calculus should vary when considering the state-sanctioned killing of a killer.

In addition, the uniqueness of death as punishment, in that it is irrevocable, should give any government pause. The possibility of mistakes in the application of the death penalty is not theoretical; in fact, the evidence suggests it is not even remote. In this sense, it is worth noting that at least 14 inmates exonerated by DNA testing were at one time sentenced to death.

Short of completely eliminating death as punishment, Congress should at least reconsider whether the value of public policy uniformity at the Federal level is outweighed in this instance by significant political, social, and cultural differences, as well as by the problems and risks associated with the pursuit of the death penalty in jurisdictions that are opposed to it.

The very non-existence of death as punishment in some jurisdictions makes it very difficult to validate a uniform process for all capital punishment cases. For example, defendants in jurisdictions without local capital punishment confront a greater challenge in obtaining proper legal representation by experienced lawyers.

In Puerto Rico, this matter is aggravated by the fact that most of the population does not speak English fluently, which could affect the quality of representation that counsel from another jurisdiction may be able to provide.

It should be clear that the majority of Puerto Rico's population firmly opposes the death penalty. No execution has taken place in Puerto Rico since 1927, and our Constitution, ratified by the U.S. Congress in 1952, specifically prohibits capital punishment.

The application of the Federal death penalty in Puerto Rico stands against our highest social, cultural, political, moral, and religious values, and such application violates the balance of power and comity that the people of Puerto Rico envision as transcendental to their relationship with the United States.

To disregard this political reality, independently of strictly legal considerations, carries the risk of inviting the erosion of the important and mutually beneficial relationship between our peoples.

It is also interesting to note that in defending its policy on capital punishment before the United Nations, the United States has relied on an argument based on the political representation that the people subject to such penalty have in Congress. However, Puerto Rico has an extremely limited participation in the Federal decisionmaking process. Therefore, the idea that our democracy has a self-correcting ability—that general dissatisfaction with Federal legislation will be channeled through the ballot box—does not apply to Puerto Rico.

Furthermore, the unique cultural and social particularities of Puerto Rico present significant obstacles for the fair imposition of the death penalty in our island.

First, as mentioned before, the use of English in all U.S. district courts, including Puerto Rico, negatively affects the quality of legal representation.

Second, because a jury determines whether death will be imposed, it is critically important to ensure that the juries constitute a fair and representative cross-section of the defendants' peers. However, an estimated 75 percent of the Puerto Rican population is automatically disqualified from serving as jurors on a Federal capital case because they are not proficient in the English language. When the situation regarding language is combined with the fact that many of the remaining potential jurors may be disqualified on account of their moral opposition to the death penalty, the jury selection process for Federal capital cases in Puerto Rico will rarely result in the selection of a true cross-section of the de-

fendants' peers. Of course, this raises troubling issues of constitutional law and basic fairness.

For all these reasons, Puerto Rico respectfully demands that this Congress intervene to restore the balance, mutual respect, and comity that the people of Puerto Rico envision as a fundamental part of their relationship with the United States. Puerto Rico's longstanding prohibition of the death penalty, which is deeply rooted in its values and traditions, and the extraordinary political process from which it evolved, entitles our people to such consideration. I urge you to consider and pass legislation which would eliminate the possibility of the ultimate penalty of death being imposed in Puerto Rico.

Finally, I wish to extend the people of Puerto Rico's gratitude for allowing me to testify before you regarding an issue of such import and consequence.

Thank you.

[The prepared statement of Mr. Sánchez Ramos appears as a submission for the record.]

Chairman FEINGOLD. Mr. Secretary, I am very pleased you are here, and I agree with your statement about a jurisdiction that does not have the death penalty. I admire the judgment of the people in Puerto Rico on this, and my State, a long way away in a very different climate, made the judgment in the 1850s, after the public was reviled by a public execution, to not have the death penalty in Wisconsin. We have not had a single execution since. It is one of the longest jurisdictions to have this in American history. And I think we feel the same way about the Federal Government overriding that judgment, the considered and continuous judgment of the people of my State.

Our next witness is David Mulhausen. He is a senior policy analyst at the Heritage Foundation Center for Data Analysis. Previously, Mr. Mulhausen worked for the Senate Judiciary Committee on crime and juvenile justice policy. Mr. Mulhausen earned a Ph.D. from the University of Maryland and a B.A. from Frostburg State University.

Mr. Mulhausen, thank you for joining us, and you may proceed.

STATEMENT OF DAVID B. MULHAUSEN, SENIOR POLICY ANALYST, CENTER FOR DATA ANALYSIS, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. MULHAUSEN. My name is David Mulhausen. I am a Senior Policy Analyst in the Center for Data Analysis at the Heritage Foundation. I thank Chairman Russell Feingold and the rest of the Subcommittee for the opportunity to testify today. The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

While opponents of capital punishment have been very vocal in their opposition, a recent Gallup opinion poll found that 67 percent of Americans favor the death penalty for those convicted of murder, while only 28 percent are opposed.

Despite strong public support for capital punishment, Federal, State, and local officials must continually ensure that its implementation rigorously upholds constitutional protections, such as due process and equal protection of the law. However, the criminal

process should not be abused to prevent the lawful imposition of the death penalty in appropriate capital cases.

As of December 2005, there were 37 prisoners under a sentence of death in the Federal system. Of these prisoners, 43 percent were white, while 54 percent were African-American. The fact that African-Americans are a majority of Federal prisoners on death row and a minority in the overall United States population may lead some to conclude that the Federal system discriminates against African-Americans. However, there is little rigorous evidence that discrimination exists in the Federal system.

To review the Federal death penalty process, the National Institute of Justice awarded the Rand Corporation a grant to determine whether racial disparities exist in the Federal system. The resulting 2006 Rand study set out to determine what factors, including the defendant's race, victim's race, and crime characteristics, affect the decision to seek a death penalty case. To accomplish this mission, three independent research teams were tasked with developing their own methodologies to analyze the data.

When first looking at the raw data without controlling for case characteristics, Rand found that the decision to seek the death penalty is more likely to occur when the defendants are white and when the victims are white. However, these disparities disappeared in each of the three studies when the seriousness of the crimes was taken into account.

The Rand study concludes that the decisions to seek the death penalty are driven by characteristics of crimes rather than by race. Rand's findings are very compelling because three independent research teams, using the same data but different methodologies, reached the same conclusions.

In recent years, a growing number of sophisticated studies having consistently found that capital punishment saves lives, Federal, State, and local officials need to recognize this benefit. Three studies of professors at Emory University support the deterrent effect. The study found that each execution, on average, results in 18 fewer murders. The second study found that implementation of State moratoria is associated with increased incidence of murders. A third study found that each execution prevents three murders and shorter waits on death row reduce murders as well.

Studies by professors at the University of Colorado at Denver found that each additional execution deters five murders. In addition, each additional commutation resulted in five additional murders. And removal from death row by a court resulted in one additional murder.

In summary, Americans support capital punishment for two good reasons: first, there is little evidence to suggest that minorities are treated unfairly; and, second, recent studies have confirmed what we learned decades ago: capital punishment does, in fact, save lives. Each additional execution appears to deter between 3 and 18 murders.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Mulhausen appears as a submission for the record.]

Chairman FEINGOLD. The Chairman of the full Committee, Senator Leahy, has just arrived, and he has asked that we hear from

the next witness, and then he will speak. And I want to thank Dr. Mulhausen for his testimony.

Our next witness is Hilary Shelton, the Director of the NAACP's Washington Bureau. Mr. Shelton runs the NAACP's Legislative and Public Policy Advocacy Office and has a very long and distinguished record of advocating for civil rights.

Thank you for joining us, and the floor is yours.

STATEMENT OF HILARY O. SHELTON, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE [NAACP], WASHINGTON, D.C.

Mr. SHELTON. Thank you and good morning. As you mentioned, my name is Hilary Shelton. I am Director of the NAACP's Federal legislative and national public policy arm of the Nation's oldest, largest, and most widely recognized grassroots-based civil rights organization, with 2,200 membership units, and units literally in every State throughout the United States.

After 98 years of fighting for full civil rights protections for all Americans, the NAACP remains resolutely opposed to the death penalty, and as such I would like to offer our sincere thanks to the Chairman, Senator Feingold, and Senator Leahy for their great work on these issues and for their unflinching efforts to end this discriminatory and immoral practice at the Federal level. You are indeed our champion and an inspiration to all on this issue. Thank you, sir.

The Government's claim to a moral authority to exact the ultimate punishment is based on the belief that the punishment will be administered fairly and evenhandedly. But even a cursory review of the death penalty at both the Federal and State levels indicate this is false.

From the days of slavery through the years of lynchings and Jim Crow laws, to even today, capital punishment has always been deeply affected by race. This is true among the States as well as at the Federal level. Despite the fact that African-Americans make up only approximately 13 percent of our Nation's population, almost 50 percent of those who currently sit on the Federal death row are African-American. And even though only three people have been executed under the Federal death penalty in the modern era, two of them have been racial and ethnic minorities. Furthermore, all six of the next scheduled executions are African-American.

The race of the victim also appears to play a role in the implementation of the Federal death penalty. According to the report just released by the ACLU's Capital Punishment Project, under the tenure of the last three Attorneys General, the death penalty was sought in 35 percent of the cases when the victim was white compared to 19 percent of the cases when the victim was a person of color. This means that the risk of Federal death penalty authorization is 1.8 times higher in the white victims' cases than racial and ethnic minority cases.

This disturbing trend is mirrored in the States. Across the Nation, about 80 percent of the victims in the underlying murder and death penalty cases are white, while less than 50 percent of murder victims overall are white. This statistic implies that white lives

are valued more than those of racial and ethnic minorities in our criminal justice system.

Finally, the NAACP is deeply concerned about the implications demonstrated when reviewing the data surrounding the numbers of people who have been exonerated since being placed on death row. Since 1973, over 120 people have been released from State death rows with evidence of their innocence. When administered, the death penalty is the ultimate punishment, one that is impossible to reverse in light of new evidence.

The American criminal justice system has been historically, and remains today, deeply and disparately impacted by race. It is difficult for African-Americans to have confidence in or be willing to work with an institution that is fraught with racial disparity. And the fact that African-Americans are so over represented on death row is alarming and disturbing, and certainly a critical element that leads to the distrust that exists in the African-American community of our Nation's criminal justice system.

It bears repeating that 49 percent of all the people, or almost half of all those currently sitting on the Federal death row, are African-American. Perhaps more disturbing is the fact that nobody at the Department of Justice can conclusively say that race is not a factor in determining which defendants are to be tried in Federal death penalty cases.

According to DOJ's own figures, 48 percent of the defendants in Federal cases in which the death penalty was sought between 2001 and 2006 were African-American.

What we don't know, unfortunately, is whether or not this number is representative of the number of criminal defendants who are accused of crimes in which the death penalty may be sought. And since there are several layers that must be examined to even begin to assess this data, including whether a crime is tried at the local or Federal level, it is not an easy statistic to attain.

What is clear, though, is that at several different points in the process of determining who is tried in a Federal death penalty case and who is not, a judgment is made by human beings in a process in which not everyone has similar views. This is born out in a new ACLU study which found that a far greater percentage of white defendants were able to avoid the death penalty through plea bargains, which can be attributed to the exercise of Federal prosecutorial discretion. This concern is mirrored at the State level where 98 percent of the chief district attorneys in death penalty cases are white and only 1 percent is African-American.

In addition to the factor of the race of the defendants, the NAACP is also deeply troubled by the role played in the race of the victim. Although at the Federal level the weight of the victim's race appears to have changed over the last few years, at the state level the race of the victim still appears to play a big role. According to the Death Penalty Information Center, 79 percent of the murder victims in cases resulting in an execution were white, even though nationally only 50 percent of murder victims overall were white. A recent study in California found that those who killed whites were over 3 times more likely to be sentenced to death than those who killed African-Americans and more than 4 times more likely than those who killed Latinos. Another study in North Carolina found

that the odds of receiving a death penalty sentence rose by 3.5 times among defendants whose victims were indeed white.

These studies, along with the fluctuations we see in all death penalty jurisdictions including the Federal Government, speak again to the varying factors involved in determining who is eligible for the death penalty and who is not. The overwhelming evidence that a defendant is more likely to be executed if the victim is white is also incredibly problematic; it again sends a message that in our criminal justice system, white lives are more valuable than those of racial or ethnic minorities.

Obviously with race being so problematic and such an overwhelming factor in the application of the death penalty, the NAACP is also concerned that there is no room for error. Yet errors do occur even today. Nationally, more than 120 people have been exonerated and freed from death row before they could be executed. Given the finality of the death sentence under which these people were living, they may, in fact, be considered the "lucky ones." Furthermore, considering the disparities in the number of African-Americans on death row, it is likely that more African-Americans are erroneously executed, a fact that once again contributes to the mistrust that is endemic among African-American communities of the American criminal justice system.

There are several other very valid arguments against the death penalty that I will mention but not elaborate on now. The death penalty is not a cost-effective punishment. A 2005 study showed that in California, taxpayers paid $114 million per year beyond the costs of keeping convicts locked up for life; taxpayers have paid more than $250 million for each of the State's executions.

With that, I want to thank you very much for the opportunity to speak with you today, and I look forward to your questions.

[The prepared statement of Mr. Shelton appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Shelton, for your testimony and for your tremendous leadership in this area.

I am just delighted that the Chairman of the full Committee is here. I am delighted he is here; I am delighted he is Chairman. And most importantly today, I hope everyone understands the enormous role that the Chairman has played, long before I got here and since I have been here, on principled questioning in opposition to the death penalty not only at the Federal level but throughout the country. We have worked hand in glove on this issue, and I am grateful to him for his tremendous efforts over the years on this issue.

Mr. Chairman.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Well, thank you. And I thank Senator Feingold for that because he has taken the same, I believe, principled stands, often difficult in political years, election years, but we both feel strongly about this.

I recall, Mr. Shelton, the first time I ran for the Senate. Even though Vermont does not have a death penalty, the polls showed that about 85 percent of the people prefer it. My opponent said in

the debate, "How can you possibly oppose the death penalty?" I said, "How many murder scenes have you gone to? How many murderers have you convicted? Let me tell you about some of the murderers I have convicted. Let me tell you about some of the murder scenes I have been to as a prosecutor."

It probably did not answer the basic question, but I wanted to make sure he understood that I speak from some real experience. Like Mr. Charlton, who is a prosecutor, you speak from real experience.

I think what Senator Feingold is doing is bringing about this oversight that is long overdue. This Committee should have been having oversight hearings on this a great deal more, and I am glad that this year now with Senator Feingold chairing one of the major Subcommittees that we have it.

Seven years ago, I came to the Senate floor, and I called attention to a national crisis in the administration of capital punishment. I noted that since the reinstatement of capital punishment in the 1970s, 85 people—now this was 7 years ago; 85 people had been found innocent and released from death row. Now, this tells you not only did you have the wrong person on death row who in some instances came within days of being executed, but it gave everybody a false sense of security. Some of these were serial murderers. They lock up the wrong person, everybody says, "Boy, are we safe. We put the guy away." That means the murderer is still out there and you are not safe.

I talked with one man who was convicted, Kirk Bloodsworth. I got to know him very well. I think, Mr. Shelton, you know him. I talked with him yesterday. It was his wedding anniversary. It was also a couple days after the 14th anniversary of being released. It was a heinous crime. I will not go into it here. He was accused of a heinous crime, declared his innocence. They would not even let him out of—he was on death row. They would not let him out of jail even to go to his mother's funeral. And it turned out, oops, sorry, we should have checked that DNA that they kept asking them to check. They had the wrong person. Actually, the right person then confessed to the crime. It is hard to bring back those years when you sit there wondering if you are going to get executed.

At that time, 7 years ago, I introduced the Innocence Protection Act of 2000. I worked for many years with others until its passage as part of the Justice For All Act of 2004. And we had a number of people join in it, both Republicans and Democrats, especially many people that had been former prosecutors. The legislation made key strides in ensuring that capital defendants had access to DNA testing and to effective counsel. You need both. DNA testing is not worth an awful lot unless you have effective counsel, and that greatly reduces the chance of innocent people being sentenced to death. It does not eliminate it; it reduces it.

But, you know, since that time, like in so many other areas, the Bush administration has proceeded on its own path, and they have done it in secrecy. Surprise, surprise. I was struck by the testimony today—and I read your testimony today, Mr. Charlton, and I was getting briefed in the back room—you notice the people around me—about your testimony. He reported that he vigorously opposed

seeking the death penalty in one case with no forensic evidence, but that his opposition was dismissed without any opportunity for him to discuss the matter with the Attorney General. Even more troubling, as Deputy Attorney General McNulty's chief of staff Michael Elston told Mr. Charlton at the time, Mr. McNulty and Attorney General Gonzales had spent considerable time on this issue, maybe 5 to 10 minutes—5 to 10 minutes to decide whether somebody might end up with the death penalty.

That is not sufficient to make a careful decision about whether to seek to execute a person in what was a difficult case, one where the evidence was very questionable.

But I worry that the Attorney General and the Deputy Attorney General may also have taken no more than 5 or 10 minutes in deciding to accept the recommendation from the political arms of the White House or elsewhere that Mr. Charlton be fired in spite of his courageous and diligent service.

I am reminded, Secretary Sánchez Ramos, you have spoken of the same thing in Puerto Rico where you do not have a death penalty and being told you are going to have to have the death penalty in Federal cases. We had a similar thing in Vermont. A case where a carjacking ended tragically, the person crossed State lines so it is now in Federal court in Vermont, which does not have a death penalty. The U.S. Attorney, a highly qualified U.S. Attorney, sought and got a plea agreement, an ironclad plea agreement, where the person would get life with no chance of parole. And the court, a very good judge, was going to make sure it was going to be ironclad.

But no, after one of those 4-minute, 5-minute phone calls from the Attorney General, we have got to have a death penalty. We will show those people in Vermont for not having a death penalty on the books. We will fix them. We will have a death penalty on this one. Instead of having a plea bargain, going to prison for life, with no chance of parole, we will spend millions of dollars both in the prosecution and defense in this case, and who knows where we will end up? But we will make a point.

This, incidentally, was the same Justice Department when we asked them to put people after 9/11 to investigate the shipping containers, the ships coming into the port in New Orleans because of the possibility if they had a bomb and they exploded it—this is before Katrina—and it blew out the dikes, a lot of people could be killed. They did not have any people for that, but they spent a fortune for the prosecution by the Department of Justice and an investigation. And you know what they found? This is going to be very shocking. If you shock easily, please cover your ears. But they found two houses of ill repute in New Orleans.

Now, I was shocked to even hear there were such things in New Orleans. I did suggest to the Attorney General that he probably could have had somebody do what one of our staff did: get out the Yellow Pages phone book in New Orleans. They advertised. They did not have to spend millions of dollars doing that. But it just shows the priorities.

That in a way is almost humorous because of what happened, but what is not humorous is that the leadership of the Department of Justice has kept its decisionmaking on these life-or-death issues

quiet. They have kept them out of the light of day. They made sure that people do not know about it. They have done things like in Puerto Rico, which does not have a death penalty, they have basically imposed one in these private meetings, as they did in Vermont.

So it is time to shine some light on it, and I cannot commend the Senator from Wisconsin enough for doing just that. I thank him for that.

Chairman FEINGOLD. Well, again, thank you very much, Mr. Chairman, for your comments and for your participation in this. I am looking forward to working with you on this issue.

Our next witness is William G. Otis. Mr. Otis is an adjunct professor at George Mason School of Law. Previously, he has served as counselor to the DEA Administrator, as an Assistant U.S. Attorney, and as an attorney in the Criminal Division of the Justice Department.

Mr. Otis, thank you for joining us, and you may begin your testimony.

STATEMENT OF WILLIAM G. OTIS, FORMER CHIEF, APPELLATE DIVISION, U.S. ATTORNEY'S OFFICE, EASTERN DISTRICT OF VIRGINIA, FALLS CHURCH, VIRGINIA

Mr. OTIS. Mr. Chairman, thank you for inviting me to testify about issues relevant to the proposed Federal Death Penalty Abolition Act. Like the great majority of our citizens, I support keeping the death penalty for particularly gruesome and heinous murders. At the same time, Mr. Chairman, I want to thank you for your principled and forthright stand. You do not seek to disguise your views behind what some market as a death penalty "moratorium," but what is actually intended for the most part to be simply the first phase of wholesale abolition. You support abolition, as you said at the outset of this hearing. This makes an honest debate possible.

Today's discussion of the death penalty cannot be divorced from the broader national debate about capital punishment. Indeed, if anything, the Federal Government's death penalty procedures are more detailed and painstaking than those of most other jurisdictions. So if the Federal death penalty were to be abolished, it is difficult to see why capital punishment should exist anywhere in the country.

But it should, in Federal law as elsewhere. The central reason for opposing abolition of the death penalty is that it is a one-size-fits-all proposition. It would tie the sentencing jury's hands by intentionally turning a blind eye to the facts of the case before it, no matter how horrible the crime, how sinister the killer, how many the victims, or how grotesque their fate. Yet more remarkably, it would tie the jury's hand even where the typical objections to the death penalty, including those that inspire this hearing, have no application.

If the proposed legislation had been the law 10 years ago, for example, Timothy McVeigh would be with us today. Presumably he would still be seeking a national audience like the one he got on "60 Minutes" to explain why he was justified in murdering 168 of

his fellow creatures, including 19 toddlers in the daycare center at the Murrah Building.

It would be wrong to prohibit our juries—the conscience of our communities—from imposing the death penalty on a person like McVeigh, and to enforce this prohibition on the basis of issues that might arise in some cases some of the time, but that often will have nothing to do with the case at hand, would be incomprehensible. This was aptly explained by none other than Barry Scheck, the head of the Innocence Project, who told the Washington Post that, "in McVeigh's case, 'there's no fairness issue. . . There's no innocence issue. Millions of dollars were spent on his defense. You look at all the issues that normally raise concern about death penalty cases, and not one of them is present in this case, period.'" Mr. Scheck might have added explicitly what was implicit in his remarks, namely, that there was no racial issue either, a fact no serious person disputes. But today's proposed bill would have prevented McVeigh's execution, or the execution of others like him, notwithstanding the fact that the stated reasons for the bill, racial and otherwise, were irrelevant to his case, and will be irrelevant to dozens if not hundreds of future cases.

Now, some will say it is unfair in the context of this hearing to use McVeigh as an example, but that is not so. There is nothing "unfair" in discussing at a hearing about the death penalty one compelling illustration of why we should keep it. Beyond that, McVeigh is fairly representative. Over the last 50 years, two-thirds of those executed by the Federal Government have been, like McVeigh, white men. This largely mirrors the national experience: Since the death penalty was reinstated by the Supreme Court in 1976, nearly three-fifths of executed criminals have been white.

We speak this morning against the backdrop of a savage campaign of global terror, from Madrid to London to New York and Arlington right across the river. If today's proposed legislation becomes law, the Federal Government's ability merely to ask a jury to consider the death penalty for terrorists will cease to exist, even if Osama bin Laden himself is in the dock. Millions of Americans would consider that an outrage, and a huge majority would consider it unjust. It is noteworthy that a majority of even those who generally oppose the death penalty thought it was appropriate for our domestic terrorist, Timothy McVeigh. All told, slightly more than 80 percent of the public thought the death penalty was right in that case. This bill would tell that 80 percent majority that, unbeknownst to them, their views are the accomplice of racism. But that is not true, and it is not the American public I came to know in my years as a prosecutor. We are a fair-minded and conscientious people. When the moral compass of 80 percent of our fellow citizens says that the death penalty should be imposed, as it did for McVeigh and will for Osama and others, it is not for Congress to tell them that their sense of justice doesn't count.

To preserve our country's heritage that justice must turn on the facts of each case individually considered, I respectfully submit that Federal juries should continue to have discretion, acting out of conscience in egregious cases, to impose the death penalty.

Thank you.

[The prepared statement of Mr. Otis appears as a submission for the record.]

Chairman FEINGOLD. Well, thank you, Mr. Otis. I appreciate your being here. I am confused by your testimony. I could not have been more clear that this was not a hearing about any piece of legislation, and I assume you were listening. This is a hearing about congressional oversight of the Federal death penalty, and if this Committee is not going to be doing the oversight of the Federal death penalty, I don't know who is. So, yes, I do believe in certain pieces of legislation, but there are many who support the death penalty who share our concern about how the Federal death penalty is administered. But, again, I do thank you for being here.

Our final witness is David Bruck—

Chairman LEAHY. Could I add, Mr. Chairman, that Mr. Otis is a very well trained lawyer and all that, but we had enough red herrings thrown out by his testimony, we should probably all be getting a fishing license here. But the fact of the matter is not legislation. It is talking about the application of the Federal law enforcement and the utilization of the death penalty, and the facts are incontrovertible that we have had many, many people on death row who were innocent, who were there because there was not adequate counsel, there was not adequate evidence made available to them, exonerating evidence. And I would hope that everybody, whether they are for or against the death penalty, would feel that if somebody is being charged with a capital crime, that they would at least have the ability to see the evidence, all the evidence, that evidence would not be withheld, and that we not make a mistake.

We do know from the number that have been released that there is an extremely high probability that innocent people have been executed. I would also hope that everybody, whether they are for or against the death penalty, would not condone having innocent people executed.

Chairman FEINGOLD. Thank you, Mr. Chairman.

Our final witness is David Bruck, a Federal death penalty resource counsel to the Federal defender system, and clinical professor of law at Washington & Lee. A death penalty litigator since 1980, Mr. Bruck has represented capital defendants in some 20 cases, argued seven death penalty cases before the Supreme Court, and handled over 60 appeals in the State and lower Federal courts.

Mr. Bruck, thank you for joining us, and you may begin.

STATEMENT OF DAVID I. BRUCK, ESQ., FEDERAL DEATH PENALTY RESOURCE COUNSEL DIRECTOR, VIRGINIA CAPITAL CASE CLEARINGHOUSE, WASHINGTON & LEE SCHOOL OF LAW, LEXINGTON, VIRGINIA

Mr. BRUCK. Well, thank you, and thank you so much, Senator Feingold, for this hearing, which is long overdue. George Will has reminded conservatives, "The death penalty is a Government program, so skepticism is in order." And I dare say oversight is also in order.

We have seen a modest push to increase the reach of the Federal death penalty since this Committee last had the opportunity for oversight hearings. But even if success were judged by the number of extra death sentences that have resulted, it has been a failure.

Mr. Sabin says the Justice Department keeps no track of the financial cost, but we have just heard from Mr. Charlton and from General Sánchez Ramos of some of the unquantifiable moral costs of this attempt to nationalize capital punishment, irrespective of the judgment of local prosecutors or the considered judgment of the people may be.

To put all this in perspective: at least a couple of the witnesses seem to be debating the death penalty as such. Only 3.2 percent of all the death sentences imposed between 2001 and 2005 have been in the Federal system. Now, that is an increase from 1.4 percent in the last 5 years of the Clinton administration; that is, the Federal Government accounted for less than 1.5 percent of all the death sentences imposed in the country. But even that does not show that the Federal Government has been having more success. What it actually reflects is the fact that the number of death sentences in the country as a whole has dropped by more than half. As the country is beginning to reject this punishment, are seeing a last surge, if you will, from the Department of Justice under Attorney General Ashcroft and Attorney General Gonzales.

Washington's intervention has resulted in an average of one extra Federal death sentence a year. That is to say, of the 30 cases in which this Administration has forced U.S. Attorneys to seek the death penalty when they did not want to and which actually went to trial, the failure rate is 80 percent. Only six new death sentences are what we have to show for it, along with all of the unreckoned costs, and all of the division and all of the problems that are front and center in this hearing.

I would like to say a couple of things about the revised protocol. Mr. Sabin seemed very modest about it. The details of the changes to the protocol were not even referred to in his prepared testimony, and it seems that but for your efforts, Mr. Chairman, that protocol would not have been disclosed until these hearings were over.

The changes are striking. They basically attempt to create an airtight regime of secrecy over the entire deliberative process, so that prosecutions in Mr. Charlton's position could be fired not merely for daring to disagree with the Attorney General, but for telling anybody that they did so.

The secrecy provisions in this protocol even extend within the Government. It not only prohibits telling the public, but creates a "need-to-know" restriction on disussing who recommended and who disagreed with whom in this process. And if you violate that, you have violated this new Department regulation. This is not openness. This is going in the wrong direction.

The new protocol also intensifies to the level of micro management the Attorney General's personal authority to implement a one-size-fits-all, Washington-knows-best approach to the Federal death penalty. It even requires a local U.S. Attorney to get the personal approval of the Attorney General before the Government is allowed to waive jury and allow capital sentencing by a Federal district judge.

Then the protocol says over and over again that the point of this tremendously centralized structure is to achieve nationwide uniformity. It is time to look at that, Mr. Chairman. This is not a goal that is achievable, and even if it was, it is not a goal in keeping

with our Federal system or with our Nation's values. The Sixth Amendment provides that the accused gets a jury of the vicinage, not one drawn from a venue chosen by Washington. There is also a grand jury requirement in the Fifth Amendment which allows charging decisions be evaluated by a local grand jury. The Framers believed that the power over life or death vested in the Federal Government should be moderated by local conditions and local views. And it is not written in stone—indeed, it does not even really make much constitutional sense—that a single appointed official in Washington far, from the reach of local control and local petition, should be the one to make these life-or-death decisions without regard to local experience and local wisdom.

It is time for a tamping down of this nationwide bureaucratic death-selection system which has grown up in the last 6 years. And I certainly hope that this Committee will help to lead this administration in a more rational and cost-effective direction in the administration of the Federal death penalty.

Thank you.

[The prepared statement of Mr. Bruck appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Mr. Bruck, and thank you to all the members of the panel. In a minute we will begin with questions, but I understand that Congressman Lungren has asked that his statement be placed in the record of this hearing. Without objection, that will be done.

Mr. Charlton, DOJ responded in writing last week to a question I asked about the internal process for evaluating possible death penalty cases. Here is what it said: "The review process permits and encourages communication between the U.S. Attorney's Office and the reviewing officials within the Department." It then recites a variety of contacts that might occur between a U.S. Attorney's Office and Main Justice during consideration of death-eligible cases, and suggests that there is an ample opportunity for robust debate throughout the process.

As a general matter, is it your view that that is an accurate portrayal of the Justice Department review process?

Mr. CHARLTON. Senator, under Attorney General Ashcroft, that was my experience. On at least two occasions, I had just that experience where we spoke at every different level and debated whether or not the death penalty should be approved or not. But under Attorney General Gonzales and with the Rios Rico case, that was not my experience for the reasons that I stated earlier.

Chairman FEINGOLD. Well, when Attorney General Gonzales testified before the Judiciary Committee earlier this year, he testified that you were asked to step down at least in part because of "his poor judgment in pushing for a recommendation on a death penalty case." He specifically said that you came back to him 2 months after he had authorized the death penalty and asked him to reconsider.

I would like to give you a chance to respond to that.

Mr. CHARLTON. Well, that was this case, and I am fully satisfied that it was appropriate to seek the opportunity to visit with him personally about this issue.

No decision is more important for a prosecutor, as I have said earlier, than whether or not to seek the death penalty, and that same truth holds for the Attorney General. I can think of nothing else in the Attorney General's day-to-day life, in his professional life, that would be more important than whether or not to intentionally and methodically take another person's life. And he ought to give the U.S. Attorney who oversees that office the opportunity to visit with him personally.

There has been some discussion here about the financial costs that are involved, but, Senator, I would like to very briefly talk about other costs—costs that may be even more important than money. When you go forward with a death penalty prosecution, you are telling jurors, you are telling the jurists, you are telling opposing counsel that we think this is an important enough case to take another person's life. If, in fact, it is not, if, in fact, it is not an appropriate case for the death penalty, then you are spending your credibility. You are losing credibility. And it is not the Attorney General who is losing credibility alone. It is those prosecutors who have to stand before the jury. It is the United States Attorney's Office that those prosecutors represent. And that credibility is everything, as you know, Senator. And that is a loss that you cannot afford as well.

Chairman FEINGOLD. Thank you. Just an editorial. Obviously, I prefer Democrat Attorney Generals, but there is mounting evidence at these Judiciary Committee hearings that all Republican Attorney Generals are not the same. It is really quite a striking distinction in many instances that we have witnessed.

Mr. Bruck, does the sort of transparency provided by former Attorney General Janet Reno's detailed report in 2000 in any way compromise or undermine the fair and just implementation of the Federal death penalty?

Mr. BRUCK. No. No one has ever suggested that any case was affected by her unprompted decision to throw sunlight on what the Department had been doing. And it is astounding to me that not only did the public not know the tally sheet of the last 6 years, but we have learned from Mr. Sabin today that until you made the request of the Department of Justice, they did not know either. So how could the Department be making intelligent assessments themselves of whether this wheel-spinning, and almost totally ineffective practice of overruling U.S. Attorneys and forcing them to seek the death penalty was being effective when the Department did not even know the numbers.

I would also like to correct one statistic of Mr. Sabin's. He said that the the death-sentencing rate in "overrule" cases under this administration was higher than under Attorney General Reno, because only 7 percent of cases where she required the death penalty to be sought ended in death sentences. The implication was that she was making even worse judgments than the current administration. That is misleading, because what he failed to point out is that under the Clinton administration, U.S. Attorneys retained the discretion to plead cases out, without the approval of the Attorney General even after the death penalty was authorized. That safety valve was cut off in the 2001 regulations. Starting in 2001, the system became like the case in Vermont that Chairman Leahy de-

scribed in Vermont where plea bargains had to be approved by the Attorney General and often were not.

So the fact is that of the "overrule" cases under the Clinton administration, almost none of them ever ultimately went to trial. And that is why the death-sentence rate was only 7 percent, not because she was making poor decisions.

Chairman FEINGOLD. Thank you for that.

And, Mr. Charlton, as a former Federal prosecutor, do you think that this transparency has undermined your work in any way?

Mr. CHARLTON. I cannot think of a reason why it is that transparency would not be beneficial. In running my own office, when we made decisions about whether or not to go forward with a case, whether or not to recommend the death penalty, whether or not to seek a term of life, we openly discussed those issues. And I think you fail the full process, you fail in allowing people to give full input when you limit their ability to discuss their opinions with others.

Chairman FEINGOLD. Thank you, sir.

Mr. Shelton, in your written testimony, you noted that law enforcement executives and rank-and-file officers agree that crimes cannot be prevented or solved without a basic community trust of the police. Can you elaborate on how the implementation of the Federal death penalty may have an effect on that level of trust?

Mr. SHELTON. Much like the disparate effect of many other aspects of our criminal justice system, whether it is racial profiling on our Nation's streets, or whether it is indeed our juvenile justice system in which even though African-American children commit crimes at the same rate as white children and other children but find themselves incarcerated at a much higher rate than their other counterparts in other racial groups, when we talk about the death penalty and its finality, we are hearing from people across the country that, No. 1, the lack of transparency, they are saying, in how these cases are being sought, why are they coming after African-Americans more often in death penalty cases, there is a lack of trust.

Everyone we have talked to, whether it is the local street police officer or whether it is the Attorney General of the United States herself, has said to us on many occasions that very well they cannot prevent crime nor can they solve crimes without the trust of the communities these law enforcement officials are serving.

Chairman FEINGOLD. Are potential disparities in the death penalty widely known or discussed in the black community? Would you characterize opposition to the death penalty in the black community as stronger than that in the Nation as a whole?

Mr. SHELTON. I think that because I work for the NAACP, which is a predominantly African-American organization, and because we have 2,200 membership units throughout the country, and because these issues for us actually come up from our local communities through our democratic process of our conventions and other processes, indeed we know that they feel what is going, they see what is going on, they end up in the 200 black-owned newspapers across the country. The issues are being discussed, and everything we do here in Washington as it works its way into those units and as we move to try to change the status quo.

So the short answer is absolutely yes. I think there is a gut feeling that you hear about first, but then as we look at the statistics and see the actual effect, we see that very well it is quite true and our people do know it.

Chairman FEINGOLD. Thank you.

Mr. Secretary, I understand that Puerto Rico faces very difficult challenges in the area of criminal justice and that resources are scarce, and it is undisputed that it costs much more to bring a Federal capital case than it does to bring non-capital murder charges, although as we heard from DOJ, it has not even tried to determine how much more, so we do not really know how much.

From your perspective, is seeking the death penalty the best use of the resources of the U.S. Attorney's Office in Puerto Rico to help fight the crime problem that you face?

Mr. SÁNCHEZ RAMOS. I definitely do not think that that is the best use or the most efficient use of resources. The U.S. Attorney's Office in Puerto Rico has very limited resources. At least that is what the U.S. Attorney has told—the previous one and the current one have told me over the last few years. During the past year, quite a few of the most experienced AUSAs there have quit. The U.S. Attorney in Puerto Rico recently requested that our prosecutors, local prosecutors, be assigned to work federally, sort of deputized federally as special AUSAs to help them deal with the rising crime problem in Puerto Rico. And I, in fact, was glad to sort of lend her two of my prosecutors. She had requested three.

So definitely there is a situation of limited resources at that office by all accounts, and I would definitely rather have that office spend the limited resources in being able to apprehend and get convictions for the highest number of criminals possible, and if the cost of not having the death penalty for a few of the persons that are caught is to have an increase in the total number of criminals that are taken off the streets and put in jail, then I definitely think that that is the preferable alternative.

Chairman FEINGOLD. Thank you, sir.

Mr. Bruck, based on information released from the Department, we know that the Attorney General has disapproved 15 plea agreements in death-eligible cases since 2001. What effect might this have on the willingness of defendants to cooperate with the Government in future cases?

Mr. BRUCK. Well, it is very simple. The way the Federal criminal justice system works is that criminal organizations are dismantled by defendants' lawyers proffering the testimony of their clients and giving up what the clients know in exchange for some consideration in plea bargaining.

In capital cases, in cases where there are many dead bodies, the most serious of cases, it is now dangerous to do that because a defense lawyer can reach agreement with the United States Attorney based on a proffer where he has laid his client out and had him interviewed, only to have the agreement overruled by a distant decisionmaking process in Washington. And because it is so unpredictable, it is now much riskier to even initiate that process of providing information to federal law enforcement.

It is just harder to engage in that process from the defense side, and I think that is going to mean less plea bargaining, less infor-

mation being made available to the government, and fewer convictions. The system just is not going to work as well.

Chairman FEINGOLD. Thank you.

Mr. Shelton and Mr. Bruck, can you respond to the arguments that the 2006 Rand study demonstrated there were no racial biases in the Federal death penalty prosecutions? And do you agree that that conclusion can be drawn from that study? Mr. Shelton.

Mr. SHELTON. I think this is an extremely limited study. As a matter of fact, I believe you have this, and I would like to just lift this up for the record. It is a letter from a number of distinguished law professors and others that have taken a look at that study and seen just how limited that study is. It is very clear that a lot of information that should be available to give you benchmarks as we are trying to assess indeed the effectiveness are not clearly displayed in that Rand study. And I hope that people will take a good look at this report and see that indeed, coming from someone like a David Baldus and others that are cited in this particular letter, challenging the effectiveness and the thoroughness of that study, someone who has actually been accredited by the Supreme Court in a number of cases and done very thorough investigations along those lines, I think that are very well—with his position and the positions that we have looked at and the inconclusiveness of that study, you cannot really consider it.

Chairman FEINGOLD. Thank you, Mr. Shelton.

Mr. BRUCK. I would like to add a couple things. The letter from Professor Baldus is actually from five of the six members of the Advisory Committee for the Rand Corporation study itself, complaining not only about the way the study developed, but about the lack of openness in the way it developed.

But the biggest thing to say about it is what you, Mr. Chairman, have already said. It is of archaeological interest. It is a study of the Clinton years, and there has been no study of the Bush years. On top of that it begs the question of how did an overwhelmingly minority pool come to be the group from which these cases are drawn? In other words, how is the Federalization decision made? Why are these cases the cases the end up in Federal court?

I only want to add that this issue is about to become front and center before all of the people in this country, because as things stand now, the next six Federal executions are all going to be of African-American men. Every one of them. Mr. Shelton is talking about people wondering in the community. Well, they are sure going to wonder then. And we will still not have the answers.

Chairman FEINGOLD. Thank you for that, Mr. Bruck.

Mr. Secretary, let's discuss the court battle several years ago about whether the Federal death penalty could be sought in Puerto Rico given the provision in the Puerto Rican Constitution outlawing capital punishment. Ultimately, the Federal Court of Appeals decided that Puerto Rico was subject to the Federal death penalty. Can you talk about the public reaction in Puerto Rico to that decision? I am not sure that many people are completely aware of the depth of public opposition to the death penalty in Puerto Rico.

Mr. SÁNCHEZ RAMOS. Sure. The opposition to the death penalty in Puerto Rico is not only broad, but very deep. People are not cas-

ually opposed to it but very firmly opposed to it. And so every time that the Federal Government announces that it is going to pursue death in a case in Puerto Rico, it generates public reaction that is massive and that is very strong.

Specifically, the Acosta case is the one that you are referring to. In that case, the defense made the argument that the Federal statute providing for the death penalty could not legally be—was not applicable to Puerto Rico, using technical, legal arguments. The district court judge ruled in favor of the defense. However, the United States took it to the First Circuit Court of Appeals. The court of appeals held for the United States and concluded that the Federal statute was applicable to Puerto Rico. This was all before the trial happened. This all got a lot of publicity. It generated quite a bit of debate on the island.

And what ended up happening was the Federal Government got its wish of having the death penalty authorized by—validated by the courts, and then when the trial occurred before the jury in the guilt phase of the trial, the jury ended up hearing the evidence and acquitting Acosta and the other co-defendant of all charges.

Chairman FEINGOLD. Was that unusual or surprising?

Mr. SÁNCHEZ RAMOS. It was very unusual, very surprising. I have been for about 7 years working on the prosecutor's side, first as Solicitor General, now as Secretary of Justice, and I have been observing, of course, the behavior of—you know, how the Federal system works in Puerto Rico, and it is very, very unusual in a murder case of this magnitude and with the strength of the evidence that was presented there to have an acquittal.

And, you know, basically the conclusion of most everyone that I have talked to and of most commentators was that this had to be a reaction by the jury, just sort of a protest by the jury against the Federal Government's decision to seek death in that case. And so there is a risk in Puerto Rico because of the depth of feeling by the population against the death penalty and because of how strongly these beliefs are held that seeking the death penalty, you know, carries this risk that the Federal Government will not even get a conviction. And so this is—

Chairman FEINGOLD. Given Puerto Rico's longstanding opposition to capital punishment, why do you think the Federal Government ran the risk here?

Mr. SÁNCHEZ RAMOS. Well, I am not sure. I mean, I think, you know, you would have to ask the Department of Justice. My speculation would be that, as they more or less stated today, they have this—they aspire to have national uniformity in an area where, as Mr. Bruck said, it is not an area where national uniformity is achievable. And even if it were constitutional, as he said, it is not something that might be desirable, even if in practical terms we were able to get it.

You know, Puerto Rico presents, of course, unique problems not only in terms of how the population feels but also the language issues, which make it very hard to get good, adequate legal representation. Since locally you do not have any death penalty cases, there are no local lawyers who are sufficiently familiarized with the proceedings and the dynamics of this type of case. So you have

to go and get outside lawyers, which normally is going to be someone who does not speak Spanish, and that creates problems.

The juries also, it is a very non-representative jury in practical terms. Although legally the courts have upheld the way the juries are selected in the Federal district courts in Puerto Rico right now, you know, the truth of the matter is that the pool from which these people can be selected is very, very small and biased toward more educated people who understand English. It is really a very small minority in Puerto Rico that can understand English well enough to serve in a jury.

Chairman FEINGOLD. Thank you, Mr. Secretary.

Mr. Charlton, everybody at the Justice Department, of course, ultimately works for the Attorney General and the President, and the employees have to follow instructions from their superiors. But what effect does it have on the morale of line prosecutors when they are directed to seek death in a case where they believe it is not warranted? Isn't that decision somewhat qualitatively different from other decisions?

Mr. CHARLTON. It is. And as I said earlier, it affects the morale because those Assistant U.S. Attorneys know that they are about to expend political good will, that they are about to waste their credibility in front of a jury that they don't believe should impose the death penalty.

I am also aware of another case from another district in which Assistant U.S. Attorneys specifically said that they did not wish to go forward with the death penalty and then refused to go forward with the death penalty once the Attorney General commanded that they do so. And I know that the Department of Justice sought to punish those Assistant U.S. Attorneys for their refusal to go forward, when I believe they were acting in good conscience.

Chairman FEINGOLD. Thank you, Mr. Charlton.

You know, I regret that there were no representatives of the minority here for this hearing. This is very important oversight, and normally they are the ones who would seek to elicit comments from their witnesses. But I am now going to give everyone a chance to very briefly, if they wish, make some concluding remarks, whoever would like to—if anyone. Mr. Mulhausen.

Mr. MULHAUSEN. Thank you for this opportunity. I guess in conclusion I would just like to say that when you look at disparities in sentencing, if you just look at descriptive statistics, you will not get the real picture. As a trained social scientist, what we do is we take those disparities and you control for whether or not the individuals are charged with the same type of crimes, the severity of the crime, and other characteristics. And what the Rand study did was, after controlling for those factors, found that there are no disparities in the sentencing system for the Federal capital punishment.

The second point I would like to make is that social science research is increasingly concluding—emerging to a consensus that capital punishment saves lives. Regular studies over the last 5 or 6 years are showing that capital punishment prevents anywhere between 3 and 18 murders. So we need to recognize that there is a possible benefit here that needs to be in the discussion as well.

That is all. Thank you.

Chairman FEINGOLD. Thank you, Doctor.

Any others? Yes, Mr. Otis.

Mr. OTIS. Thank you. I very much appreciate your giving the other side the opportunity to say something here. I think that speaks very well for your fairness as Chairman of this Committee. I have only two things to add.

When you try to have justice by the numbers, by looking at tables and statistics, you will get numbers, but you will not get justice. I have found in my career, which was 18 years as a career Assistant U.S. Attorney—not a political appointee, but a career person—that you had to look at the facts of each case. It did not matter what happened in the case before or in ten cases before or what you thought was going to happen in the ten cases after. You have to look at the facts of each case and give that defendant and that victim and the public as potential future victims your best judgment. I have never believed in justice by the numbers. I think numbers are interesting for some purposes, but for deciding as a prosecutor what is the right thing to do, don't look at the numbers, look at the facts.

The second thing I would say is this: There have been some suggestions that by looking at these numbers, what we would discover is that there is racism in the Department of Justice. I was in the Department of Justice for a long time. I was in the U.S. Attorney's Office from 1981 to 1999 under administrations of both parties. In my 18 years there, under both Democrats and Republicans, not one single time did I encounter a colleague of mine in the U.S. Attorney's Office or at Main Justice who made a decision based on racial bigotry. Not one single time. Those are not my colleagues. That is not the service we granted. And if such a thing were to have happened and the person had been found out, he would have been run out of the building, and I would have been one of the people running him.

Chairman FEINGOLD. Thank you, Mr. Otis.

Anyone else? Mr. Shelton.

Mr. SHELTON. Chairman Feingold, I want to thank you for holding this proceeding to raise these issues that are too often hidden in our society. As we talk about issues like the death penalty in the United States, we really are speaking to the values of the American people, and a value I think that can become misconstrued all too often, I think the American people value life. They value people having an opportunity to make their case, to prove their concerns, to raise the issues in the public forum. And very well if you put someone to death, indeed they don't have that opportunity anymore.

We know in cases like Gary Graham in Texas, we had an African-American man who was not able to even get a new trial, though it was proven that his attorney slept through much of the proceeding. And let us look at other places, making sure that we have good, qualified attorneys as counsel. Indeed, we know we do not have that in our country.

It would be great if every American had the dream team that O.J. Simpson had when his life was being challenged, when indeed his life was on the line as he made his arguments in an American

court. But we know that that is not the case for most African-Americans or other people of color in the United States.

The death penalty is something that we can do without. It costs too much. It costs too much in not only the dollars that we could utilized for other things to prevent crimes from happening in the first place and advance quality of life throughout our Nation, but it costs to much to the very soul of Americans in being able to say that we will put someone to death even after they have been caught, even after they have been locked in a prison, even though we could very well leave them in there for the duration of their life. We still seek to spend the extra resources to put them to death. I think it is unnecessary, and indeed we need to reconsider this and move toward some change in our country.

Chairman FEINGOLD. Thank you so much, Mr. Shelton.

Let me thank all—did you want to say something, Mr. Secretary?

Mr. SÁNCHEZ RAMOS. I just wanted to say briefly that deterrence, as Dr. Mulhausen has said, is definitely an important value, but it is not the only value in the calculus. I am sure we could devise or change the system to—even assuming that the death penalty has a deterrent effect, we could even increase its deterrence effect by maybe giving the defendants fewer rights, maybe having public executions, maybe painful executions. Maybe that would, in fact, statistically provide higher deterrence, but there are other principles and values that should be taken into consideration when one does this equation in terms of, you know, what kind of society we want to be and what value we ascribe to the problem, what cost we ascribe to the problem of having an innocent person be convicted and punished.

And so, you know, in this sense, societies that have fewer liberties, such as, you know, communist societies throughout the years, they have had fewer crime. But at what cost? And so that is basically the point that I wanted to make. Deterrence is not the only value. You have to look at what the cost of that deterrence is in order to have the proper equation in balance to make a good policy determination.

Chairman FEINGOLD. Thank you, Mr. Secretary. I would note that the issue of deterrence was, in fact, taken up in this Subcommittee in a hearing last year, and I will now place in the record, without objection, the testimony of Professor Jeffrey Fagin from that hearing.

Mr. Shelton.

Mr. SHELTON. I am sorry, Senator Feingold. I could not sit quietly as we talked about the issue of deterrence. I think it is very important to also consider that the States that utilize the death penalty also have the highest murder rates in our country. So, indeed, if there is some correlation between deterrence and the number of murders that are actually occurring, then indeed what we are seeing is that in States throughout the United States, those States that have the highest murder rate also have the death penalty. There is some cause and effect that is not being—

Chairman FEINGOLD. We have always had that feeling in Wisconsin.

Thank you all for your testimony and a thoughtful discussion. We appreciate your taking the time to be here. We thank you for your insights.

The hearing record will remain open for 1 week for additional materials to be submitted. Because of the upcoming recess, we will require written questions for the witnesses to be submitted by the close of business 2 weeks from today. We will ask the witnesses to respond to those questions promptly so the record of this hearing can be completed.

I am concerned about some of the things we have learned today. I am concerned that the Justice Department is itself not tracking basic statistics about its Federal capital cases, including something as basic as what it costs to bring such a case. In this time of rising violent crime and limited Federal criminal justice resources, I would hope DOJ would be interested in knowing what it costs to bring a capital case and might consider whether those resources could be more effectively used elsewhere.

I am also concerned about the death penalty becoming just another political tool. If the message is conveyed in whatever form to U.S. Attorneys that the Attorney General looks with disfavor on those who do not recommend frequently enough that the Government seek the death penalty, might some of these individuals end up making a recommendation to seek death in cases where that is not the best outcome from a law enforcement perspective or where it is against their better judgment? Such considerations have no place in the decision about whether the Government should take someone's life.

I remain concerned about racial disparities in the administration of the death penalty. This is an area where we need more information. And I believe the Justice Department should reconsider its policy of routinely seeking the death penalty in jurisdictions where that penalty is not usually available. At the very least, a very strong Federal interest in seeking death should be present, and perhaps of most concern is that it appears that the current Attorney General does not appreciate the gravity of his authority to decide whether to seek to execute an individual. And it appears that he discounts the views of his U.S. Attorneys on the ground who know the local judges and who know the local community.

So this, as I have said, is not the end of our oversight work. We will continue to examine all of these issues. I want to again thank the Department of Justice for its cooperation in preparing for this hearing and, again, our witnesses for their contributions.

Thank you, and the hearing is adjourned.

[Whereupon, at 11:28 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

PRE-HEARING QUESTIONS AND ANSWERS

Department of Justice responses to Oversight Questions from Senator Russ Feingold regarding the Federal Death Penalty

June, 2007

Responses to oversight questions from Senator Feingold:

1. Have the Department of Justice internal protocols and procedures for federal death penalty cases changed since June 7, 2001, when several formal amendments to the U.S. Attorney's Manual provisions governing such cases were announced? Please list and explain any such changes.

The internal protocol and procedures for federal death penalty cases appear in chapter 9–10.000 of the United States Attorney Manual. No revisions have been made since June 2001, but the Department is presently considering revisions to the protocol. The proposed revisions will clarify existing procedures, create mechanisms to more closely manage cases, and expedite decision-making for certain categories of cases in which the Justice Department will not likely seek the death penalty.

2. Please list all individuals who serve on the Attorney General's Review Committee on Capital Cases ("review committee"), or who have served on the review committee since January 20, 2001. Explain how and why those individuals were selected for the committee, including a discussion of their particular qualifications for analyzing whether the death penalty should sought. For former members of the committee, please indicate why they no longer serve on the committee, and who was selected to replace them.

The Committee has two standing members, a Deputy Assistant Attorney General from the Criminal Division or other senior attorney with capital experience from the Criminal Division and the career Chief of the Capital Case Unit. Additional Committee members are assigned on a rotating basis from two pools. The first pool includes selected attorneys in the Office of the Deputy Attorney General; the second pool includes Assistant United States Attorneys with capital trial experience from approximately half a dozen United States Attorneys' Offices around the country. One representative from each pool is named to the Committee for every case. The Committee members were selected based on their abilities to synthesize facts and to fairly and uniformly evaluate arguments regarding the application of the Federal death penalty statutes.

Current Committee Members	Former Committee Members
ODAG representative:	Christopher A. Wray*
Joan Meyer	Paul Murphy*
	Uttam Dhillon*
Alternates:	
Mark Grider	Mythili Raman*
Stuart Nash	Kevin O'Connor*
Thomas Monheim	Michael Scudder*
Steven Campbell	John Irving*
David Woll	Michael Purpura*

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Mary Lee Warren, Deputy Assistant Attorney General, Criminal Division	
Margaret P. Griffey Chief, Capital Case Unit	
Assistant U.S. Attorney representatives: Johnny Gasser Steve Holtshouser Debra Long-Doyle Mark Miller Tanya Pierce	

* These individuals are no longer on the Committee because they are no longer with the Office of the Deputy Attorney General.

3. How often does the review committee meet and what is the format for these meetings? For example, is there a regular agenda or is each meeting organized around the specifics of an individual case up for review? Does the review committee have any policy-setting or information-gathering functions other than consideration of individual cases?

The Committee does not have any policy-setting or information-gathering functions other than consideration of individual cases. For a further explanation, please refer to the attached Death Penalty Protocol Instruction Memorandum. This Instruction Memorandum is available online to United States Attorney Offices.

4. Please detail the process followed by the Justice Department, including the review committee, upon receipt of a U.S. Attorney's recommendation whether to seek the death penalty in a particular case. Include in your answer whether records of review committee meetings are kept and whether the committee makes written recommendations.

The process is described in the attached Death Penalty Protocol Instruction Memorandum.

All information relevant to the death penalty determination, including that provided by defense counsel and the U.S. Attorney's Office, discussed at the meeting is reflected in the Committee's recommendation memorandum to the Attorney General.

5. Please detail the process followed by the Deputy Attorney General and Attorney General upon receipt of the review committee's recommendation. Specifically, what role does the Deputy Attorney General play. Include in that answer how the review committee conveys its recommendation, whether there is any personal meeting between the Deputy Attorney General, Attorney General, and the committee, and how the Attorney General's final decision is recorded.

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The process is explained in the attached Death Penalty Protocol Instruction Memorandum.

The Committee's recommendation memorandum, the U.S. Attorney's submission, any defense submission, and any other pertinent documents are forwarded to the Deputy Attorney General and the Attorney General. The documents are organized in an indexed "AG notebook." The notebook is initially received by the Office of the Deputy Attorney General, where it is assigned to a staff member who did not serve on the Committee for the case. The staff member prepares a brief analysis and recommendation that is forwarded along with the AG notebook to the Deputy Attorney General's Chief of Staff. The Chief of Staff makes a separate recommendation to the Deputy Attorney General. The Deputy Attorney General then makes a separate recommendation to the Attorney General. The Deputy Attorney General's recommendation is conveyed to the Attorney General in the AG notebook. A staff member in the Office of the Attorney General reviews the recommendations of the U.S. Attorney, the Committee, and the Deputy Attorney General, and presents the case to the Attorney General. The Attorney General's decision is memorialized in a letter addressed to the prosecuting U.S. Attorney. The letter states whether the Attorney General has authorized the U.S. Attorney to seek the death penalty.

The Committee does not meet in person with the Deputy Attorney General or the Attorney General. There is, however, frequent communication between all of those involved in the review process, including U.S. Attorneys' Offices, CCU attorneys, Committee members, and those involved in the review process in the Offices of the Deputy Attorney General and the Attorney General. These communications may concern the bases of the U.S. Attorney's and Committee's recommendations as well as evidentiary issues.

6. What happens if the DOJ entities involved–the U.S. Attorney, the review committee, the Deputy Attorney General, and the Attorney General–do not all agree? Prior to the Attorney General issuing his final decision, is there any process in place for discussion of the sources of disagreement? Particularly in those cases where the Attorney General is going to overrule the recommendation of the U.S. Attorney, how is that decision conveyed? Is there a written form in each instance detailing the rationale for why the U.S. Attorney's recommendation is being overruled?

The review process permits and encourages communication between the U.S. Attorney's Office and the reviewing officials within the Department. The Committee's recommendations are communicated to the prosecution team. Certain recommendations may prompt further discussion between the Committee and the prosecutors, who have a continuing right to supply the Committee with supplementary documents and information in support of their position. The U.S. Attorney's Office typically has multiple opportunities to present its position to the Deputy Attorney General and various members of his staff. U.S. Attorneys' Office may also communicate directly with staff members in the Office of the Attorney General. The written documentation of the Attorney General's reasons for seeking the death penalty in each case is contained in the recommendation memoranda by the U.S. Attorney's Office, the Committee, and the Office of the Deputy Attorney General. The reasons for overruling a recommendation in a

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particular case are conveyed to the U.S. Attorney's Office.

7. How are records on the entire death penalty review process maintained? How extensive are the records on each case?

"Baseline" and working files are created for each incoming case. The baseline file contains all documents submitted and created in the course of reviewing the case, including the AG notebook materials after a decision has been made by the Attorney General. Some documents may have been forwarded electronically and exist in a computer file. Certain information concerning the case and defendant and non-decisional (demographic) information is maintained in a restricted-access database. The baseline files, computer files, and database are maintained by the Capital Case Unit. The records in each case may be quite extensive depending on the complexity of the case and number of defendants submitted for review.

8. On an aggregate and annual basis covering 2001 to 2006, in how many death-eligible cases did U.S. Attorneys request authorization to seek the death penalty? Of those, in how many cases did the review committee agree or disagree with a U.S. Attorney's recommendation? In how many of these cases did the Attorney General follow the U.S. Attorney's recommendation and/or the review committee's recommendation?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

a. Submissions by U.S. Attorneys requesting authorization to seek the death penalty

U.S. Attorney Requests for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	7	13	2	0	22
2002	5	10	4	2	21
2003	9	15	5	3	32
2004	8	14	8	1	31
2005	7	5	4	0	16
2006	10	17	7	0	34

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U.S. Attorney Requests for Authorization to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	11	8	3	0	22
2002	9	12	3	4	28
2003	16	9	4	6	35
2004	12	12	6	2	32
2005	7	9	3	0	19
2006	8	19	10	3	40

b. Recommendations by the Attorney General's Review Committee in cases where the U.S. Attorney requested authorization to seek the death penalty.

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	7	9	2	0	18
2002	5	9	4	2	20
2003	9	15	5	3	32
2004	6	13	8	1	28
2005	7	5	2	0	14
2006	10	13	7	0	30

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	9	7	3	0	19
2002	9	8	3	4	24
2003	16	9	4	6	35
2004	11	11	6	2	30
2005	7	9	0	0	16
2006	8	17	10	3	38

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Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	0	4	0	0	4
2002	0	1	0	0	1
2003	0	0	0	0	0
2004	2	1	0	0	3
2005	2	0	2	0	4
2006	0	4	0	0	4

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	3	1	0	0	4
2002	0	4	0	0	4
2003	0	0	0	0	0
2004	1	1	0	0	2
2005	0	1	3	0	4
2006	0	2	0	0	2

c. Decisions by the Attorney General in cases where the U.S. Attorney requested authorization to seek the death penalty.

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	7	9	2	0	18
2002	5	9	4	2	20
2003	8	15	5	3	31
2004	7	13	8	1	29
2005	7	5	2	0	14

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2006	10	13	7	0	30

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	9	7	3	0	19
2002	9	8	3	4	24
2003	15	9	4	6	34
2004	11	10	6	2	29
2005	7	9	0	0	16
2006	8	17	10	3	38

Attorney General Decisions
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	0	4	0	0	4
2002	0	1	0	0	1
2003	1	0	0	0	1
2004	1	2	0	0	3
2005	2	0	2	0	4
2006	0	4	0	0	4

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	3	1	0	0	4
2002	0	4	0	0	4
2003	1	0	0	0	1
2004	2	2	0	0	4
2005	0	1	3	0	4
2006	0	2	0	0	2

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Explanatory notes:

i. Defendants and victims are categorized by year based on the date of the U.S. Attorney's initial submission to the Department for a decision concerning that defendant and victim.

ii. Race and ethnicity designations are made using the same methodology followed in the Department's September 2000 survey. *See* U.S. Department of Justice, *The Federal Death Penalty System: A Statistical Survey*, at T-xv, T-xvi (Sept. 12, 2000).

iii. A particular defendant is not counted more than once within a single year in a table, despite the fact that permission to seek the death penalty against that defendant may have been requested in more than one case or with respect to more than one victim. Likewise, a single victim is not counted more than once in a single year in a table, despite the fact that permission to seek the death penalty may have been requested against more than one defendant for that victim's murder.

A particular defendant may be counted more than once over successive tables reflecting agreement or disagreement with the U.S. Attorney's request by the review committee or the Attorney General. In some instances, the Committee or the Attorney General may have agreed with the U.S. Attorney's request for a particular defendant with regard to certain counts or victims, but disagreed with the U.S. Attorney's request with regard to other counts or victims. In such a situation, the defendant will be counted in tables reflecting the review committee's or Attorney General's agreement with the U.S. Attorney's request, and separately counted in tables reflecting the review committee's or Attorney General's disagreement with the U.S. Attorney's request.

Likewise, a particular victim may be counted more than once over successive tables reflecting agreement or disagreement with the U.S. Attorney's request by the review committee or the Attorney General. In some instances, the Committee or the Attorney General may have agreed with the U.S. Attorney's request involving one defendant and victim, but disagreed with the U.S. Attorney's request with regard to another defendant's participation in the murder of the same victim. In such a situation, the victim will be counted in tables reflecting the review committee's or Attorney General's agreement with the U.S. Attorney's request, and separately counted in tables reflecting the review committee's or Attorney General's disagreement with the U.S. Attorney's request.

iv. The foregoing data do not include cases in which the Attorney General has not made a decision (*e.g.*, cases in which a decision has been deferred because the defendant is a fugitive or for other reasons, and cases still under review).

v. In a small number of cases, the review committee did not make a death penalty recommendation because it was evenly divided or because it recommended that a decision be deferred. As a result, the number of cases in which the committee made a recommendation is slightly lower than the number of cases that were submitted for review and decided by the Attorney General.

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vi. The foregoing data reflect initial requests and decisions to seek the death penalty, and does not reflect subsequent requests and decisions to withdraw a death penalty notice following an initial decision to seek the death penalty. That information, however, is provided separately below.

In several cases included in the foregoing data as instances where the Attorney General authorized the U.S. Attorney to seek the death penalty, U.S. Attorneys subsequently requested and received authorization to withdraw the notice of intention to seek the death penalty. The race/ethnicity breakdowns for cases falling in this group are as follows; the defendants and victims are categorized by the year of the U.S. Attorney's initial request to seek the death penalty:

Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	0	2	2	0	4
2002	1	2	0	1	4
2003	4	3	3	0	10
2004	2	1	0	1	4
2005	4	0	0	0	4
2006	0	1	0	0	1

Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	1	0	0	0	1
2002	3	2	0	2	7
2003	4	1	2	0	7
2004	0	1	0	2	3
2005	3	0	0	0	3
2006	2	1	0	0	3

In several other cases included in the foregoing data as instances where the Attorney General authorized the U.S. Attorney to seek the death penalty, U.S. Attorneys subsequently requested, but were denied, authorization to withdraw the notice of intention to seek the death penalty. The race/ethnicity breakdowns for cases falling in this group are as follows; the defendants and victims are categorized by the year of the U.S. Attorney's initial request to seek the death penalty:

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Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	1	2	0	0	3
2002	0	2	0	1	3
2003	1	0	0	0	1
2004	0	1	0	1	1
2005	0	0	0	0	0
2006	0	1	0	0	1

Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	9	1	0	2	12
2002	1	2	0	0	3
2003	3	0	0	0	3
2004	0	1	0	0	1
2005	0	0	0	0	0
2006	0	2	0	0	2

9. On an aggregate and annual basis covering 2001 to 2006, in how many death-eligible cases did U.S. Attorneys not recommend seeking the death penalty? Of those, in how many cases did the review committee agree or disagree with the recommendation? In how many cases did the Attorney General follow the U.S. Attorney's recommendation and/or the review committee's recommendation?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

a. Submissions by U.S. Attorneys requesting authorization not to seek the death penalty

U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	24	66	59	12	161

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2002	30	70	68	12	180
2003	25	57	57	10	149
2004	16	71	72	20	179
2005	17	71	80	7	175
2006	34	92	102	12	240

U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	25	54	65	5	149
2002	30	39	42	11	122
2003	26	33	74	8	141
2004	14	51	84	11	160
2005	16	56	85	10	167
2006	24	60	110	8	202

b. Recommendations by the Attorney General's Review Committee in cases where the U.S. Attorney requested authorization not to seek the death penalty.

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	20	58	59	12	149
2002	28	63	68	10	169
2003	22	50	54	10	136
2004	14	69	71	19	173
2005	17	65	79	7	168
2006	27	80	93	10	210

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total

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2001	22	47	64	4	137
2002	28	33	42	8	111
2003	20	31	73	8	132
2004	13	50	85	11	159
2005	16	48	83	10	157
2006	20	47	107	6	180

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	4	8	1	0	13
2002	2	7	0	2	11
2003	2	6	3	0	11
2004	2	3	1	1	7
2005	0	4	1	0	5
2006	7	12	8	2	29

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	3	8	2	1	14
2002	2	8	0	3	13
2003	5	3	23	0	31
2004	2	3	0	1	6
2005	1	5	2	0	8
2006	6	17	7	2	32

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c. Decisions by the Attorney General in cases where the U.S. Attorney requested authorization not to seek the death penalty.

Attorney General Decisions
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	23	55	57	12	147
2002	26	62	65	10	163
2003	23	50	54	10	137
2004	15	69	72	20	176
2005	17	69	79	7	172
2006	28	84	96	11	219

Attorney General Decisions
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	23	48	64	3	138
2002	28	32	41	8	109
2003	22	31	73	8	134
2004	14	49	85	11	159
2005	16	54	83	10	163
2006	21	51	107	8	187

Attorney General Decisions
Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	1	11	3	0	15
2002	4	8	3	2	17
2003	2	8	3	0	13
2004	1	3	0	0	4
2005	0	2	1	0	3

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2006	6	8	6	1	21

Attorney General Decisions
Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	2	7	3	3	15
2002	2	8	3	3	16
2003	4	3	23	1	31
2004	1	4	0	0	5
2005	1	2	2	0	5
2006	5	14	3	0	22

Explanatory notes:

i. Explanatory notes i through v of the response to Question 8 apply to this response.

ii. The foregoing data do not include cases in which the U.S. Attorney was authorized not to seek the death penalty without referral to the Attorney General for a decision (*e.g.*, cases in which the only evidence of guilt was the defendant's protected proffer).

iii. A U.S. Attorney's initial request to accept a plea agreement under which the government would agree not to seek the death penalty, and any decision approving such a request, are counted as recommendations and decisions not to seek the death penalty within this response. The response to Question 15 separately deals with instances in which the Attorney General approved or overruled a U.S. Attorney's request to enter into such a plea agreement.

iv. The foregoing data reflect decisions on initial requests not to seek the death penalty, and does not reflect subsequent requests and decisions to withdraw a death penalty notice following an initial decision to seek the death penalty. That information is provided below.

In several cases included in the foregoing data as instances where the Attorney General authorized the U.S. Attorney to seek the death penalty, U.S. Attorneys subsequently requested and received authorization to withdraw the notice of intention to seek the death penalty. The race/ethnicity breakdowns for cases falling in this group are as follows; the defendants and victims are categorized by the year of the U.S. Attorney's initial request not to seek the death penalty:

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Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	0	5	1	0	6
2002	1	5	1	1	8
2003	0	5	1	0	6
2004	1	0	0	0	1
2005	0	0	0	0	0
2006	0	0	2	0	2

Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	1	2	2	1	6
2002	1	6	1	1	9
2003	0	2	2	0	4
2004	1	0	0	0	1
2005	0	0	0	0	0
2006	0	0	2	0	2

v. The foregoing data also do not reflect subsequently-denied requests to seek the death penalty following an initial decision by the Attorney General authorizing the U.S. Attorney not to seek the death penalty.

10. On an aggregate and annual basis covering 2001 to 2006, in how many cases in which the Attorney General agreed with the U.S. Attorney's recommendation to seek the death penalty was a death sentence imposed?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

a. Cases where the death penalty was imposed following a decision by the Attorney General approving a U.S. Attorney request to seek the death penalty.

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Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	2	1	0	0	3
2002	3	2	0	0	5
2003	5	3	0	0	8
2004	2	0	3	0	5
2005	0	3	0	0	3
2006	0	0	0	0	0

Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	5	1	2	0	8
2002	6	1	0	0	7
2003	7	1	0	0	8
2004	4	0	2	0	6
2005	1	3	0	0	4
2006	0	0	0	0	0

b. Cases where the death penalty was not imposed following a decision by the Attorney General approving a U.S. Attorney request to seek the death penalty.

Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	2	6	0	0	8
2002	1	5	4	1	11
2003	1	9	1	0	11
2004	2	6	4	0	12
2005	3	2	0	0	5
2006	0	1	0	0	1

Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	3	6	1	0	10

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2002	1	7	3	2	13
2003	8	7	1	1	17
2004	6	1	1	0	8
2005	1	4	0	0	5
2006	0	0	1	0	1

Explanatory notes:

i. Explanatory notes i through v of the response to Question 8 apply to this response.

ii. The response to Question 8 provides data on defendants and victims for whom the Attorney General approved seeking the death penalty, and also provides data on defendants and victims for whom the Attorney General later authorized the U.S. Attorney to withdraw the death penalty notice. Those data, however, do not correlate in all instances to the data provided in the present response, for several reasons. For a number of defendants and victims, the trial has not occurred; the present response is limited to cases in which the trial-level litigation has concluded. Additionally, defendants and victims in cases involving multiple defendants or victims may be counted more than once over the successive tables contained in the response to Question 8 and the present response. The Attorney General in some instances allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all defendants involved in killing the same victim or victims, or allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all victims killed by the same defendant or defendants. In such instances, the defendants or victims may be counted in Question 9 as ones for whom the death penalty notice was withdrawn, but also counted as individuals for whom the death penalty was sought in the present response.

11. On an aggregate and annual basis covering 2001 to 2006, in how many cases in which the Attorney General overruled the U.S. Attorney's recommendation not to seek the death penalty, was a death sentence imposed?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

a. Cases where the death penalty was imposed following a decision by the Attorney General overruling a U.S. Attorney request not to seek the death penalty.

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Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	1	0	0	0	1
2002	1	0	0	1	2
2003	0	0	0	0	0
2004	0	1	0	0	1
2005	0	0	0	0	0
2006	2	0	0	0	2

Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	1	0	0	0	1
2002	1	0	0	2	3
2003	0	0	0	0	0
2004	0	1	0	0	1
2005	0	0	0	0	0
2006	1	0	0	0	1

b. Cases where the death penalty was not imposed following a decision by the Attorney General overruling a U.S. Attorney request not to seek the death penalty.

Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	0	5	2	0	7
2002	2	3	2	0	7
2003	2	3	2	0	7
2004	0	1	0	0	1
2005	0	1	0	0	1
2006	0	1	0	0	1

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Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	1	1	1	2	5
2002	0	5	2	0	7
2003	4	1	20	1	26
2004	0	1	0	0	1
2005	0	2	0	0	2
2006	0	1	0	0	1

Explanatory notes:

i. Explanatory notes i through v of the response to Question 8 apply to this response.

ii. The response to Question 9 provides data on defendants and victims for whom the Attorney General overruled a U.S. Attorney's request not to seek the death penalty, and also provides data on defendants and victims for whom the Attorney General later authorized the U.S. Attorney to withdraw the death penalty notice. Those data, however, do not correlate in all instances to the data provided in the present response, for several reasons. For a number of defendants and victims, the trial has not occurred; the present response is limited to cases in which the trial-level litigation has concluded. Additionally, defendants and victims in cases involving multiple defendants or victims may be counted more than once over the successive tables contained in the response to Question 9 and the present response. The Attorney General in some instances allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all defendants involved in killing the same victim or victims, or allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all victims killed by the same defendant or defendants. In such instances, the defendants or victims may be counted in Question 9 as ones for whom the death penalty notice was withdrawn, but also counted as individuals for whom the death penalty was sought in the present response.

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13. On an aggregate and annual basis covering 2001 to 2006, in how many cases has the Attorney General authorized U.S. Attorneys to seek the death penalty in local jurisdictions in which capital punishment is not available for the crime at issue?

The government has tried and sought the death penalty for 26 defendants in non-death penalty states, obtaining death sentences for 8 of these defendants.

	2001	2002	2003	2004	2005	2006	total
Defendants	3	4*	8**	1	1	9***	26
Death Sentences	1	3	1	1	0	2	8

* The notice of intent to seek the death penalty was dismissed in one of these cases.
** The notices of intent to seek the death penalty were dismissed in three of these cases.
** Trial is pending for 7 defendants.

Explanatory notes:

i. Defendants are categorized by year based on the date of the Attorney General's decision to seek the death penalty.
ii. The foregoing data do not include cases in which the government filed, but later withdrew, a notice of intention to seek the death penalty.

14. On an aggregate and annual basis covering 2001 to 2006, in how many cases has the Attorney General authorized the U.S. Attorneys to seek the death penalty in cases in which the crimes had already been prosecuted at the state or local level? In how many of those cases had the perpetrator already been imprisoned for the crime? In how many of those cases had the perpetrator already been imprisoned for life for the crime?

It would be difficult to retrospectively identify relevant cases from maintained information. It should be noted, however, that there are unlikely to have been many such cases. Before a crime that has been prosecuted at the state or local level can be prosecuted by the federal government, the prosecuting district must apply for and obtain a waiver of the Petite Policy. The Petite Policy forbids the initiation or continuation of a federal prosecution following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless the prior prosecution left a substantial federal interest demonstrably unvindicated.

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15. On an aggregate and annual basis covering 2001 to 2006, in how many cases in which the Attorney General overruled the U.S. Attorney's recommendation not to seek the death penalty, did the Attorney General's decision effectively negate a negotiated plea agreement between the defendant and U.S. Attorney's office?

17. With respect to questions 15 through 16, please provide a break down of the race ethnicity of the defendants and the race/ethnicity of the victims.

The data in the following table only include cases in which the U.S. Attorney specifically requested authorization of a plea agreement rather than authorization not to seek the death penalty. Sometimes cases are submitted as requests for authorization not to seek although tentative plea agreements have been reached. The data also reflect only the initial decisions by the Attorney General, not the decisions made in response to requests for reconsideration of an initial decision to seek or authorization to withdraw the death notice. Data pertaining to requests for reconsideration or authorization to withdraw the death notice are provided in response to question 16.

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement Under Which the Government Would Agree Not to Seek the Death Penalty
Defendant Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	1	1	0	2
2003	0	0	1	0	1
2004	0	1	0	0	1
2005	0	0	0	0	0
2006	1	0	0	0	1

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement Under Which the Government Would Agree Not to Seek the Death Penalty
Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	2	1	0	3
2003	0	0	1	0	1
2004	0	1	0	0	1

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2005	0	0	0	0	0
2006	1	0	0	0	1

Explanatory notes:

i. Explanatory notes i through v of the response to Question 8 apply to this response.

16. In how many cases has the Attorney General approved a plea agreement that takes capital punishment off the table? In how many instances has the Attorney General refused to approve a plea agreement that takes capital punishment off the table? In each instance in which the Attorney General refused to approve such a plea agreement, why did he make that decision?

17. With respect to questions 15 through 16, please provide a break down of the race ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

Decisions by the Attorney General
Approving a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant and Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
Defendants	4	8	8	2	22
Victims	5	7	6	4	22

Decisions by the Attorney General
Overruling a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant and Victim Race/Ethnicity

	White	Black	Hispanic	Other	Total
Defendants	4	8	2	1	15
Victims	10	10	4	2	26

18. Does the Attorney General rely on specific criteria that are consistently applied to determine whether to approve such plea agreements? If so, please provide those criteria.

The Department considers a variety of factors when a prospective plea agreement is at

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issue, including, but not limited to, whether the defendant will cooperate in an investigation and prosecution, whether the defendant's cooperation and testimony is needed, any deterioration in the evidence since the initiation of the prosecution, and the balance of factors militating in favor of and against seeking the death penalty.

When there has already been an initial decision to seek the death penalty for a particular defendant, that decision will not normally be rescinded unless there is a change in the facts or circumstances that militated in favor of the capital prosecution at the time of the original decision. *See* U.S.A.M. 9-10.090 ("If the United States Attorney wishes to withdraw the notice [of intent to seek the death penalty], the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request, including any changes in facts or circumstances."). Following receipt of the U.S. Attorney's recommendation in the Criminal Division, the case is forwarded through the Office of the Deputy Attorney General to the Office of the Attorney General, who makes the final decision.

19. Between 2001 and 2006, what were the average and median time intervals between (a) indictment of the defendant for a death-eligible offense; (b) submission by the U.S. Attorney to the Department of Justice of a recommendation whether to seek the death penalty; and (c) a decision by the Attorney General whether to seek the death penalty.

The average and median time intervals between indictment and submission of cases by U.S. Attorneys to the Department of Justice cannot be calculated from information maintained by the Capital Case Unit.

The average and median times between the U.S. Attorney's submission of a case and a decision by the Attorney General are 103.2 days and 79 days, respectively. It should be noted that the time between submission and a decision by the U.S. Attorney can be influenced by a variety of factors including a defense request for more time to investigate and develop mitigating evidence, a request for additional information from the Capital Case Unit or the Committee, the complexity of the case, and the balance of aggravation and mitigation. Sometimes a case is opened when the Capital Case Unit receives an initial submission from an Assistant U.S. Attorney rather than the final recommendation of the U.S. Attorney. Initial submissions and consultation between the Capital Case Unit and the prosecuting United States Attorney's Office may precede a final submission by up to a period of years, for example, when a defendant is already incarcerated for a prior offense.

20. What steps does the Department take to track the monetary cost to the U.S. government of seeking the Federal death penalty in death-eligible cases? Please provide the average and median total cost (including investigative costs) to the Justice Department of seeking the death penalty in death-eligible cases between 2001 and 2006. Please also provide information on the average and median total cost (including investigative costs) to the Justice Department should an otherwise death-eligible case instead be brought as a non-capital case (*i.e.* where life without parole is sought).

The Department does not track or attempt to attribute specific sums to the capital review

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process. The Department does not track these kinds of expenses for capital, or non-capital, cases.

21. Please identify the five U.S. Attorney offices that have brought the most death penalty cases since 2001. For each office, please provide the total staff and budget for each office for each year. For each office, please provide the number of defendants against whom the death penalty was sought since 2001 and the results of each case.

District	Total Defendants	Defendants for whom the Attorney General later authorized withdrawal of the death penalty notice	Defendants for whom a capital trial is pending	Defendants sentenced to death	Defendants not sentenced to death
C.D. Cal.	20	5	10	2	3
D. Md.	14	2	7	1	4
E.D.N.Y.	12	2	6	1	3
E.D. Va.	11	1	1	0	9
D.D.C.	9	0	2	0	7
W.D. Va.	9	4	0	1	4

Explanatory notes:

i. The defendants listed in the above table are those for whom the Attorney General authorized the U.S. Attorney to seek the death penalty.

22. Does the Department recommend to U.S. Attorney Offices administrative procedures for handling death penalty cases, such as the number of staff to allocate or the amount of resources to spend on experts? If so, what are those procedures?

23. Does the Department ever give specific instructions or recommendations on staffing or resources or recommendations on staffing or resources to be allocated in a particular case? If so, please indicate in what cases such instructions or recommendations were provided as well as the content and rationale for such instructions or recommendations.

The Department does not have standardized recommendations for U.S. Attorneys' Offices regarding administrative procedures for handling death penalty cases, such as the number of staff members to allocate to a capital case or the resources to expend on experts. As far as can be determined, neither has the Department given specific instructions or recommendations on staffing or resources that should be allocated to any particular capital case. U.S. Attorneys are generally entrusted with the core management decisions relating to cases they prosecute.

However, the Capital Case Unit provides training to individual districts and at the National Advocacy Center on the prosecution of capital cases and, in that context, discusses the

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requirements of capital cases (for example, investigation relevant to the punishment phase). The Capital Case Unit also provides guidance and counsel on a case by case basis and, on the request of the prosecuting district, and as time and resources allow, assists by providing or drafting motion responses and in the actual trial of the case.

The Capital Case Unit also receives inquiries from the districts regarding expert witnesses and how they can defray such costs. Capital Case Unit personnel occasionally direct prosecuting districts to the Executive Office of United States Attorneys, which has funds for one-time litigation expenses to defray unusual expenses adherent to any particular case.

24. Finally, please provide the Subcommittee with a copy of the "Death Penalty Evaluation" form, the prosecution memorandum form, and the form for a recommendation not to seek the death penalty, referenced in the U.S. Attorney Manual 9-10.040 and 9-10.055.

The forms are attached.

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QUESTIONS AND ANSWERS

Responses to Questions from Senator Specter

David I. Bruck, Federal Death Penalty Resource Counsel
July 27, 2007

1. There have actually been approximately 60 death sentences imposed under federal law since 1976 (not 36), and there are currently about 51 federal death row inmates. I agree that this is a small percentage of the more than 3000 inmates now on death row across the United States. My testimony, however, was not intended to suggest that the Department of Justice was on course to take over the nation's death penalty system if it was not "restrained." Rather, my point was that the current Justice Department's transfer of death penalty decision-making from local U.S. Attorneys' offices to Washington in pursuit of an unattainable goal of nationwide consistency has instead produced a scattershot, wasteful and increasingly unsuccessful record of death penalty prosecutions in the federal courts. The testimony of former United States Attorney Paul K. Charlton and of Secretary of Justice Roberto Sanchez Ramos provided telling examples of this.

2. a. The Department of Justice has never made public a list of cases in which the Attorney General has authorized the government to seek the death penalty, and therefore I cannot provide a list of "all" such cases. The Federal Death Penalty Resource Counsel Project does maintain an unofficial listing, derived from press coverage, PACER federal court docket checks, and communications from defense counsel, which we post on our web site in a list which is organized by case outcome.[1] The very brief factual summaries accompanying these case citations are obviously incomplete, and are included simply to aid in identifying the cases.

   b. and c. Neither the Federal Death Penalty Resource Counsel Project nor I personally categorize federal capital cases as "deserved" or "undeserved." I therefore cannot answer these questions. Whatever my personal opinions might be, federal law places this determination in the hands of juries, and it is surely significant that of the 72 cases that the Justice Department brought to

[1]See www.capdefnet.org/fdprc/contents/summaries_of_cases/case_summ_frame.asp. Since a printout of this list would run close to 150 pages, I have not included one with this response, but I will be happy to do so upon request.

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trial as death penalty prosecutions between the beginning of 2001 and the end of 2006, exactly two-thirds (48) have ended in acquittals, convictions of less offenses, or (for the most part) sentences of less than death. The most recent federal sentencing verdict is illustrative: on July 18, a jury in Akron, Ohio unanimously imposed a life sentence on Donna Moonda after convicting her of arranging the murder-for-hire of her husband. According to the Associated Press, the triggerman in the murder received a 17½ sentence after testifying against Moonda, and during deliberations the jury asked the judge whether a less-than-life sentence was available. Joe Milicia, "Wife of Murdered Doctor Sentenced to Life in Prison," Akron Beacon-Journal, July 19, 2007 (copy attached). This case appears to have been in federal court only because the murder plot traversed the state line between Ohio and Pennsylvania, and however blameworthy Ms. Moonda's conduct, it was surely predictable that no jury would sentence her to death given the relatively lenient sentence given to the actual killer. If this case reflects the Attorney General's current standard for death penalty decision-making, the Department's low capital case "success" rate is not surprising.

3. a. They are being tried for federal crimes.

b. As I tried to explain in my testimony, I do not categorically object to the use of the death penalty in every instance where state or local law would forbid it (although I do categorically oppose the death penalty for other reasons). My point was simply that federal policy in favor of the death penalty should trump state law to the contrary only where there is a compelling *federal* interest in seeking the death penalty. The Oklahoma City Bombing, which Mr. Otis cited repeatedly in his testimony at the June 27 hearing, provides a clear example of a crime implicating such an over-arching federal interest. So do cases involving the murders of federal law enforcement or other federal government officials, murders by inmates in federal prisons, and murders committed in furtherance of international or multi-state criminal enterprises. Many other cases, however, that fall within an ever-expanding federal criminal jurisdiction (such as most kidnaping or carjacking cases, and murders in furtherance of relatively small-scale drug trafficking conspiracies) involve serious offenses against the local community, not the nation as a whole. It is these kinds of murders that should, as a general rule, be punished according to local rather than federal law.

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I realize that like many legal dividing lines, the distinction between a national and a local crime will be easier to discern in some cases than in others. But the fact that some cases will always fall close to the line does not mean that the line should not be drawn. If a given murder's impact is primarily local, and if it could just as easily be tried and punished in the state's criminal justice system, it normally should be. And so long as the judgment of the local jurisdiction about how to punish such crimes falls within federal constitutional limitations, that judgment should be respected.

In any event, the issues of federalism that surround the death penalty cannot be analogized to those involved in the abortion controversy. No private individual has any enforceable legal right to have anyone else executed, while the Supreme Court has held that women do normally have a constitutional right to choose whether to carry a non-viable unborn child to term. Furthermore, I neither testified nor meant to suggest that the federal government lacks the constitutional authority to impose the death penalty in state and local jurisdictions that have rejected it. I simply suggested, and still believe, that this authority should be exercised sparingly, and only when the interests of the United States clearly require it. Were the Justice Department to adopt such a federalism-based approach, I suspect it would find that juries would impose the death penalty in a much higher proportion of the cases in which was sought, the persistent question of racial disparity would disappear, and the death penalty would no longer exact such a disproportionate toll on the time, resources and morale of the federal judicial and criminal justice systems.

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Wife of murdered doctor sentenced to life in prison

Jury spares Donna Moonda, 48, from death penalty for hiring lover to kill husband on Ohio Turnpike

By Joe Milicia

Associated Press
Thursday, July 19, 2007

A federal court jury on Wednesday spared a woman the death sentence for hiring her lover to kill her wealthy husband on the Ohio Turnpike two years ago and instead said she should spend the rest of her life in prison.

Donna Moonda, 48, who was convicted of murder-for- hire this month, quietly cried upon learning her sentence.

Moonda's attorney David Grant had asked the jury in U.S. District Court in Akron not to sentence her to death because she suffers from a personality disorder and because the shooter, Damian Bradford, 26, was sentenced to just 17 ½ years in prison.

Prosecutors said she had promised her drug dealer boyfriend half of Dr. Gulam Moonda's multimillion-dollar estate in return for the killing.

Assistant U.S. Attorney Linda Barr said Moonda deserved a death sentence because she had her husband killed for the worst possible reason -- money.

Moonda was given a private moment with her tearful 77-year-old mother after the jury gave its sentence. Dorothy Smouse was sitting in the back seat of the car when the 69-year-old doctor was shot May 13, 2005, along the turnpike south of Cleveland.

``This might be the last opportunity for Donna and her mother to hug," Grant said.

About three hours into their deliberations, jurors asked Judge David D. Dowd Jr. if there was any other sentence they could consider on the charge of murder-for-hire.

Dowd told them there was no other option. Several jurors nodded their heads in understanding. They returned a decision about an hour later.

``Had they had the option, she probably would have been sentenced to less than life without parole," Grant said.

U.S. Attorney Greg White said afterward that he was pleased with the outcome.

White believed the jury's decision was influenced by Bradford's sentence and that he wilbe out of prison sometime around his 40th birthday.

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``Some things are distasteful in law enforcement," he said of the deal with Bradford.

Bradford, of Monaca, Pa., who met Moonda in drug rehab, testified during Moonda's trial that he followed the couple from their Hermitage, Pa., home near the Ohio state line and shot the doctor in the side of the head after she pulled over on the turnpike, supposedly to let her husband take the wheel.

Grant said his client was holding up well.

``She's ready for the next fight," Grant said of Moonda, who maintains her innocence and will appeal after she is sentenced Sept. 17. Dowd can't change the jury's sentence.

A longtime colleague of Gulam Moonda's said he was satisfied with the jury's decision.

``Life in prison without parole is a pretty severe sentence," said Dr. Ravi Sachdeva, a surgeon who worked with the late doctor at Sharon Regional Health System in Sharon, Pa. ``I feel sorry for her family. I hope they can get over what she did."

Sachdeva said the estate that Moonda and Bradford plotted to obtain will go to the doctor's family and charity.

Dr. Moonda, one of only two urologists in Sharon, still is missed by those who were under his care, Sachdeva said.

``Even now, patients come to the office and they have nothing but contempt for her," he said of Donna Moonda.

In pushing for the death sentence, Barr told the jury that Moonda was more culpable in the crime than Bradford because she came from a better upbringing than the convicted drug dealer. She also helped plan the killing, knowing her husband's schedule and what he was worth financially.

Grant called Barr's suggestion that Moonda is more culpable ridiculous, noting Barr's own words from the trial that ``two fingers were on the trigger."

He noted psychologist Robert Kaplan's testimony that she has dependent personality disorder as a factor to consider in sparing her the death penalty.

Moonda feared displeasing her father in childhood and that pattern continued with her husband, Kaplan said. The disorder could lead her to act against her own best judgment.

Barr dismissed that argument, saying the disorder wouldn't cause someone to plot their husband's murder. Nor was she a ``robot carrying out the commands of her lover," Barr said.

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Questions for Paul Charlton from Senator Arlen Specter

1. A. Do you agree that a US Attorney serves at the pleasure of the President? **Yes.**

   B. Do you agree that he/she has an obligation to follow the policies promoted by the President and his Administration? **Yes. Additionally, a U.S. Attorney has an obligation to raise concerns regarding the implementation of those policies to leadership at the Department of Justice. Nowhere is that obligation more necessary or important than in the implementation of the death penalty. Similarly, the Attorney General has the solemn obligation to listen to all with special knowledge of the facts of a death penalty eligible case before seeking to take another's life.**

   C. And considering that you chose not to seek the death penalty in these situations, in contradiction to the Administration's desires, do you agree that they had every right to let you go? **I understand that I served at the pleasure of the President. When asked to resign, I did so. This question, however, assumes that: 1) I "chose not to seek the death penalty," and 2) this issue was the genuine reason for asking for my resignation.**

   Assumption number 1 is untrue as no U.S. Attorney can "choose" to seek or not seek the death penalty. He or she can only recommend whether or not the Attorney General should seek the death penalty. A U.S. Attorney fails the Constitution as well as the dictates of his or her own conscience when he or she does not, or cannot, give the Attorney General honest advice on a death penalty case. And while I will not address the conscience of the Attorney General, I can say that he too fails the Constitution when he does not make a fully informed decision before asking for the execution of a defendant.

   Assumption number 2 is currently the subject of a number of investigations.

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2. Several witnesses for this hearing have made the argument that the federal death penalty should not be used in a state where the state death penalty is not legal. Do you agree with that statement, and why or why not? **I can speak best about my own experience in the District of Arizona. There, the U.S. Attorney has jurisdiction over major crimes committed on Arizona's 21 Indian tribes. Each of those tribes has opted out of the federal death penalty. *See* 18 U.S.C. §3598. The Department of Justice, however, does not consider this express desire when reviewing death penalty eligible cases that are crimes of general jurisdiction. For example, a carjacking that occurs on a reservation with Native American defendants and victims will be considered as a potential death penalty case by the Department, despite the tribes' express disagreement with this penalty and the law's prohibition in most other contexts. The Department of Justice should defer to the tribes' wishes as reflected in 18 U.S.C. §3598.**

3. Do you believe that the use of the federal death penalty unfairly impacts on racial minorities? **In my ten plus years of service as an Assistant U.S. Attorney and more than five years as a U.S. Attorney, I never witnessed an instance in which racial bias played a role in a decision to go forward with a case. That said, the statistics indicate that we as a nation should more fully explore the reason behind the disproportionate number of minorities on death row.**

1597687/1-0006

Questions for David Muhlhausen from Senator Arlen Specter

1. In your testimony, you mention that the original results of Professor Ray Paternoster's study, commissioned by then-Governor of Maryland Glendening, which found that black defendants who murder white victims were more likely to be sentenced to death, was statistically unsound.
   a. Why did Professor Richard Berk determine that Professor Paternoster's study could not stand up to statistical scrutiny?

   Professor Richard Berk found that the results of Professor Paternoster's study do not stand up to statistical scrutiny.[1] The logit model used by Professor Paternoster to predict capital charges has accuracy problems. For example, Professor Berk found that the model misclassified cases with a capital charge for 40 percent of the time, while 12 percent of cases were incorrectly predicted to receive no capital charge. Professor Paternoster's model inadequately differentiates between cases in which a capital charge is likely and cases in which the charge is unlikely. This statistical imprecision make drawing valid conclusions based on Professor Paternoster's modeling very difficult to obtain.

   b. Aside from determining that the results of Professor Paternoster's study were inaccurate, what else did Professor Berk's study determine?

   Professor Berk makes a methodological point that using causal modeling to understand the role of the defendant's race and victim's race can lead to fragile results. Using three different statistical techniques—logistic regression, classification and regression trees (CART), and random forests analysis—Professor Berk found varying results. First, the logistic modeling used by Professor Paternoster failed to adequately predict capital cases. Second, the CART analysis found no racial effects. Third, the random forests analysis found that cases with a black defendant and white or other race victim were less likely to receive a capital sentence.

2. In your testimony you mention that cases with a black defendant and white victim or "other" racial combination are *less* likely to have a death sentence. Can you elaborate on this?

   According to Professor Berk's re-analysis, "for both capital charges and death sentences, race either played no role or a small role that is very difficult to specify based on the three statistical models used in his study. In short, it is very difficult to find convincing evidence for racial effects in the Maryland data and if there are any, they may not be additive."[2] Further, Professor Berk's random forests analysis indicates that race may have a small influence because "cases with a black defendant and white victim or 'other' racial combination are *less* likely to have a death sentence."[3] Regardless of the findings by Professors Berk and Paternoster, decision-makers involved in potential capital cases should make their

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decisions based on the severity of the crime and not worry about the race of the offender and victim.

3. In your testimony you point to a number of studies using panel data sets that indicate that the death penalty is an effective crime deterrent. Can you tell us more about panel data studies and the accuracy of their results?

Panel studies observe multiple units over several time periods. The addition of multiple data collection points gives the results of panel studies substantially more credibility than cross-sectional studies.

Policymakers should read capital punishment studies based on cross-sectional data (e.g., cross-state comparisons within a single year) with an air of caution. First, cross-sectional data does not allow researchers to control for important differences between states that explain varying murder rates. For example, states with high murder rates may be more likely to implement the death penalty, while states low murder rates may be less likely to use the death penalty. Thus, any cross-sectional comparison of these states will likely indicate that the death penalty states have higher murder rates than the non-death penalty states. It would be erroneous to conclude that the death penalty increases murder rates. In fact, cross-sectional studies have little use in evaluating the effectiveness of many criminal justice policies. [4]

To tease out the effect of the death penalty, social scientists need to use panel data. Panel data allows researchers to examine the effect of the death penalty over time within and between states. Panel data allows researchers to measure changes in murder rates after the implementation of the death penalty. Cross-sectional studies cannot measure these changes. The overwhelming majority of panel studies published in recent years strongly suggest that capital punishment deters murders.

Third, by increasing the number of data points compared to cross-sectional statistics, panel analysis increases the degrees of freedom and reduces possible collinearity among the independent variables, thus improving the efficiency of the econometric estimates. Fourth, panel analysis also reduces omitted variable bias by introducing cross-sectional and time-specific fixed effects into the model specification.[5]

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[1] Richard Berk, Azusa Li, and Laura J. Hickman, "Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland," *Journal of Quantitative Criminology*, Vol. 21, No. 4 (December, 2005), pp. 365–390.
[2] *Ibid.*, p. 386.
[3] *Ibid.*, p. 381.
[4] For example, University of Pennsylvania Professor Lawrence Sherman's 1992 review of policing strategies intended to reduce crime excluded cross-sectional studies of large cities because cross-sectional

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data are not well suited for explaining changes in crime rates . See Lawrence Sherman, "Police and Crime Control," in Michael Tonry and Norval Morris, eds., *Modern Policing* (Chicago: University of Chicago Press, 1992), pp. 159–230.

[5]Cheng Hsiao, *Analysis of Panel Data* (Cambridge, U.K.: Cambridge University Press, 1986).

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The Honorable Arlen Specter
United States Senate
711 Hart Building
Washington, DC 20510

(via e-mail)

Dear Senator Specter:
Thank you for permitting me to address your questions.

1. In your testimony, you state that it is a "myth" that we are executing the innocent. However, while it is true that no one who has been exonerated [executed?] has been proven innocent, it is also true that our trial system is not set up to prove innocence. In fact, defense teams only attempt to create a small amount of doubt to prevent the conviction of the defendant.

a. So aren't you asking for something that is not likely to ever be shown?

b. Thus, isn't it still a possibility that we have, or we might, execute an innocent man?

Answer: At the outset, if the defense is unable to create even a small amount of doubt at trial -- enough to persuade just one of twelve jurors that the prosecution has not carried its burden of proof -- there is reason to wonder whether subsequently produced "documentation" of innocence, which often surfaces years later in the form of "recantations" obtained under circumstances not subject to the truth-finding mechanisms of a trial, really shows factual innocence at all. Instead, in a large number of these instances of supposed exoneration, what is shown, or allegedly shown, is that there may be a reasonable doubt about the defendant's legal guilt or the degree of his culpability. That might be sufficient to eliminate the death sentence, and in some instances the conviction itself, but it is not as a categorical matter the same as proving that the defendant had no complicity in the murder.

Because human beings are fallible, it is of course possible that we have executed, or in the future might execute, an innocent person. But several points should be made about that. First, just

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as the judicial system is fallible, so is the penal system. What this means is that if we abolish the death penalty, killers who would have been executed will continue to be with us in fallibly administered prisons, creating the possibility that they will kill again. Thus, a murderer sentenced to life imprisonment could go on to kill a cellmate, a guard, counselor, teacher, doctor or nurse, a rival gang member, or a weaker inmate who refused him sexual favors. He could also escape or be erroneously released and kill once he was free -- something that happened most notoriously in the case of Kenneth McDuff, a sadistic Texas multiple killer whose death sentence was commuted after the Supreme Court effectively barred capital punishment in Furman. McDuff was eventually released and went on to murder at least four, and most likely twelve, additional innocent people. They would be alive today had McDuff been executed when he should have been.

In a perfect system, episodes like McDuff would not happen. But, as noted, penal systems are at least as subject to human fallibility as are courts. Thus, the possibility of government complicity in taking an innocent human life cannot be ended simply by ending the death penalty. Because killers can do it again, and because prisons make mistakes just as court do, it is a matter of trade-offs. With *either* life imprisonment or the death penalty, there exists the possibility that innocent life will be forfeited. The only realistic question is which of these punishments is less likely to have that result. Given the absence of any proof for decades that the death penalty has taken even one innocent life -- while murders by previously convicted killers number in the dozens -- the better tradeoff, simply in terms of preserving innocent life, is to keep capital punishment, as the great majority of our citizens want.

In asking for proof that we have executed an innocent person, death penalty proponents are simply asking their adversaries to demonstrate what they claim -- scarcely an unreasonable request. We are not seeking something that is "not likely to ever be shown." Indeed, in moments when they thought it would be propitious, *abolitionists* have made a point of their ability to "prove" that an innocent person has been executed. Their problem has not been with lack of opportunity, but with the

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results when opportunity arrived. Thus, as Justice Scalia showed in his concurrence in Kansas v. Marsh, the abolitionists' "proof" that Roger Keith Coleman was innocent came to grief, not when abolitionists were denied the chance to make their case through DNA testing, but when the DNA test they demanded and obtained showed that Coleman was guilty. In addition to DNA testing provided by the state, as happened with Coleman, the family and/or the estate of an executed person alleged to have been innocent could sue the state for wrongful death. Finally, legislative hearings or commissions of inquiry established by the executive branch could also be devices for assessing claims of innocence. In other words, if in fact there are credible claims that we are executing the innocent, means exist in all three branches for examining them. Against this backdrop, it is stunning that there has not been a single proven incident for decades of an innocent person's having been executed. And it is powerful evidence that it simply is not happening.

By contrast, Kenneth McDuff and cases like his stand as compelling testimony to the possible consequences to innocent life if we do *not* execute those who have earned it. The execution of an innocent person remains a matter of conjecture. The murder of innocent people by previously convicted killers -- caught but not executed -- is regrettably a matter of fact.

2. As several of our witnesses have mentioned, it is becoming exceedingly expensive to execute criminals. For one example, according to DPIC, the California death penalty system costs taxpayers $114 million per year beyond the costs of keeping convicts locked up for life. (This may be exaggerated, of course.) Considering that all government spending operates at an opportunity cost, isn't it possible that it would be more economically efficient to forgo the use of the death penalty - whose imposition (both federal and state) is extraordinarily rare - in favor of life without parole?

Answer: Those who have done the most to balloon the cost of carrying out death sentences are poorly positioned to rest their arguments on the public expense they did so much to create. This

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would be true in any event, but it is especially true in light of the fact that the majority of these increased costs derive from years of mostly non-meritorious, and not infrequently frivolous, appeals.

In addition, and as your question suggests, abolitionist groups may tend to exaggerate the cost of execution while minimizing the cost of keeping convicted killers imprisoned for life. I am not an expert in this area and cannot offer dollar figures, but I am quite sure that you and other senators considering this question would be well served by seeking cost estimates from neutral parties, rather than taking at face value estimates provided by advocacy groups on either side. Having said that, I have to believe that the cost of imprisoning a convicted killer starting (say) at age 30 and keeping him locked up until he was roughly 70 -- a period of 40 years -- would be enormous, even disregarding the extra security measures that would be required for an inmate of that type, and the rapidly escalating medical costs the taxpayers would have to bear as he aged.

Lastly, while any responsible lawmaker must consider the burden on the public fisc that a given form of punishment would impose, cost cannot be the controlling factor. If, for example, it turned out to cost less to execute an inmate than imprison him for life, no serious person would say that this fact means that a life sentence, if otherwise justified by the facts of the case, should be foregone in favor of execution. At the end of the day, justice cannot be about money. No one promised that justice would be cheap, and it isn't. Whether the costs of keeping capital punishment as an option for the jury are worth the candle is ultimately a question for those who bear those costs, namely, the public. The public is aware that the capital punishment system is expensive, but nonetheless continues to favor the death penalty by a margin of better than two-to-one. Indeed, notwithstanding its costs and all the other arguments made against it, the death penalty enjoys a degree of public support virtually unrivaled by any other contentious issue.

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3. You mention in your testimony that the increase in executions over the last 15 years is not *alone* responsible for the decreasing murder rate.

a. What other factors might have been responsible?

b. To what extent did these other factors contribute to the overall decreasing murder rate?

c. To what extent can you isolate the role that executions played in decreasing the murder rate, as divorced from the other possible contributing factors?

Answer: (a). I am not a criminologist or a sociologist, so I cannot give answers in which I have great confidence. I believe, however, that demographics might also have been partly responsible for the decline in the murder rate over the last 15 years. Murder is a crime of violence, and therefore one that, in my experience as a prosecutor, tends to be committed in disproportionate numbers by persons from age 18 to about 35. I believe this group has declined as a percentage of the population over the last 15 years. The general aging of the population over this period, as the demographic bulge known as "the baby boomers" has reached middle age (or older), probably accounts for some part of the drop in the rate of violent crime from the early 1990's to the present.

(b) and (c). Again, because I am not a criminologist or a sociologist, I cannot say to what extent demographics, and perhaps other factors, contributed to decreasing the overall murder rate, nor can I isolate the effect of one factor versus another. Whatever the answer may turn out to be, however, the unvarnished fact remains that *when the number of executions goes up, the murder rate goes down, and when the number of executions goes down, the murder rate goes up*. These facts are so overwhelmingly established as to be beyond serious dispute, and at the hearing, in fact they were not disputed. To reiterate: In the 15 years between 1965 and 1980, when there was a virtual moratorium on executions (only six took place, I believe), the murder rate *doubled*, from 5.1 per 100,000 people to 10.2. I am not aware of any period in American history so short in which the murder rate increased so

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much. On the other hand, in the 15 years from 1991 to 2006 (the most recent period for which figures are available) -- a period in which there were roughly 900 executions -- the murder rate was on a steady decline, from 9.8 to 5.5. That is a decrease of 44%. Given these figures, the notion that capital punishment does not significantly contribute to decreasing the murder rate is, not merely implausible, but preposterous.

Again, I am grateful for the opportunity to respond to your questions.

Sincerely,

William G. Otis

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 17, 2007

The Honorable Russell D. Feingold
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of Deputy Assistant Attorney General Barry Sabin before the Committee on June 27, 2007, at a hearing entitled "Oversight of the Federal Death Penalty".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Sam Brownback
Ranking Minority Member

"Oversight of the Federal Death Penalty"

June 27, 2007

Questions for the Hearing Record
for
Barry Sabin
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice

QUESTION FROM SENATOR FEINGOLD:

1. **In 2000, then-Attorney General Janet Reno voluntarily released a detailed report on the implementation of the federal death penalty from 1988 to 2000. This public report was nearly 400 pages long, and included detailed data about the handling of federal death-eligible cases, disaggregated down to the district level. During the hearing on June 27, 2007, you testified that the new Department death penalty protocols that went into effect on July 1, 2007–and specifically the new confidentiality rules contained in those protocols–would not have precluded former Attorney General Reno from issuing her 2000 report. I asked that the Department prepare a report, analogous to that provided by former Attorney General Reno, and you stated that the Department would respond in writing.**

   a. **Will the Department compile and publicly release such a report, presenting the information in the same format utilized by the Reno report?**

   b. **When will the Department release the report?**

   c. **What steps will the Department take to ensure that such a report is released prior to the close of this Administration's tenure?**

RESPONSE:

The Department has not yet made a decision on this request, which is still under review and will require that the Department's new leadership be briefed and advised. As with the question responses set forth below, such a report would require a large dedication of resources over an extended period, including substantial time commitments by senior Department personnel involved in compiling and reviewing responsive information.

2. **The final Department death penalty protocols that went into effect on July 1, 2007, and were published on the Department's website include a prohibition on threatening to seek the death penalty solely for negotiating purposes. That**

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prohibition, which had been in the protocols in some form since they were first written in 1995, was not in the version of the revised protocols that the Department provided to the subcommittee on June 25, 2007.

a. I was pleased to see that change had been made. Why was that prohibition reinserted in the final protocols?

RESPONSE:

The Department has always and consistently adhered to the principle that a threat of a death penalty will not be used in negotiating a plea agreement. In our view, the prohibition against using a threat of a capital prosecution in negotiation is contained in other provisions of the United States Attorneys' Manual. In deleting the express language from the draft revised death penalty protocol, it was not our intent to alter existing practice. Nevertheless, we ultimately decided to include the express language in order to make our ongoing commitment to this principle abundantly clear.

b. Were any other changes to the protocols made between the June 25, 2007, version provided to the subcommittee, and the final version published on the Department's website? If so, please identify the changes and explain why they were made.

No other changes were made to the protocol between June 25 and July 1, 2007.

3. You stated in your testimony that the Department "aims to apply the most faithful reading of Federal law to cases" in its implementation of the federal death penalty. You also stated that if statutory requirements are not met, the Attorney General will not authorize a capital prosecution. However, the statute does not require that the death penalty be sought in any case or specify any process that must be used to decide whether to seek the death penalty; rather, it leaves a great deal of discretion to the Attorney General to decide when to seek the death penalty and for what reasons.

a. Does the Department agree with this characterization of the statute?

Yes. The statutes merely establish who is eligible for the death penalty, not for whom the death penalty should be sought.

b. Does the Review Committee, the Deputy Attorney General, or the Attorney General rely on a uniform set of factors for assessing whether to seek the death penalty in each case that is eligible under the statute? If so, what are they?

c. If a uniform set of factors is not relied on for assessing whether to seek the death penalty in each case that is eligible under the statute, what factors do

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the review Committee, the Deputy Attorney General, or the Attorney General consider?

Initially, the capital procedure statutes provide the parameters of the Department's review. The "circumstances of the offense [must be] such that a sentence of death is justified." 18 U.S.C. § 3593 (a). In determining whether a sentence of death is justified, the Review Committee, the Deputy Attorney General and the Attorney General make the same assessment that would be required of a jury: "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. § 3593 (e). In making this assessment, reviewers must determine which, if any, of the statutory aggravating and mitigating factors are applicable to the particular offender and offense and whether there are any applicable non-statutory aggravating or mitigating factors.

Consistent with the parameters established by the Constitution for a capital jury's consideration, we consider the circumstances of the crime and the character and background, including criminal history, of the defendant. *See Penry v. Lynaugh*, 492 U.S. 302, 318 (1989)("[I]t was clear from *Lockett* [*v. Ohio*, 438 U.S. 586 (1978)] and *Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982)], that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigate against imposing the death penalty."); *see also California v. Brown*, 479 U.S. 538, 544 (1987)(O'Connor, J., concurring)("In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence."). There are obviously a wide range of factors relevant to a defendant's character and background and circumstances of the offense that could inform an assessment of a defendant's culpability and whether a the death penalty should be sought. Not every consideration is relevant in each case.

The factors considered by the Department include, but are not limited to, as relevant: (1) the facts and circumstances of the offense, including for example whether it involved multiple victims or witness elimination; (2) the quality and quantity of the evidence of guilt; (3) the defendant's criminal history, including whether it includes other acts of violence, particularly other homicides; (4) the defendant's likelihood of future dangerous conduct or capacity for rehabilitation, as demonstrated, for example, by his conduct in prison; and (5) factors that extenuate the gravity of the offense or the defendant's culpability, for example, provocation or mental disease or defect. *See*, *e.g.*, 18 U.S.C. § 3592(a), (c); U.S.A.M. 9-10.080.

The Department's review is informed by the extensive information and documentation expressly required by the protocol to be included in a district's capital case submission. The U.S. Attorney's memorandum includes the following information: (1) whether the case involves

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specified "unusual circumstances" requiring special treatment, (2) any deadline or other consideration affecting the timing of the review process, (3) a narrative delineation of the facts and separate delineation of the supporting evidence, (4) a discussion of relevant prosecutorial considerations, (5) a death penalty analysis, including applicable aggravating and mitigating factors, (6) the background and criminal record of the capital defendant(s), (7) the background and criminal record of the victim(s), (8) victim impact evidence and the views of the victim's family on seeking the death penalty, (9) a discussion of the federal interest in prosecuting the case, (10) a discussion on whether the defendant(s) are citizens of foreign countries, and if so, whether the requirements of the Vienna Convention on Consular Relations have been satisfied, and (11) the recommendation of the United States Attorney on whether the death penalty should be sought. In addition, the submitting district must provide copies of all existing and proposed superseding indictments, a draft notice of intention to seek the death penalty, the materials provided by defense counsel, and relevant court decisions in the case.

4. **The form of the Department's response to my April 19 oversight questions numbers 12 and 17 made it difficult to evaluate any potential disparities with regard to the race of the victims in death-eligible cases because the responses do not indicate in how many cases there were multiple victims of different races. Please provide answers to question numbers 12 and 17 of my April 19 letter, broken down to show how many defendants were prosecuted for crimes that included: (1) exclusively white homicide victim(s); (2) exclusively black homicide victim(s); (3) exclusively Hispanic homicide victim(s); (4) exclusively "other" homicide victim(s); (5) one or more white homicide victims in addition to one or more homicide victims of other races; (6) no white homicide victims and multiple homicide victims of more than one race. (Please note that "race" in this context refers to race or ethnicity.)**

Appendix A includes the data sought by this request. The April 19 questions requested numerical breakdowns of both defendants and victims, which were provided in our prior response. The present question, in contrast, requests numerical counts of defendants, broken down by race/ethnicity and categories of victims. The data contained in Appendix A and the responses to other questions herein do not reflect any changes occurring after October 9, 2007.

The Department evaluates potential capital cases without regard to the race of the defendant or the victim, and with the goal of applying the death penalty in a fair and consistent manner nationwide. Reviewers do not know the race of the defendant or victim, unless it is disclosed in the defense presentation or is intertwined with the facts of the case (*e.g.*, a racially-motivated killing).

5. **In September 2000 and June 2001, the Justice Department released data regarding the implementation of the federal death penalty through 2000. The 2000 report contained information about 682 defendants whose cases were reviewed under the Department's death penalty decision-making process from 1995 to 2000. However, according to the 2001 report, this number excluded a number of cases in which the facts would have supported a capital charge but**

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that were not charged as capital crimes, and therefore, under pre-2001 protocols, did not go through the Main Justice review process. If these cases are included, the total number of death-eligible defendants from 1995 to 2000 was 973. Does the Department agree that this number – 973 defendants – is most comparable to the total number of death-eligible defendants considered by the Justice Department from 2001 to 2006, which you have stated is approximately 1,200 defendants?

The 973 figure, which includes nearly 400 defendants whose cases were not reviewed by the Attorney General during the prior period (1/27/1995 to 7/20/2000), does not constitute the comparable pool of offenders to the more than 1200 defendants actually reviewed by the Attorney General for the 2001-to-2006 period. For the prior period, the September 2000 survey reflects that the Attorney General actually reviewed and decided only 588 defendants' cases (not 682 as suggested in the above question). We do not know what the death penalty decisions would have been had the nearly 400 additional defendants been reviewed by the Attorney General. It cannot be assumed, had the Department reviewed and the Attorney General made a decision for all of them, that the decision in each instance would have been not to seek the death penalty. The Department sought the death penalty in numerous cases in which U.S. Attorneys requested authorization not to seek the death penalty between 1995 and 2000.

Further, even accepting the 973 defendants as an appropriate basis of comparison, the rate of decisions to seek the death penalty compared to the total number of defendants during the prior period was greater than the corresponding rate for the 2001-to-2006 period. The 148 defendants for whom the death penalty was sought during the prior period and not later withdrawn by the Attorney General represent 15% of the 973 defendants and 25% of the 588 defendants in whose cases a decision was actually reached during that period. In contrast, for the recent period (1/1/2001 to 12/31/2006), the 158 defendants for whom the death penalty was sought and not later withdrawn represent 13% of the more than 1200 defendants whose cases were reviewed and decided by the Attorney General.

6. **According to the Department's response to my April 19 oversight questions, U.S. Attorneys recommended seeking the death penalty from 2001 to 2006 for a total of 156 defendants (see chart on page 4 of those responses). Those responses also stated that the Attorney General approved a recommendation to seek the death penalty for 142 defendants and overruled a recommendation to seek for 17 defendants (see charts on pages 6 and 7).**

   a. **Why do the numbers of approvals plus overrules (142 + 17) not equal the total number of cases (156) in which the U.S. Attorneys recommended seeking the death penalty?**

   b. **If the reason is that in some instances, certain defendants are counted more than once because there was agreement or disagreement with respect to different victims or counts, please indicate for how many defendants this occurred, in which racial categories, and in which years.**

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c. Is it accurate to conclude that for any defendant counted twice in the responses referenced above, the Attorney General approved seeking the death penalty against that defendant for at least one count or victim?

The response to April 19 question 8 reflected that there were 142 approvals and 17 overrulings by the Attorney General of U.S. Attorney requests to seek the death penalty. These 159 decisions exceeded the 156 total defendants submitted because the Attorney General's decision with regard to three particular defendants approved in part and denied in part the U.S. Attorney's request to seek the death penalty for the killings of multiple victims. Thus, for each of the three defendants, the decision was recorded in the Department's prior response as both agreement and disagreement with the U.S. Attorney's request to seek the death penalty. It is therefore accurate to say that, for each of the three defendants, the Attorney General approved seeking the death penalty against each defendant for at least one count or at least one victim.

The explanatory notes to the Department's response to the April 19 oversight questions specifically cautioned that a small number of defendants were counted more than once, in the separate tables reflecting Attorney General *agreement* versus *disagreement* with the U.S. Attorney's recommendation. The prior response explained:

A particular defendant may be counted more than once over successive tables reflecting agreement or disagreement with the U.S. Attorney's request by the review committee or the Attorney General. In some instances, the Committee or the Attorney General may have agreed with the U.S. Attorney's request for a particular defendant with regard to certain counts or victims, but disagreed with the U.S. Attorney's request with regard to other counts or victims. In such a situation, the defendant will be counted in tables reflecting the review committee's or Attorney General's agreement with the U.S. Attorney's request, and separately counted in tables reflecting the review committee's or Attorney General's disagreement with the U.S. Attorney's request.

The race/ethnicity breakdowns for the three defendants are as follows. In 2004, for one black defendant who killed "exclusively black victim(s)" (using the nomenclature employed in Appendix A, *infra*), the Attorney General approved the U.S. Attorney's request to seek the death penalty for the murder of one of the victims but denied the request to seek the death penalty for the other victims. In 2005, for two white defendants who killed exclusively black victims, the Attorney General approved the U.S. Attorney's request to seek the death penalty for the murders of two of the victims but denied the request to seek the death penalty for the other victim.

The 159-defendant and 156-defendant figures also include three other particular defendants, all white, against whom two U.S. Attorneys' offices brought separate but related prosecutions, and submitted separate requests to seek the death penalty in different years (2001 and 2006). In light of the separate submissions, the three defendants are counted in the data for 2001 and also for 2006. The explanatory notes to the Department's prior response cautioned that a "particular defendant is not counted more than once *in a single year in a table*, despite the fact that permission to seek the death penalty against that defendant may have been requested in more

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than one case or with respect to more than one victim." Response to April 19 questions at 8 (emphasis added).

The 2001 request to seek the death penalty against the three defendants involved "exclusively black victim(s)." The 2006 request to seek the death penalty involved, for two of the defendants, the same "exclusively black victim(s)" identified in the 2001 submission. For the remaining defendant submitted in 2006, the victims included "persons of more than one race, including at least one white victim," among them the black victim or victims identified in the 2001 submission. The Attorney General approved the 2001 and 2006 requests to seek the death penalty with regard to all three defendants.

Although the six defendants discussed above have been accounted in a way that the Department believes most accurately presents the actual decisions reached, we also note that, from a purely statistical point of view, the manner of inclusion of the six defendants does not appear to result in a statistically significant impact. The overall pool contains more than 150 defendants.

7. **According to the Department's response to my April 19 oversight questions, U.S. Attorneys recommended against seeking the death penalty from 2001 to 2006 for a total of 1084 defendants (see chart on pages 10-11 of those responses). Those responses also stated that the Attorney General approved a recommendation not to seek the death penalty for 1014 defendants, and overruled a recommendation not to seek for 73 defendants (see charts on pages 13-14).**

   a. **Why do the numbers of approvals plus overrules (1014 + 73) not equal the total number of cases (1084) in which U.S. Attorneys recommended against seeking the death penalty?**

   b. **If the reason is that in some instances, certain defendants area counted more than once because there was agreement or disagreement with respect to different victims or counts, please indicate for how many defendants this occurred, in which racial categories, and in which years.**

   c. **Is it accurate to conclude that for any defendant counted twice in the responses referenced above, the Attorney General decided to seek the death penalty against that defendant for at least one count or victim?**

The response to April 19 question 9 reflected that there were 1014 approvals and 73 overrulings by the Attorney General of U.S. Attorney requests not to seek the death penalty. These 1087 decisions exceeded the 1084 total defendants submitted because the Attorney General's decision with regard to three particular defendants approved in part and denied in part the U.S. Attorney's request not to seek the death penalty for the killings of multiple victims. Thus, for each of the three defendants, the decision was recorded in the Department's prior response as both agreement and disagreement with the U.S. Attorney's request not to seek the death penalty. It is therefore accurate to say that, for each of the three defendants, the Attorney General

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approved seeking the death penalty against each defendant for at least one count or at least one victim.

As previously noted, the explanatory notes to the Department's response to the April 19 oversight questions specifically cautioned that a small number of defendants were counted more than once, in the separate tables reflecting Attorney General *agreement* versus *disagreement* with the U.S. Attorney's recommendation.

The race/ethnicity breakdowns for the three defendants are as follows. In 2001, for one Hispanic defendant who killed exclusively Hispanic victims, the Attorney General approved the U.S. Attorney's request not to seek the death penalty for the murder of one of the victims but directed that the death penalty be sought for the killings of the other victims. In 2003, for one black defendant who killed exclusively black victims, the Attorney General approved the U.S. Attorney's request not to seek the death penalty for the murder of one of the victims but directed that the death penalty be sought for the killing of the other victim. In 2004, for one black defendant who killed exclusively black victims, the Attorney General approved the U.S. Attorney's request not to seek the death penalty for the murder of two of the victims but directed that the death penalty be sought for the killings of the other two victims.

The 1087-defendant and 1084-defendant figures also include two other defendants for whom U.S. Attorneys' offices submitted separate requests not to seek the death penalty in different years. In light of the separate submissions, the two defendants are counted in the data for both of the years in which the separate submissions were made. The explanatory notes to the Department's prior response cautioned that a "particular defendant is not counted more than once *in a single year in a table*, despite the fact that permission to seek the death penalty against that defendant may have been requested in more than one case or with respect to more than one victim." Response to April 19 questions at 8 (emphasis added).

In both of the two cases, U.S. Attorneys submitted separate requests not to seek the death penalty in different years to address distinct victims killed by a single defendant. One case, submitted by the U.S. Attorney in 2003 and again in 2004, involved a defendant of "other" race/ethnicity who killed "exclusively 'other' victim(s)." The other case, submitted by the U.S. Attorney in 2003 and again in 2005, involved an Hispanic defendant who killed exclusively Hispanic victims. The Attorney General approved the requests not to seek the death penalty with regard to both defendants.

Although the five defendants discussed above have been accounted in a way that the Department believes most accurately presents the actual sequence of submissions and decisions, we also note that, from a purely statistical point of view, the manner of inclusion of the five defendants does not appear to result in a statistically significant impact. The overall pool contains more than 1,000 defendants.

8. **According to the Department's responses to my April 19 oversight questions, U.S. Attorneys recommended seeking the death peualty from 2001 to 2006 for a total of 156 defendants (see chart on page 4) and recommended against seeking**

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from 2001 to 2006 for a total of 1084 defendants (see chart on pages 10-11). The following is based on those charts:

Year	US Attorney Rec to Seek Death Penalty	US Attorney Rec Not to Seek Death Penalty	Total Defendants
2001	22	161	183
2002	21	180	201
2003	32	149	181
2004	31	179	210
2005	16	175	191
2006	34	240	274
Total	156	1084	1240

a. **Is it accurate to assume that U.S. Attorneys made recommendations, in total, with respect to 1240 defendants, or are some of these defendants counted more than once?**

b. **If some defendants are counted twice, please provide the total number of defendants who were counted twice for each year and why.**

It is not correct to assume that U.S. Attorneys made recommendations, in total, with respect to 1240 defendants. As discussed above, the explanatory notes to the Department's response to the April 19 oversight questions reflect that a small number of defendants were counted more than once based on differing U.S. Attorney recommendations and differing Attorney General decisions with regard to distinct homicides committed by the affected defendant.

The responses to April 19 questions 8 and 9 reflected that, by defendant, there were 156 U.S. Attorney requests to seek the death penalty and 1084 requests not to seek the death penalty. A small number of defendants (12 in all) were counted in the U.S. Attorney request tallies for both question 8 (requests to seek the death penalty) and question 9 (requests not to seek the death penalty). In all 12 instances, U.S. Attorneys requested to seek the death penalty for the killing of one or more victims and not to seek the death penalty for the killings of others. In seven of the 12 instances, the distinct requests occurred in separate death penalty submissions at different discrete points in time.

In addition to the foregoing 12 defendants, an additional defendant was counted under both questions 8 and 9 for killing a particular victim. In 2004, the U.S. Attorney requested and received authorization to enter into a plea agreement, but the defendant later backed out of the

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proposed agreement. Later in 2004, the U.S. Attorney requested and received authorization to seek the death penalty. Thus, the decisions in that case were recorded in the Department's prior response as approving a request not to seek the death penalty and approving a request to seek the death penalty.

Finally, as noted in the responses to supplemental oversight questions 6 and 7 above, three particular defendants were the subject of distinct requests to seek the death penalty in separate years, and two defendants were the subject of distinct requests not to seek the death penalty in separate years. In light of the separate submissions, these defendants are counted in the data for each year in which a separate submission was made.

Although the defendants discussed above have all been accounted in a way that the Department believes most accurately presents the actual submissions and decisions, we also note that, from a purely statistical point of view, the manner of inclusion of the defendants does not appear to result in a statistically significant impact. The overall pool contains more than 1,000 defendants.

9. Based on the chart in the previous question, it appears that there were substantially more death-eligible federal cases that came through the DOJ review process in 2006 than in prior years. Why was that? Was there any change in policy with respect to prosecutorial priorities that would have led to more death-eligible federal cases being brought in 2006?

The data reflects that in 2006, there was about a one-third increase in U.S. Attorneys' death penalty submissions over the preceding years' submissions. This increase cannot be directly linked to particular prosecutorial initiatives, especially given that the rate of capital case submissions varies from year to year, with a year of fewer submissions often being followed by a year with a greater number of submissions, and vice versa. However, historically, many of the Department's capital case submissions have involved gang- or drug-related homicides, or both. In light of the Department's strategic goal emphasizing aggressive prosecution of these types of offenses, the increase in submissions may reflect gang and/or drug enforcement related initiatives.

10. In cases in which DOJ pursued the death penalty from 2001 to 2006, based on the Department's responses to my April 19 oversight questions (see charts on pages 16 and 18 of those responses), the death penalty was imposed against 30 defendants, and was not imposed against 72 defendants. Of the 30 defendants against whom the death penalty was imposed, 16 were white, 14 were non-white. Of the 72 defendants against whom the death penalty was not imposed, 13 were white and 59 were non-white. Thus, the success rate for imposing the death sentence for non-whites was 14 out of 73, or 19 percent.

a. Does the Department agree that those numbers are correct?

b. Is this cause for concern?

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c. It is difficult to evaluate based on the data provided, whether the race of the victims reflected a similar disparity, because it is unclear in how many cases there were multiple victims of different races. The answer to Question 4, above, should shed some light on this issue. Based on the answer to Question 4, might this disparity be explained by the race of the victims in these cases?

The foregoing figures appear to have been correct as of the April 19 responses, although a number of additional defendants falling within the scope of that response have subsequently been sentenced by juries. The correct figures are now as follows: The death penalty was imposed against 30 defendants, and was not imposed against 78 defendants. Of the 30 defendants sentenced to death, 16 were white, 14 were non-white. Of the 78 defendants not sentenced to death, 16 were white and 62 were non-white.

These figures strongly rebut any argument that juries are returning deaths sentences at a disproportionately higher rate against minority defendants. Most of the defendants sentenced to death have been white, whereas those who avoided the death penalty have mainly been minority defendants. During the period covered by the Department's September 2000 survey, minority defendants accounted for 16 of the 20 defendants sentenced to death.

The reasons why juries return death penalty verdicts in some cases and not others can vary widely and usually are not known, due in part to local rules generally restricting post-verdict contacts with jurors without court approval. Reliable evidence is therefore not readily available, and further study is unlikely to provide significant additional insight.

Statistics alone do not establish a link between death sentences and the races of victims. For 21 of the 30 defendants sentenced to death, the victims of the capital counts included at least one white victim, whereas the other nine defendants (30% of the total) killed exclusively minority victims. For 19 of the 78 defendants not sentenced to death, the victims of the capital counts included at least one white victim, whereas the other 59 defendants killed exclusively minority victims.

As noted, the Department evaluates potential capital cases without regard to the race of the defendant or the victim and with the goal of applying the death penalty in a fair and consistent manner nationwide.

11. The Department's responses to my April 19 oversight questions indicate that for a total of 5 defendants from 2001 to 2006, the Attorney General overruled an initial request by a U.S. Attorney for authorization of a plea agreement under which the government would not seek the death penalty (in instances where the U.S. Attorney filed a request for authorization of a plea agreement rather than a request for authorization not to seek, meaning that a notice to seek the death penalty had not been filed) (see chart on page 21). The Department's responses also indicate that for a total of 15 defendants, the Attorney General overruled a U.S. Attorney request to enter a plea agreement under which the government

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would not seek the death penalty after the notice of intention to seek the death penalty had already been filed (see chart on page 22).

a. Based on these charts, is it accurate that from 2001 to 2006, for at least 20 defendants, the Attorney General did not approve a plea agreement negotiated by the U.S. Attorney that would have taken the death penalty off the table?

The foregoing figure appears to have been correct as of the April 19 responses, although a subsequent decision has reduced the number of defendants facing the possibility of the death penalty. The Attorney General recently authorized a U.S. Attorney to withdraw the death penalty notice against a defendant for whom a proposed plea agreement had previously been rejected. Also, two defendants who were inadvertently omitted from the prior response and thus not included in the above figure, but for whom death penalty notices were previously filed, no longer face the death penalty as a result of recent Attorney General decisions approving plea agreements with the defendants.

b. Please provide examples of reasons that the Attorney General would overrule a U.S. Attorney recommendation to enter into a plea agreement that takes the death penalty off the table.

c. At the hearing, David Bruck testified that overruling U.S. Attorney recommendations to enter a plea agreement taking the death penalty off the table makes it less likely that defendants will proffer cooperative testimony in exchange for a plea agreement because of the risk that the Attorney General will not approve the agreement. How does the Department respond to the argument that this practice ultimately results in less cooperation and therefore fewer convictions?

Each case is evaluated on its own facts, and it would be difficult, if not impossible, to identify "examples of reasons that the Attorney General would overrule a U.S. Attorney recommendation" without revealing the rationales for case-specific charging decisions, which we decline to do. In addition, while there is a record of the recommendations of the U.S. Attorney, the Committee and, in the case of a request for authorization to withdraw a notice of intent to seek the death penalty, the Assistant Attorney General for the Criminal Division, there is no record of the bases for the Attorney General's decisions, except to the extent they can be inferred from the underlying recommendations.

The consequence predicted by Mr. Bruck has not resulted in practice. Indeed, the Department continues to receive death penalty submissions for defendants who have provided protected proffers as an indication of the value of their cooperation if the death penalty is not sought.

12. According to numerous former U.S. Attorneys and other former DOJ officials, former Attorney General Janet Reno was personally engaged in each decision whether to authorize seeking the death penalty. In fact, former U.S. Attorneys

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have indicated they came to expect substantial direct communication with Attorney General Reno about their recommendations. Has former Attorney General Reno's hands-on approach to these very serious decisions carried over to the Justice Department under Attorney General Ashcroft and Attorney General Gonzales? Why or Why not?

The "hands-on approach" continues under this administration. If anything, the overall consideration, review, and exchange of viewpoints has expanded over that which occurred under Attorney General Reno in that the Office of the Deputy Attorney General now independently reviews each case and the Deputy Attorney General makes a recommendation independent from that of the Review Committee. This did not occur prior to 2001. The Attorney General's briefing book contains input from each of these individuals or entities. Recent Attorneys General have taken very seriously their responsibilities as the individuals who ultimately decide whether the death penalty will be sought and have spent extensive time acquainting themselves with the facts and issues adherent to all cases for which it could be appropriate to seek the death penalty.

13. Based on the Department's responses to my April 19 oversight questions, it appears that in 70 percent of the cases where U.S. Attorneys sought approval for the death penalty from 2001 to 2006, the defendants were minorities. In cases where the Attorney General overruled the U.S. Attorney's recommendation against death, 81 percent of the defendants were minorities. (See chart below.) Given the Department's race-blind policy for death penalty review, what explains these disparities? What will the Department do going forward to monitor and evaluate these disparities?

We understand this question to solicit the Department's comment on the perceived disparity between the identified percentages and the representation of minority individuals in the population at large, rather than the difference between the identified 70 and 81 percent numbers. These statistics are misleading if not viewed in context. The relevant context includes the corresponding data concerning requests and decisions *not* to seek the death penalty, and also the well-accepted statistical evidence concerning the racial breakdowns for homicide victims and offenders on a nationwide basis, not limited to federal capital homicides. The percentages in this question also do not account for requests and decisions to seek the death penalty that were later withdrawn by the Attorney General.

As noted, many of the Department's capital case submissions have involved gang- or drug-related homicides, or both. According to national statistics maintained for homicides nationwide, not limited to federal capital homicides, non-white offenders committed 66% of all drug-related homicides, and 46% of all gang-related homicides. U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States* 27 (July 11, 2007). Further, these percentages appear not to include a significant number of Hispanic offenders, because the homicide trend statistics are broken down by race but not ethnicity. *See id.*; U.S. Department of Justice, *The Federal Death Penalty System: A Statistical Survey* xv, xvi (Sept. 12, 2000). The Department's June 2001 study noted the impact of the racial composition of various drug gangs

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on the racial breakdowns for defendants submitted for the Department's death penalty review. *See* U.S. Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* 14-15 (June 6, 2001).

The data from the April 19 oversight response also show that minority defendants accounted for 86% of the 1084 defendants for whom U.S. Attorneys requested not to seek the death penalty –16% higher than the 70% figure cited above. Thus, minority defendants have a much greater representation among requests not to seek the death penalty than among requests to seek the death penalty.

The data show in addition that minority defendants accounted for 87% of the defendants for whom the Attorney General agreed with a U.S. Attorney's request not to seek the death penalty – 11% more than the 76% minority representation of defendants for whom the Attorney General rejected a U.S. Attorney's request not to seek the death penalty (the 76% figure excludes defendants for whom decisions to seek the death penalty were later withdrawn, who were included in the cited 70%).

In light of all of the foregoing, it is incorrect to conclude that the Department's decision-making process for capital cases has disproportionately focused or impacted on minority offenders.

14. Federal Judge John Gleeson, of the Eastern District of New York, wrote a 2003 law review article expressing his view that the Attorney General should overrule U.S. Attorneys to require them to seek the death penalty only in exceptional circumstances and that the best way to achieve uniformity in the federal death penalty is to specifically define the types of particularly federal interests that will justify bringing a federal capital case.

a. Does the Review Committee, the Deputy Attorney General, or the Attorney General give any deference to a U.S. Attorney's recommendation? Is there a different standard of review when U.S. Attorneys have recommended seeking the death penalty than when they have recommended against it?

In evaluating the evidence and issues relevant to a decision whether to seek the death penalty, reviewers at all levels give significant weight to the recommendation of the U.S. Attorney, as he or she and the line prosecutors are the ones with first-hand knowledge of the case. However, Federal laws must be enforced consistently, irrespective of geography and local predisposition for or against the death penalty. Thus, the standard applied in each case is the same irrespective of the U.S. Attorney's recommendation.

Under the capital sentencing provisions enacted by Congress, a notice of intent to seek the death penalty is only filed when the Attorney General, as the "attorney for the government," believes that "the circumstances of the offense are such that . . . a sentence of death is justified." 18 U.S.C. § 3593 (a). In determining whether a sentence of death is justified, the Department's reviewers make the same assessment that would be required of a jury: "whether all the

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aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. § 3593 (e).

b. Judge Gleeson's article also contended that seeking the death penalty could, in some instances, jeopardize prosecutors' ability to secure a conviction, because jurors hold them to a higher standard in capital cases. Does the Review Committee or the Attorney General give any weight to this consideration in their decision-making?

Department reviewers do not consider or give weight to the unsubstantiated premise that a decision to seek the death penalty may "in some instances, jeopardize prosecutors' ability to secure a conviction." Considering the effect on local jury pools of a decision to seek the death penalty runs counter to the Department's goal of nationwide consistency in the fair and even-handed application of federal capital sentencing laws, irrespective of geography or local predisposition for or against the death penalty. Further, the Department assumes that jurors follow their instructions, that federal prosecutors are fully capable of making it clear to jurors that the determinations of guilt and punishment are two distinct determinations and that the determination of guilt does not require them to impose a death sentence. Accordingly, reviewers do not weigh the possibility that jurors will fail to follow the law and impose a higher burden of proof than beyond a reasonable doubt.

15. Another possible relevant consideration in the decision to authorize seeking the death penalty is the possible incentives and disincentives it might create for future cases. The local community or cooperating witnesses may be less willing to help the government in the future if they think prosecutors are likely to seek capital punishment. Does the review committee or the Attorney General give weight to this consideration in their decision-making?

This is another argument for disparate application of the federal capital statutes based on geography or local predisposition, albeit one that is couched in terms of a hypothetical reaction by citizens to a capital prosecution in their community. We know of no evidence that, where death is a possible punishment for highly aggravated offenses, citizens will condone criminal conduct by failing to report crime or assist investigators.

16. The Secretary of Justice for Puerto Rico testified that many people believe the jury may have acquitted the defendants in the Acosta Martinez case to protest the federal government's insistence on seeking the death penalty in a jurisdiction that has explicitly renounced capital punishment. Does the Review Committee or the Attorney General give weight to this consideration in their decision-making?

The goal of the Department's death penalty review and decision-making process is nationwide consistency in the fair and even-handed application of federal capital sentencing laws

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in appropriate cases, irrespective of geography or local predisposition for or against the death penalty. The reviewers and the Attorney General assume that jurors will follow their oaths and duties as jurors.

17. The 2006 RAND study of the federal death penalty from 1995 to 2000 provided some information about the implementation of the federal death penalty, but as several of the hearing witnesses testified, it was a limited picture. Crucially, the study failed to examine the decision to bring homicide cases into the federal system in the first place. In an October 2006 letter, five expert consultants hired to conduct the peer review of the study prior to its release sent a letter to RAND and likened drawing conclusions from the RAND study to "'studying' the effects of income and religion on acceptance to Harvard by looking only at the ten percent who were accepted." In light of these critiques, has the Department of Justice taken any steps to track or otherwise collect data on the intake decisions of the U.S. Attorneys and the race of defendants selected or rejected for federal prosecution?

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The NORC (National Opinion Research Center) study, which was commissioned and released by NIJ simultaneously with the RAND study, looked at the factors that resulted in federal versus state prosecution. One of the principal findings of the NORC study was that the selection of cases for federal prosecution was dependent on the relationships between federal and local investigators and prosecutors within each jurisdiction. The NORC researchers also found that, in the districts studied, the proportion of minority defendants in potential federal homicide cases varied from 80% to 88%, whereas the proportion of minority offenders in those cases that it classified as unlikely federal homicide cases, with one exception, varied from 62% to 74% (for one district the representation of minority offenders in the unlikely federal cases was 82%). According to the NORC study, "The federal laws that brought homicide cases to the federal system primarily targeted drug, gang, and firearm activity; activity that [NORC survey] respondents indicated was likely to involve more minority participants."

The NORC study sufficiently investigated and addressed the issue of why cases are prosecuted by the state or federal governments and the reasons why minorities are represented at a higher rate in the pool of offenders prosecuted federally for capital offenses than they are in the general population.

18. The 2006 RAND study covered data from 1995 to 2000. It did not include any analysis of implementation of the death penalty under this Administration.

a. Has DOJ taken any steps to review potential racial disparities from 2001 to 2006, beyond responding to my April 19 oversight questions?

No.

b. Would the Department consider another NIJ study of this Administration's implementation of the federal death penalty?

The new leadership of the Department must be briefed and advised on all issues relevant to an NIJ-sponsored study of this Administration's implementation of the federal death penalty before a decision could be made to proceed with such a project.

19. In the Department's responses to my April 19 oversight question number 14, the Department stated that it would be difficult to provide information about how many federal capital cases brought charges for crimes that had already been prosecuted at the state or local level. According to that same DOJ response, however, federal prosecutors must seek a special waiver to bring federal charges in such cases. If that is true, while it may be time-consuming, it should be possible to compile this information.

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a. What office or individual at the Department is responsible for processing the waiver requests to bring federal charges after a state or local prosecution has already occurred?

Office of Enforcement Operations (OEO), Criminal Division

b. Is this process documented? Are the waivers retained? Does the documentation indicate whether the crime is death eligible?

OEO retains each Petite waiver request and decision. (The decision is made by Deputy Assistant Attorney General Jack Keeney.) A computer database tracks these decisions, but does not necessarily contain information about whether a federal prosecution could expose the defendant to the death penalty.

c. Please respond to my original question: On an aggregate and annual basis covering 2001 to 2006, in how many cases has the Attorney General authorized U.S. Attorneys to seek the death penalty in cases in which the crimes had already been prosecuted at the state or local level? In how many of those cases had the perpetrator already been imprisoned for the crime? In how many of those cases had the perpetrator already been imprisoned for life for the crime?

We have been able to identify the following cases in which a federal capital prosecution was preceded by a state or local prosecution.

Bryant Wilson and Ramon Shorter faced federal capital charges relating to the shooting death of a elderly bank customer during a robbery. In November 2001, the Attorney General authorized the U.S. Attorney for the Western District of Tennessee to seek the death penalty for both men. In January 2002, however, they both pled guilty in state court and received life sentences. Authorization to seek the death penalty was withdrawn and the defendants entered guilty pleas to the capital counts in federal court, receiving life sentences there as well.

Brent Simmons murdered two James Madison students. Following a 1998 state trial that resulted in a hung jury, Simmons entered an Alford plea in state court and received two 20 year sentences for second degree murder. In December 2003, a Petite waiver was granted and, in 2004, the Attorney General authorized the U.S. Attorney for the Western District of Virginia to seek the death penalty for Simmons, who had been indicted for two counts of using a firearm during a crime of violence (interstate stalking) resulting in death, 18 U.S.C. § 924(j). Simmons was convicted by the jury and received two sentences of life without the possibility of release.

Kenneth Eugene Barrett, a methamphetamine manufacturer, killed an Oklahoma Highway Patrolman and wounded another officer who were attempting to execute a search warrant on his property. His first state trial in 2002 resulted in a hung jury. In a second state trial, he was convicted of first degree manslaughter and assault and battery

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with a dangerous weapon and received consecutive sentences of 20 and 10 years. He would have been eligible for parole in 10 years. A Petite waiver was approved, and Barrett was charged with three capital offenses: using or carrying a gun during and in relation to a crime of violence with death resulting, 18 U.S.C. § 924 (c)(1)(a) and (j); and intentionally killing a law enforcement officer engaged in the performance of his official duties during a drug trafficking crime, 21 U.S.C. § 848 (e)(1)(B). The U.S. Attorney for the Eastern District of Oklahoma was authorized to seek the death penalty. In accordance with the jury verdict, on December 29, 2005, Barrett received two sentences of life without the possibility of parole and a death sentence.

Shawn Gardner was charged with the racketeering murder of Tanya Jones Spence. Subsequent to the submission of the case to the Department but before the Attorney General had reached a decision on whether to seek the death penalty, Gardner was convicted in state court and was eligible for a parolable sentence. A Petite waiver was obtained and, in December 2004, the Attorney General authorized the U.S. Attorney for the District of Maryland to seek the death penalty against Gardner. On August 30, 2007, the Attorney General authorized withdrawal of the death penalty notices against Gardner and the other capital defendants in the case.

20. Zachary Carter, former U.S. attorney for the Eastern District of New York, has argued that any committee, either at DOJ or in individual U.S. Attorney's offices, that is making death penalty-related decisions should have ideological or philosophical diversity, including individuals who are not avid proponents of capital punishment. He argues that this is necessary to ensure a robust debate, in which all sides of the issue are fully considered.

a. Has the Department ever analyzed ideological or philosophical diversity on the Review committee? Are there differing views among committee members about how widely and aggressively the death penalty should be pursued, or how often and for what reasons U.S. Attorneys should be overruled?

b. Has the Department attempted to ensure any measure of ideological or philosophical diversity on the existing Review Committee?

c. Would someone who did not support capital punishment be allowed to sit on the Review Committee?

While there is no litmus test for Committee service, differing viewpoints are often expressed among Committee members on whether a particular case is an appropriate one in which to seek the death penalty and on the degree of deference to be given a U.S. Attorney's recommendation. Debate is robust and all viewpoints are considered.

In identifying Committee members, the focus has been on identifying individuals with significant prosecutorial experience, particularly in capital litigation, as well as

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strong analytical abilities. It would not make sense to have someone sit on the Committee who is opposed to capital punishment in all instances. For example, individuals who are unable to follow the law and consider assessment of a capital sentence in appropriate circumstances are not eligible to sit on a capital jury. A debate whether capital punishment is ever appropriate is different from consideration of whether, under the current laws providing for capital punishment, a certain offender and offense are appropriate for capital punishment. Someone who uniformly opposes capital punishment would be unable to effectively contribute to considerations about whether it is appropriate under existing laws in a specific case to seek a death sentence.

21. In the Department's responses to my April 19 oversight questions number 6, DOJ asserted that its death penalty review procedure is an open process. According to the Department's response, the Review Committee informs the U.S. Attorney directly if it disagrees with his or her recommendation; the Attorney General's reasons for overruling of a recommendation are conveyed to the U.S. Attorney; and there is ongoing discussion and dialogue among all parties involved.

a. Is this an accurate portrayal of the process for the entire time period from 2001 to 2006?

Yes. If the Committee's recommendation is contrary to that of the U.S. Attorney, that information is conveyed to the U.S. Attorney and/or the prosecuting Assistant U.S. Attorney by the Committee or a Capital Case Unit attorney acting on behalf of the Committee. In addition, there are typically one or more contacts between high level officials in the Offices of the Deputy Attorney General and the Attorney General if strong consideration is being given to seeking the death penalty against the U.S. Attorney's recommendation. Of course, with the July 2007 revisions to the protocol, the U.S. Attorney now receives a copy of the Committee's memorandum if the recommendation is contrary to that of the U.S. Attorney.

b. In what form are the Committee's recommendation and the reasons for its disagreement with the U.S. attorney communicated?

The U.S. Attorney or prosecuting Assistant U.S. Attorneys in attendance at a Committee conference are informed of the Committee's recommendation following a closed caucus of Committee members at the conclusion of the Committee meeting–unless the Committee postpones a vote in order to wait for additional information from either the defense or prosecution. If the Committee vote occurs at a later point, then the Committee recommendation is normally communicated by a Capital Case Unit trial attorney or chief to the prosecuting Assistant U.S. Attorney or U.S. Attorney.

c. In what form are the Attorney General's decisions and the reasons for any disagreement with the U.S. Attorney communicated?

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The reasons for the Attorney General's decision are contained in Departmental memoranda. With the institution of the July 1, 2007 protocol provisions, the U.S. Attorney now receives a copy of the Committee's memorandum. Prior to the implementation of that practice, the rationale for the Committee recommendation was conveyed to the U.S. Attorney or prosecuting Assistant U.S. Attorney in attendance at the conclusion of the Committee meeting, or if a decision was reached at a later point, by a Capital Case Unit attorney.

d. **Was the handling of Paul Charlton's recommendation in the Rios Rico case typical or atypical of the process? How does the Department explain the failure to communicate with Charlton prior to the Attorney General overruling his recommendation against seeking the capital punishment in that case? Did the Attorney General ever convey to Charlton in that case why he was overruled, and if so, in what form?**

The standard Department practice for notifying a prosecuting district of a Committee recommendation adverse to a U.S. Attorney's recommendation was followed in the Rios Rico case. What was atypical was former U.S. Attorney Paul Charlton's failure to file the notice of intent to seek the death penalty once a decision had been made.

May 31, 2006 was the Court-imposed deadline for filing a notice of intent to seek the death penalty, and on that day, the Attorney General signed a letter addressed to former U.S. Attorney Paul Charlton directing him to seek the death penalty for Jose Rios Rico, but not to seek the death penalty for the other two defendants in the case. Prior to this time, the Capital Case Unit attorney assigned to the case had been working with the prosecuting Assistant U.S. Attorneys in Arizona to draft the notice of intent to seek the death penalty. Although prosecuting attorneys in Arizona had previously represented to Capital Case Unit attorneys that May 31 was a hard and fast deadline, which the Court would not consider extending, the U.S. Attorney's Office did not file the notice of intent to seek the death penalty, but instead moved to extend the deadline for the notice of intent to seek the death penalty by a month, citing an "ongoing dialog" the office was having with the Department of Justice in Washington.

On June 28, 2006, then United States Attorney Paul Charlton made a Supplemental Submission to the Assistant Attorney General, requesting reconsideration of the decision to seek the death penalty. Because the Supplemental Submission was not based on a material change in facts or circumstances in accordance with established Department practice, the Assistant Attorney General made no recommendation regarding former U.S. Attorney Charlton's request for reconsideration. Mr. Charlton continued to press his case for reversal of the decision to seek the death penalty with the Offices of the Deputy Attorney General and Attorney General. While officials at each level considered his arguments, review was denied at each level based on the lack of changed circumstances. A notice of intent to seek the death penalty for Rios Rico was filed on August 16, 2006. Former U.S. Attorney Charlton was informed that the Department

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would consider any subsequent request for reconsideration based on changed circumstances, and Mr. Charlton informed the Department that he would not pursue the issue further.

22. You testified that the preparation and review of data on death-eligible cases for the hearing was "helpful," allowing the Department to become "more informed." You also agreed with the suggestion that the compilation and analysis of statistics such as those I requested prior to the hearing were necessary components of any thoughtful determination of federal death penalty cases.

a. What step is the Department planning to take to make review of the statistics regarding its implementation of the federal death penalty a more regular part of its overall implementation strategy?

b. How frequently will such a review take place?

The death penalty decisions to date have been extensively reviewed and analyzed. The Department will conduct a further review after sufficient time has passed resulting in a new pool of cases.

23. According to your testimony, the Department seeks to maintain consistent and uniform application of the federal death penalty at the national level. According to the Department's statistics, the Attorney General has overruled U.S. Attorneys far more often to require capital prosecutions than to limit them. In fact, one third of all cases in which the Attorney General has authorized seeking the death penalty under this administration have been the result of overruling a U.S. Attorney recommendation not to seek the death penalty.

a. Based upon these statistics, is it fair to conclude that the Department is attempting to create national consistency by increasing the rate of death prosecutions in jurisdictions where they have been less common?

Each case is judged on its individual merits and the jurisdiction in which the prosecution arises simply does not figure into the review or decision-making process.

b. The Attorney General overruled the U.S. Attorney recommendations not to seek the death penalty 21 times in 2006, as compared to 3 times in 2005. What is the reason for the dramatic increase in overrules between 2005 and 2006?

The data reflecting an increase in the number of "overrule" decisions in 2006 is misleading if not viewed in context. In 2004 and 2005, for example, the number of "overrule" decisions were unusually low when compared to both preceding and

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subsequent years. The average of the override decisions for 2005 and 2006 is actually the same as the average for 2001, 2002, and 2003. Further, the increase in the number of override decisions for 2006 appears to be partly attributable to the one-third increase in the total number of death penalty submissions for 2006, discussed in the response to Question 9, *supra*.

24. Former U.S. Attorney Paul Charlton testified that the decision of the Attorney General to force a U.S. Attorney's office to pursue the death sentence where that office does not believe it is appropriate is qualitatively different from other directives from the Attorney General and can have a significant demoralizing effect on that office. Mr. Charlton also testified that line prosecutors who are forced to seek the death penalty against their judgment lose credibility with jurors. Does the Department consider the effect that a decision to overrule the U.S. Attorney may have on the morale and credibility of line prosecutors? Should it?

The goal of the Department's death penalty review and decision-making process is nationwide consistency in the fair and even-handed application of federal capital sentencing laws in appropriate cases, irrespective of geography or local predisposition for or against the death penalty. Consistent and appropriate application of the Federal capital sentencing laws would be undermined if, rather that basing a decision on the circumstances of the offense and the character and background of the offender, a decision were based on its hypothetical emotional impact on the prosecutor.

In any event, it is unlikely that, knowing from the outset that the decision whether to seek the death penalty belongs to the Attorney General, an Assistant U.S. Attorney will be significantly demoralized by the Attorney General's decision. The Assistant U.S. Attorney may not agree with a particular decision, but that does not translate to significant demoralization. Further, it would be inappropriate for a prosecutor to inform jurors that he had been "forced" to seek the death penalty, so it would be difficult to understand how a decision contrary to the U.S. Attorney's recommendation could undermine the prosecutor's credibility with jurors.

25. During the hearing, you testified that the Department does not currently track the costs of pursuing the death penalty in particular cases, even in cases where the U.S. Attorney's recommendation not to seek the death penalty is overruled or where the Petite Policy has been waived. You also testified that the Department would work to gather that information to the extent that it can be captured.

a. Does the Department currently possess the capability to gather and report such information?

b. The federal government is expected to monitor and report its spendiug on a range of activities. If the Department currently does

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not have policies and procedures in place that would enable it to track the additional cost of seeking the death penalty, will it develop and implement such a monitoring system?

The Department does not have the capability to gather and report the requested information. Costs for capital prosecutions fall within the budgets of several agencies and branches of government, including: the United States Attorney's Offices (attorney hours in investigation, grand jury, Department's decision-making process, trial preparation, trial etc., expert witness expenses); Department of Justice (attorney hours in the protocol review process, assisting the prosecution, training); U.S. Administrative Office of the U.S. Courts (costs of providing defense for indigent defendants, including trial preparation and representation by defense counsel, expert assistance and witnesses); U.S. Marshal Service (witness and court security); FBI, DEA and other Federal investigative agencies (particularly investigation relating to punishment issues), as well as state investigative agencies (cost of investigation); and U.S. Courts (expenses involved trying capital case). Assuming *arguendo* that the Department had access to the relevant budgetary information of these agencies and branches of government, there would be the issue of whether the budget of each entity is accounted for in a manner that allows expenses attributable to a capital case to be identified.

A second, but no less difficult endeavor, would be to define what expenses are properly attributable to a capital case. For example, the subsection (a) inquiry calls for the "costs of pursuing the death penalty," whereas the subsection (b) inquiry is limited to the additional cost of seeking the death penalty. While the additional costs over those of a non-capital prosecution may be most relevant to some ends, they are also the most difficult to define. For example, while it might be thought that mental health experts or jury selection experts are more likely to be employed by the defense in a capital case, this does not mean that they would not be employed in the same case if the defendant faced exposure to a life sentence.

In short, there are two significant impediments to calculating the costs of capital prosecutions: (1) lack of access to many of the budgetary figures, and (2) difficulty defining what expenses should be attributed to the capital prosecution.

c. In particular, would it make sense for the Department – at least initially – to prioritize monitoring the costs of capital prosecutions in special circumstances, such as when the U.S. Attorney's recommendation not to seek the death penalty has been overruled or when the Petite Policy has been waived?

As previously stated, the Department's goal is nationwide consistency in seeking the death penalty in appropriate cases. To that end, the Review Committee and others involved in the review process consider the circumstances of the offense and the personal culpability of the offender (including his or her prior criminal history) against the backdrop, or in the context of, the other federal cases submitted for review and a death

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penalty decision. The cost of a capital prosecution cannot influence the decision making in individual cases without undermining the goal of uniform application.

d. Should the additional costs of seeking the death penalty ever be a factor in the analysis of whether to seek the death penalty? Should it be given any additional weight where the Attorney General is overruling the U.S. Attorney's recommendation not to seek the death penalty or where the Petite Policy is waived? Should it be given any additional weight where the local jurisdiction does not have capital punishment?

As previously stated, the goal of the Department's death penalty review and decision-making process is nationwide consistency in the fair and even-handed application of federal capital sentencing laws in appropriate cases, irrespective of geography or local predisposition for or against the death penalty. Also as previously indicated, while the recommendation of the U.S. Attorney and the information and understanding of the case provided by his or her office is invaluable to the review and decision-making process, they principally serve to aid reviewers in placing the case within the context of capital cases nationwide. To propose that the costs of a capital prosecution should mitigate against seeking the death penalty whenever the U.S. Attorney's recommendation is against seeking is to apply federal capital sentencing laws using factors irrelevant to the appropriateness of the death penalty for the individual offense and offender. Congress has enacted federal capital sentencing provisions, and there is no principled basis for rationalizing cost as a basis for unevenly applying those laws.

26. You testified that the confidentiality rules in the new death penalty protocols were designed to ensure that robust and informed debate about death–eligible cases within the Department is not chilled. Yet no evidence or testimony has been presented to demonstrate that the lack of such formalized confidentiality rules has chilled such debate. In fact, former U.S. Attorney Charlton testified that he "cannot think of a reason why it is that transparency would not be beneficial to the federal death penalty process. And Mr. Bruck testified that he believes the new confidentiality rules are designed to "create an airtight regime of secrecy" around the process that is unprecedented.

a. From what individual or office did the new confidentiality provision originate?

The confidentiality provisions set forth at U.S.A.M. 9-10.040 were the result of a collaborative effort by a number of components within the Department, including the Criminal Division, U.S. Attorneys, the Office of the Deputy Attorney General, and the Office of the Attorney General. These provisions merely restate the long-standing principle that the decision-making process preliminary to the Attorney General's final

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decision is confidential. One goal behind the revised protocol was to codify existing practice.

b. Please list all individuals who were directly involved in drafting or revising the confidentiality language.

The confidentiality provisions were widely discussed throughout the Department prior to their incorporation into the protocol.

c. What prompted the development of the new confidentiality language? Have there been any reports or evidence that the sort of transparency allowed under previous protocols, or the 2000 report released by former Attorney General Reno, in any way inhibited the deliberation process and the fair and just implementation of the federal death penalty?

As previously stated, the confidentiality provision does not constitute a change in Department policy or practice. The long-held and well-founded view of the Department is that the U.S. Attorney's recommendation, the Committee's recommendation, and any other aspect of the internal department considerations are privileged as part of the deliberative process and as advice to the Attorney General. The confidentiality provision is essential to preserve free and candid discussions about the merits of a potential capital prosecution, which are essential to a reasoned decision. The privilege underlying the confidentiality could be waived to allow disclosure of certain statistical information if that was deemed in the best interest of law enforcement and public interest.

27. The federal government often alleges, as a non-statutory factor, that a defendant should be sentenced to death because he poses an unacceptable risk of committing additional violent crimes if allowed to live.

a. After arguing for capital punishment based on this type of "future dangerousness" allegation, does the Department of Justice track the subsequent conduct of convicted federal capital offenders sentenced to a term of years, life imprisonment, or death?

b. From 2001 to 2006, against how many defendants did the government allege, in its notice or amended notice of intent to seek the death penalty, some form of "future dangerousness" as a non-statutory aggravating factor?

c. From 2001 to 2006, in how many instances has an inmate borne out government predictions of "future dangerousness" by committing serious physical violence against other persons after the conclusion of the capital sentencing proceeding? Please specify the particular types of observed inmate behavior that the Department believes to have borne out or validated its pretrial allegations of "future

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dangerousness." Also please break down the answer according to whether "future dangerousness" was (i) alleged in the notice or amended notice of intent to seek the death penalty, and/or (ii) submitted to the sentencing jury or judge as part of a contested capital sentencing hearing.

d. From 2001 to 2006, in how many instances where the government has alleged "future dangerousness" as a reason to impose the death penalty has the inmate not committed any acts of serious physical violence against other persons after the conclusion of the capital sentencing proceeding? Please break down the answer according to whether "future dangerousness" was (i) alleged in the notice or amended notice of intent to seek the death penalty, and/or (ii) submitted to the sentencing jury or judge as part of a contested capital sentencing hearing.

This information is unavailable and not readily obtainable.

QUESTION FROM SENATOR SPECTER:

1. Why does the death penalty protocol advise the United States Attorney to consult with the family of the victim regarding the decision to seek the death penalty and to include the views of the victim's family concerning the death penalty in any submission made to the Department?

This practice is consistent with the Justice for All Act and long-standing prosecution practice to consult with any victims and/or their family and keep them fully informed regarding a prosecution related to the offense against them.

2. Despite what you note as an "absence of discrimination," the Department nonetheless adopted additional procedural safeguards in 2001.

a. What prompted the Department to institute these new safeguards?

In June 2001, the provisions of the United States Attorneys' Manual, USAM 9-10.000 et seq., were amended to ensure that the centralized death penalty decision-making process was applicable to all capital offenses charged, or that could be charged, for conduct prosecuted in federal court. Specifically, the revised protocol requires a U.S. Attorney to obtain authorization not to seek the death penalty or for a plea agreement before entering into an agreement that eliminates death as a potential punishment. It also requires a U.S. Attorney to obtain the Attorney General's authorization for a plea agreement in those cases in which there has been a preceding decision to seek the death penalty.

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b. To what extent did these new safeguards change and/or improve the process?

Under the prior protocol, a plea agreement eliminating death as a potential punishment could be entered into at any time, including before the case was submitted for a death penalty decision by the Attorney General and after the Attorney General had decided to seek the death penalty. The new safeguards ensure that the same centralized review and decision-making process is applicable to all capital offenses that are charged or could be charged for conduct being prosecuted in federal court. This enhances the goal of consistent and fair application of the death penalty. As a practical matter, it has meant that the number of cases submitted annually for review and a decision has approximately doubled from that under the prior protocol.

3. **In your testimony, you note that the Attorney General, the Committee and other Department personnel involved in reviewing protocol submissions are not advised of the race or ethnicity of defendants, and that clerical staff sanitizes the submissions of any references to the races of victims or defendants. Aside from defense counsel choosing to submit race-identifying information about a client, is there any other way for individuals involved in the review process to find out the race or ethnicity of victims or defendants?**

No.

QUESTION FROM SENATOR KENNEDY:

The death penalty is the most extreme form of punishment we have. Once administered, it cannot be undone, so we must be absolutely certain that it is applied in a fair and consistent manner under a transparent process. We know that since 1993, 120 people convicted and sentenced to death have been exonerated and released from state death rows prior to execution. We also know that minority defendants are disproportionately sentenced to death compared to whites. The reason for this discrepancy is not clear and a recent study from the National Institute of Justice has not provided adequate answers.

The possibility that innocent people are being executed or that the death penalty is being applied in a discriminatory manner makes it essential for the decision to execute a defendant to be open and transparent. Unfortunately, the administration has been reviewing capital cases in a non-transparent manner by creating protocols that require the decision-making process to be performed in a confidential manner. In addition, the line prosecutors who are most familiar with their cases have little input in the decision whether to pursue the death penalty in a particular case.

1. **What steps is the Department of Justice taking to make the deliberations on application of the death penalty more transparent?**

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The prosecuting U.S. Attorney and Assistant U.S. Attorneys are the principal sources of the information regarding the cases submitted for Department review and they are the people to whom the Department turns whenever there are questions concerning the evidence or any other issue related to the case. The U.S. Attorney and/or the prosecuting Assistant U.S. Attorneys are consulted at each stage of review: by the Committee, the Office of the Deputy Attorney General and the Office of the Attorney General if a recommendation or decision could be contrary to the U.S. Attorney's recommendation. Under the revised protocol effective July 1, 2007, if the Committee's recommendation is contrary to that of the U.S. Attorney, then a copy of the Committee's memorandum is provided to the U.S. Attorney, who is informed that he may address a memo in opposition to the Committee's position to the Deputy Attorney General.

Although the Department views the deliberations underlying a decision to seek or not to seek the death penalty as privileged and confidential, within the Department the decision-making process is extremely transparent. It would, however, be inappropriate for the transparency of the Department's decision-making process to extend outside the Department. The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotations omitted), discretion that is subject to judicial oversight only when it has been exercised in violation of the Constitution. Moreover, the Department has consistently adhered to a policy of declining to discuss ongoing prosecutions, a policy that promotes a fair trial, prevents prejudicing the jury pool, and generally protects the defendant's interests.

2. **Are you familiar with the death penalty study conducted under former Attorney General Janet Reno? Will the findings from that study be made available to the public?**

The findings of Attorney General Reno's death penalty study have been available since their release in September 2000. http://www.usdoj.gov/dag/pubdoc/dpsurvey.html.

3. **The NIJ study conducted by RAND on racial bias and the death penalty examined data from 1995-2000 concluded that there was no racial bias at the federal level, yet the next 6 individuals facing the death penalty at the federal level are all African American males. In light of this fact, is the Department prepared to make more recent data available for analysis of the impact of race on the death penalty?**

You have not identified the next six individuals who in your view will face imposition of the death penalty. However, assuming it to be the six known individuals who have concluded, or are near to concluding, their direct appeals and post conviction review, the authorization to seek the death penalty for those individuals either preceded 1995 or occurred between 1995 and 2000, the period of the Attorney General Reno's study. More recent data would have no relevance to the fact that these individuals face imposition of their death sentences.

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Appendix A
Response to Supplemental Oversight Question 4

Supplemental Oversight Question 4 requests that the Department amplify its responses to April 19 Oversight Questions 12 and 17. April 19 Questions 12 and 17 requested that the Department provide race and ethnicity breakdowns on the capital defendant and victim data provided in response to April 19 Oversight Questions 8 to 11, 15, and 16. The following tables are provided in response to Supplemental Oversight Question 4.

8. On an aggregate and annual basis covering 2001 to 2006, in how many death-eligible cases did U.S. Attorneys request authorization to seek the death penalty? Of those, in how many cases did the review committee agree or disagree with a U.S. Attorney's recommendation? In how many of these cases did the Attorney General follow the U.S. Attorney's recommendation and/or the review committee's recommendation?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

a. Submissions by U.S. Attorneys requesting authorization to seek the death penalty

U.S. Attorney Requests for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	4	5	0	0	9
2002	4	1	0	0	5
2003	9	6	0	0	15
2004	5	7	1	0	13
2005	6	1	0	0	7
2006	2	3	0	0	5

U.S. Attorney Requests for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	3	5	0	0	8

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2002	0	7	0	0	7
2003	0	7	0	0	7
2004	2	7	0	0	9
2005	2	4	0	0	6
2006	5	12	0	0	17

U.S. Attorney Requests for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	2	0	2
2002	0	0	4	0	4
2003	0	0	5	0	5
2004	1	0	7	0	8
2005	0	0	2	0	2
2006	0	0	8	0	8

U.S. Attorney Requests for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	1	1
2003	0	1	0	3	4
2004	0	0	0	1	1
2005	0	0	0	0	0
2006	1	0	0	0	1

U.S. Attorney Requests for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	2	0	1	3

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2003	0	0	0	0	0
2004	0	0	0	0	0
2005	1	0	0	0	1
2006	2	0	0	0	2

U.S. Attorney Requests for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	3	0	0	3
2002	0	0	0	0	0
2003	0	1	0	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	2	0	0	2

b. Recommendations by the Attorney General's Review Committee in cases where the U.S. Attorney requested authorization to seek the death penalty.

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	4	3	0	0	7
2002	4	1	0	0	5
2003	9	6	0	0	15
2004	4	7	1	0	12
2005	6	1	0	0	7
2006	2	3	0	0	5

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

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	White	Black	Hispanic	Other	Total
2001	3	3	0	0	6
2002	0	6	0	0	6
2003	0	7	0	0	7
2004	1	6	0	0	7
2005	2	4	0	0	6
2006	5	8	0	0	13

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	2	0	2
2002	0	0	4	0	4
2003	0	0	5	0	5
2004	1	0	7	0	8
2005	0	0	0	0	0
2006	0	0	8	0	8

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	1	1
2003	0	1	0	3	4
2004	0	0	0	1	1
2005	0	0	0	0	0
2006	1	0	0	0	1

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty

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Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	2	0	1	3
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	1	0	0	0	1
2006	2	0	0	0	2

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	3	0	0	3
2002	0	0	0	0	0
2003	0	1	0	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	2	0	0	2

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	1	0	0	0	1
2005	0	0	0	0	0
2006	0	0	0	0	0

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Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	0	1	0	0	1
2003	0	0	0	0	0
2004	1	1	0	0	2
2005	2	0	0	0	2
2006	0	4	0	0	4

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	2	0	2
2006	0	0	0	0	0

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

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Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

c. Decisions by the Attorney General in cases where the U.S. Attorney requested authorization to seek the death penalty.

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	4	3	0	0	7
2002	4	1	0	0	5
2003	8	6	0	0	14

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2004	4	6	1	0	11
2005	6	1	0	0	7
2006	2	3	0	0	5

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	3	3	0	0	6
2002	0	6	0	0	6
2003	0	7	0	0	7
2004	2	7	0	0	9
2005	2	4	0	0	6
2006	5	8	0	0	13

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	2	0	2
2002	0	0	4	0	4
2003	0	0	5	0	5
2004	1	0	7	0	8
2005	0	0	0	0	0
2006	0	0	8	0	8

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	1	1
2003	0	1	0	3	4

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2004	0	0	0	1	1
2005	0	0	0	0	0
2006	1	0	0	0	1

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	2	0	1	3
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	1	0	0	0	1
2006	2	0	0	0	2

Attorney General Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	3	0	0	3
2002	0	0	0	0	0
2003	0	1	0	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	2	0	0	2

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2

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2002	0	0	0	0	0
2003	1	0	0	0	1
2004	1	1	0	0	2
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	0	1	0	0	1
2003	0	0	0	0	0
2004	0	1	0	0	1
2005	2	0	0	0	2
2006	0	4	0	0	4

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	2	0	2
2006	0	0	0	0	0

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0

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2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Explanatory notes:

i. Defendants are categorized by year based on the date of the U.S. Attorney's initial submission to the Department for a decision concerning that defendant and victim.

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ii. Race and ethnicity designations are made using the same methodology followed in the Department's September 2000 survey. *See* U.S. Department of Justice, *The Federal Death Penalty System: A Statistical Survey*, at T-xv, T-xvi (Sept. 12, 2000).

iii. In cases involving multiple defendants and victims, a defendant is not necessarily linked to all victims killed by other defendants in the same case. Rather, a particular defendant is linked to a victim in the foregoing data if he was charged with that victim's murder or, if no charges had been filed, the facts showed that the defendant participated in that murder.

iv. Where a defendant has killed more than one victim of "other" race/ethnicity, those victims are categorized as having an "exclusively 'other'" race/ethnicity, although decedents may not have shared a common race/ethnicity within "other" (*e.g.*, Asian, Native American, or Pacific Islander).

v. Consistent with the methodology applied in the 2006 Rand study and the Bureau of Justice Statistics's annual *Homicide Trends* reports, the responses to the April 19 questions responses do not include data on victims of mass killings by acts of terrorism. The defendants in such cases are, however, counted in both the April 19 questions responses and in the present response.

vi. A 2001 white defendant included in the response to April 19 question 8 is not included in the present response because that defendant was charged with a capital espionage offense that did not result in the death of an identified victim.

vii. After the April 19 question responses were submitted, the Attorney General approved a U.S. Attorney's 2006 recommendation, endorsed by the Committee, that the death penalty be sought against a Hispanic defendant for killing exclusively Hispanic victims. Accordingly, that information is newly included in the present response.

viii. The April 19 question responses counted a few defendants under the incorrect race category due to inadvertent clerical errors in entering information provided by U.S. Attorneys' offices into the Capital Case Unit's database. That information has been corrected in the present response. A 2005 white defendant who killed exclusively white victims was incorrectly counted as Hispanic. The Attorney General approved the U.S. Attorney's and the Committee's recommendation that the death penalty be sought, and later approved the U.S. Attorney's subsequent request to withdraw the death penalty notice. Further, a 2005 white defendant who killed victims of more than one race including a white victim was incorrectly counted as Hispanic. The Attorney General approved the U.S. Attorney's and the Committee's recommendation that the death penalty be sought.

ix. A particular defendant is not counted more than once within a single year in a table, despite the fact that permission to seek the death penalty against that defendant may have been requested in more than one case or with respect to more than one victim.

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A particular defendant may be counted more than once over successive tables reflecting agreement or disagreement with the U.S. Attorney's request by the review committee or the Attorney General. In some instances, the Committee or the Attorney General may have agreed with the U.S. Attorney's request for a particular defendant with regard to certain counts or victims, but disagreed with the U.S. Attorney's request with regard to other counts or victims. In such a situation, the defendant will be counted in tables reflecting the review committee's or Attorney General's agreement with the U.S. Attorney's request, and separately counted in tables reflecting the review committee's or Attorney General's disagreement with the U.S. Attorney's request.

Likewise, a particular victim may be counted more than once over successive tables reflecting agreement or disagreement with the U.S. Attorney's request by the review committee or the Attorney General. In some instances, the Committee or the Attorney General may have agreed with the U.S. Attorney's request involving one defendant and victim, but disagreed with the U.S. Attorney's request with regard to another defendant's participation in the murder of the same victim. In such a situation, the victim will be counted in tables reflecting the review committee's or Attorney General's agreement with the U.S. Attorney's request, and separately counted in tables reflecting the review committee's or Attorney General's disagreement with the U.S. Attorney's request.

Data concerning the defendants who are thus counted more than once over successive tables are contained in the Department's responses to the Committee's July 16 oversight questions 6 through 8.

x. The foregoing data do not include cases in which the Attorney General has not made a decision (*e.g.*, cases in which a decision has been deferred because the defendant is a fugitive or for other reasons, and cases still under review).
xi. In a small number of cases, the review committee did not make a death penalty recommendation because it was evenly divided or because it recommended that a decision be deferred. As a result, the number of cases in which the committee made a recommendation is slightly lower than the number of cases that were submitted for review and decided by the Attorney General.

xii. The foregoing data reflect initial requests and decisions to seek the death penalty, and not subsequent requests and decisions to withdraw a death penalty notice following an initial decision to seek the death penalty. That information, however, is provided separately below.

In some of the cases included in the foregoing data as instances where the U.S. Attorney requested and received authorization to seek the death penalty, the U.S. Attorney later sought and received permission to withdraw the death penalty notice. The race/ethnicity breakdowns for these cases are as follows; defendants are categorized by the year of the U.S. Attorney's initial request to seek the death penalty:

Attorney General Decision Withdrawing a Prior Decision

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Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	1	0	0	0	1
2003	4	1	0	0	5
2004	0	0	0	0	0
2005	4	0	0	0	4
2006	0	1	0	0	1

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	1	0	0	1
2003	0	3	0	0	3
2004	2	3	0	0	5
2005	0	0	0	0	0
2006	0	1	0	0	1

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	2	0	2
2002	0	0	0	0	0
2003	0	0	3	0	3
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	1	0	1

Attorney General Decision Withdrawing a Prior Decision

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Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	1	1
2003	0	0	0	0	0
2004	0	0	0	1	1
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	1	0	0	1
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	1	0	0	1

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xiii. The foregoing tables of withdrawal decisions include five defendants for whom the Attorney General approved withdrawing death penalty notices after the Department's responses to the April 19 questions.

xiv. The tables of withdrawal decisions in the response to April 19 question 8 counted one defendant and a few victims under the incorrect race category due to inadvertent clerical errors. For 2001, one Hispanic victim was incorrectly counted as white, one Hispanic victim was omitted, and one black victim was incorrectly counted as white. Two 2002 "other" victims were incorrectly counted for 2001. For 2004, the tables incorrectly counted an "other" victim where there were none. For 2003, the tables omitted a black defendant who killed exclusively black victims.

xv. In a few instances where the U.S. Attorney requested and received authorization to seek the death penalty, the U.S. Attorney later sought, but was denied, permission to withdraw the death penalty notice. Data concerning these defendants are contained in the Department's response to the Committee's April 19 oversight questions.

9. On an aggregate and annual basis covering 2001 to 2006, in how many death-eligible cases did U.S. Attorneys not recommend seeking the death penalty? Of those, in how many cases did the review committee agree or disagree with the recommendation? In how many cases did the Attorney General follow the U.S. Attorney's recommendation and/or the review committee's recommendation?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

a. Submissions by U.S. Attorneys requesting authorization not to seek the death penalty

U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	21	5	3	3	32
2002	23	10	1	0	34
2003	19	8	4	1	32
2004	9	9	1	0	19
2005	14	6	2	0	22

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2006	23	8	1	1	33

U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	2	45	3	1	51
2002	0	53	3	0	56
2003	2	38	0	1	41
2004	5	54	1	1	61
2005	3	60	7	0	70
2006	6	77	1	1	85

U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	1	6	53	0	60
2002	5	6	57	0	68
2003	2	8	51	0	61
2004	0	8	60	1	69
2005	0	4	67	0	71
2006	2	8	101	1	112

U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	8	10
2002	0	0	0	12	12
2003	0	3	2	8	13
2004	0	1	2	18	21
2005	0	1	2	7	10
2006	0	1	0	9	10

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U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	2	1	6	0	9
2003	0	0	0	0	0
2004	2	0	3	0	5
2005	0	1	0	0	1
2006	2	0	0	0	2

U.S. Attorney Requests for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	7	0	0	7
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	3	0	3
2005	0	0	0	0	0
2006	0	0	1	2	3

b. Recommendations by the Attorney General's Review Committee in cases where the U.S. Attorney requested authorization not to seek the death penalty.

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	17	5	3	3	28
2002	21	9	1	0	31
2003	16	7	4	1	28

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2004	7	9	1	0	17
2005	14	6	1	0	21
2006	18	7	1	1	27

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	2	39	3	1	45
2002	0	47	3	0	50
2003	2	35	0	1	38
2004	5	52	1	1	59
2005	3	55	7	0	65
2006	5	66	1	0	72

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	1	6	53	0	60
2002	5	6	57	0	68
2003	2	7	48	0	57
2004	0	8	60	1	69
2005	0	3	67	0	70
2006	2	8	92	1	103

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	1	0	8	9

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2002	0	0	0	10	10
2003	0	1	2	8	11
2004	0	1	1	17	19
2005	0	1	2	7	10
2006	0	1	0	8	9

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	2	1	6	0	9
2003	0	0	0	0	0
2004	2	0	3	0	5
2005	0	1	0	0	1
2006	1	0	0	0	1

Attorney General's Review Committee Recommendations
Concurring with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	5	0	0	5
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	3	0	3
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General's Review Committee Recommendations

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Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	4	0	0	0	4
2002	2	1	0	0	3
2003	2	1	0	0	3
2004	2	0	0	0	2
2005	0	0	1	0	1
2006	5	1	0	0	6

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	6	0	0	6
2002	0	6	0	0	6
2003	0	4	0	0	4
2004	0	3	0	0	3
2005	0	3	0	0	3
2006	1	11	0	1	13

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	1	0	1
2002	0	0	0	0	0
2003	0	1	3	0	4
2004	0	0	0	0	0
2005	0	1	0	0	1

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2006	0	0	8	0	8

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	2	2
2003	0	0	0	0	0
2004	0	0	1	1	2
2005	0	0	0	0	0
2006	0	0	0	1	1

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	1	0	0	0	1

Attorney General's Review Committee Recommendations
Disagreement with a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2

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2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	1	2	3

c. Decisions by the Attorney General in cases where the U.S. Attorney requested authorization not to seek the death penalty.

Attorney General Decision
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	20	3	3	3	29
2002	21	9	1	0	31
2003	17	8	4	1	30
2004	8	9	1	0	18
2005	14	6	1	0	21
2006	18	7	1	1	27

Attorney General Decision
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	2	40	3	1	46
2002	0	46	3	0	49
2003	2	34	0	1	37
2004	5	52	1	1	59
2005	3	59	7	0	69
2006	5	70	1	0	76

Attorney General Decision
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

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	White	Black	Hispanic	Other	Total
2001	1	6	.51	0	58
2002	3	6	54	0	63
2003	2	7	48	0	57
2004	0	8	60	1	69
2005	0	3	67	0	70
2006	2	8	95	1	106

Attorney General Decision
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	1	0	8	9
2002	0	0	0	10	10
2003	0	1	2	8	11
2004	0	1	2	18	21
2005	0	1	2	7	10
2006	0	1	0	9	10

Attorney General Decision
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity,
Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	2	1	6	0	9
2003	0	0	0	0	0
2004	2	0	3	0	5
2005	0	1	0	0	1
2006	2	0	0	0	2

Attorney General Decision
Approving a U.S. Attorney Request for Authorization Not to Seek the Death Penalty

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Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	4	0	0	4
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	3	0	3
2005	0	0	0	0	0
2006	0	0	1	2	3

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	1	2	0	0	3
2002	2	1	0	0	3
2003	2	0	0	0	2
2004	1	0	0	0	1
2005	0	0	1	0	1
2006	5	1	0	0	6

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	5	0	0	5
2002	0	7	0	0	7
2003	0	5	0	0	5
2004	0	3	0	0	3
2005	0	1	0	0	1
2006	1	7	0	1	9

Attorney General Decision

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Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	3	0	3
2002	2	0	3	0	5
2003	0	1	3	0	4
2004	0	0	0	0	0
2005	0	1	0	0	1
2006	0	0	6	0	6

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	0	0	0	2	2
2003	0	2	0	0	2
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision
Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity,
Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

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Attorney General Decision
Overruling a U.S. Attorney Request for Authorization Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	3	0	0	3
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Explanatory notes:

i. The explanatory notes to Question 8 apply to this response.

ii. The foregoing data do not include cases in which the U.S. Attorney was authorized not to seek the death penalty without referral to the Attorney General for a decision (*e.g.*, cases in which the only evidence of guilt was the defendant's protected proffer).

iii. A U.S. Attorney's initial request to accept a plea agreement under which the government would agree not to seek the death penalty, and any decision approving such a request, are counted as recommendations and decisions not to seek the death penalty within this response. The response to Question 15 separately addresses instances in which the Attorney General approved or overruled a U.S. Attorney's request to enter into such a plea agreement.

iv. A 2002 Hispanic defendant and two 2003 white defendants included in the response to April 19 question 8 are not included in the present response because those defendants were charged with capital espionage offenses that did not result in the death of an identified victim. Additionally, a 2004 Hispanic defendant included in the response to April 19 question 8 is not included in the present response because that defendant was charged with capital drug offense that did not result in the death of an identified victim. A 2005 Hispanic defendant included in the response to April 19 question 8 are not included in the present response because the races/ethnicities of the three victims were unknown.

v. After the April 19 question responses were submitted, the Attorney General approved a U.S. Attorney's 2006 recommendation, endorsed by the Committee, that the death penalty not be sought against two black defendants for killing exclusively black victims. Also, the Attorney General approved a U.S. Attorney's 2006 recommendation, opposed

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by the Committee, that the death penalty not be sought against two "other" defendants and one Hispanic defendant for killing victims of more than one race but not any white victims. Accordingly, that information is newly included in the present response.

vi. The April 19 question responses counted a few defendants under the incorrect race category due to inadvertent clerical errors in entering information provided by U.S. Attorneys' offices into the Capital Case Unit's database. That information has been corrected in the present response. For 2004 and 2005, two black defendants (one each year) who killed exclusively black victims were incorrectly counted as Hispanic. The Attorney General approved the U.S. Attorneys' and the Committee's recommendations that the death penalty not be sought for both defendants. A 2006 Hispanic defendant who killed exclusively Hispanic victims was incorrectly counted as white. The Attorney General approved the U.S. Attorney's and the Committee's recommendation that the death penalty not be sought.

vii. The foregoing data reflect decisions on initial requests not to seek the death penalty, and not subsequent requests and decisions to withdraw a death penalty notice following an initial decision to seek the death penalty. That information, however, is provided below.

In several cases included in the foregoing data as instances where the Attorney General authorized the U.S. Attorney to seek the death penalty, U.S. Attorneys subsequently requested and received authorization to withdraw the notice of intention to seek the death penalty. The race/ethnicity breakdowns for cases falling in this group are as follows; the defendants and victims are categorized by the year of the U.S. Attorney's initial request not to seek the death penalty:

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	1	1	0	0	2
2003	0	0	0	0	0
2004	1	0	0	0	1
2005	0	0	0	0	0
2006	1	0	0	0	1

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

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	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	0	4	0	0	4
2003	0	4	0	0	4
2004	0	1	0	0	1
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	1	0	1
2002	0	0	1	0	1
2003	0	0	1	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	3	0	3

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	1	1
2003	0	1	0	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty

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Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decision Withdrawing a Prior Decision
Approving a U.S. Attorney Request for Authorization to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

viii. The foregoing tables include two defendants for whom the Attorney General approved withdrawing death penalty notices after the Department's responses to the April 19 questions.

ix. The foregoing data do not show subsequently-denied requests to seek the death penalty following an initial decision by the Attorney General authorizing the U.S. Attorney not to seek the death penalty.

10. On an aggregate and annual basis covering 2001 to 2006, in how many cases in which the Attorney General agreed with the U.S. Attorney's recommendation to seek the death penalty was a death sentence imposed?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

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The requested information is provided in the tables and accompanying explanatory notes set forth below.

a. Cases where the death penalty was imposed following a decision by the Attorney General approving a U.S. Attorney request to seek the death penalty.

Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	2	0	0	0	2
2002	3	1	0	0	4
2003	5	2	0	0	7
2004	2	0	1	0	3
2005	0	1	0	0	1
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	1	0	0	1
2003	0	1	0	0	1
2004	0	0	0	0	0
2005	0	2	0	0	2
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	2	0	2
2005	0	0	0	0	0

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2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

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b. Cases where the death penalty was not imposed following a decision by the Attorney General approving a U.S. Attorney request to seek the death penalty.

Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	2	1	0	0	3
2002	0	0	0	0	0
2003	1	3	0	0	4
2004	1	4	0	0	5
2005	1	0	0	0	1
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	3	0	0	3
2002	0	4	0	0	4
2003	0	4	0	0	4
2004	0	2	0	0	2
2005	2	2	0	0	4
2006	2	1	0	0	3

Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	4	0	4
2003	0	0	1	0	1
2004	1	0	4	0	5
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

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	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	1	0	2	3
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	1	0	0	0	1

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	1	0	1	2
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	1	0	0	0	1

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	0	0	0	0	0
2003	0	1	0	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	1	0	0	1

Explanatory notes:

i. The explanatory notes to Questions 8 and 9 apply to this response.

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ii. The response to Question 8 provides data on defendants and victims for whom the Attorney General approved seeking the death penalty, and also provides data on defendants and victims for whom the Attorney General later authorized the U.S. Attorney to withdraw the death penalty notice. Those data, however, do not correlate in all instances to the data provided in the present response, for several reasons. For a number of defendants and victims, the trial has not occurred; the present response is limited to cases in which the trial-level litigation has concluded. Additionally, defendants and victims in cases involving multiple defendants or victims may be counted more than once over the successive tables contained in the response to Question 8 and the present response. The Attorney General in some instances allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all defendants involved in killing the same victim or victims, or allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all victims killed by the same defendant or defendants. In such instances, the defendants or victims may be counted in Question 8 as ones for whom the death penalty notice was withdrawn, but also counted as individuals for whom the death penalty was sought in the present response.

iii. In particular, in 2004, two U.S. Attorneys submitted separate requests to seek the death penalty against two particular white defendants for the murders of discrete white victims. The Attorney General approved both requests and subsequently, the defendants received the death penalty in the one the two cases. The Attorney General then granted the other U.S. Attorney permission to accept a guilt plea from the defendants in the prosecution awaiting trial. As a result, the defendants, who were counted only once in the death penalty authorizations in question 8 because they were submitted in the same year, are counted both as defendants for whom death penalty notices were withdrawn (in the explanatory notes to question 8) and as defendants who were sentenced to death (in the present response).

iv. The defendants counted above as having received the death penalty include one 2005 white defendant whose death sentence was later set aside by the district court. The government has appealed from the district court's order vacating the death sentence. The defendants' victim(s) were exclusively white.
v. The foregoing tables include six defendants who were sentenced to life imprisonment after the Department's responses to the April 19 questions.

11. On an aggregate and annual basis covering 2001 to 2006, in how many cases in which the Attorney General overruled the U.S. Attorney's recommendation not to seek the death penalty, was a death sentence imposed?

12. With respect to Questions 8 through 11, please also provide a breakdown of the race/ethnicity of the defendants and the race/ethnicity of the victims.

The requested information is provided in the tables and accompanying explanatory notes set forth below.

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a. Cases where the death penalty was imposed following a decision by the Attorney General overruling a U.S. Attorney request not to seek the death penalty.

Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	1	0	0	0	1
2002	1	0	0	0	1
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	2	0	0	0	2

Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	1	0	0	1
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

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47297.107

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	1	1
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

b. Cases where the death penalty was not imposed following a decision by the Attorney General overruling a U.S. Attorney request not to seek the death penalty.

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Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	0	0	0	0	0
2003	2	0	0	0	2
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	2	0	0	2
2002	0	3	0	0	3
2003	0	1	0	0	1
2004	0	1	0	0	1
2005	0	1	0	0	1
2006	0	1	0	0	1

Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	2	0	2
2002	2	0	2	0	4
2003	0	1	2	0	3
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	0	0	0	0	0

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2003	0	1	0	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	1	0	0	1
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Explanatory notes:

i. The explanatory notes to Questions 8, 9, and 10 apply to this response.

ii. The response to Question 9 provides data on defendants and victims for whom the Attorney General overruled a U.S. Attorney's request not to seek the death penalty, and also provides data on defendants and victims for whom the Attorney General later authorized the U.S. Attorney to withdraw the death penalty notice. Those data, however, do not correlate in all instances to the data provided in the present response, for several reasons. For a number of defendants and victims, the trial has not occurred; the present

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response is limited to cases in which the trial-level litigation has concluded. Additionally, defendants and victims in cases involving multiple defendants or victims may be counted more than once over the successive tables contained in the response to Question 9 and the present response. The Attorney General in some instances allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all defendants involved in killing the same victim or victims, or allowed the U.S. Attorney to withdraw a death penalty notice with respect to some but not all victims killed by the same defendant or defendants. In such instances, the defendants or victims may be counted in Question 9 as ones for whom the death penalty notice was withdrawn, but also counted as individuals for whom the death penalty was sought in the present response.

iii. In particular, in 2001, a U.S. Attorney submitted a request not to seek the death penalty against a black defendant for the murders of a white victim or victims. The Attorney General directed the U.S. Attorney to seek the death penalty, but later granted the other U.S. Attorney permission to accept a guilt plea from the defendant. The defendant then refused to plead guilty as his counsel had proposed and the case proceeded to trial and a capital sentencing hearing, resulting in imposition of a life sentence. Accordingly, the defendant is counted both as a defendant for whom the death penalty notice was withdrawn (in the explanatory notes to question 9) and as a defendant sentenced to a life term (in the present response).

15. On an aggregate and annual basis covering 2001 to 2006, in how many cases in which the Attorney General overruled the U.S. Attorney's recommendation not to seek the death penalty, did the Attorney General's decision effectively negate a negotiated plea agreement between the defendant and U.S. Attorney's office?

17. With respect to questions 15 through 16, please provide a break down of the race ethnicity of the defendants and the race/ethnicity of the victims.

The data in the following table only include cases in which the U.S. Attorney specifically requested authorization of a plea agreement rather than authorization not to seek the death penalty. Sometimes cases are submitted as requests for authorization not to seek although tentative plea agreements have been reached. The data also reflect only the initial decisions by the Attorney General, not the decisions made in response to requests for reconsideration of an initial decision to seek or authorization to withdraw the notice of intent to seek the death penalty. Data pertaining to requests for reconsideration or authorization to withdraw the notice of intent to seek the death penalty are provided in response to question 16.

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement Under Which the Government Would Agree Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0

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2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	1	0	0	0	1

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement
Under Which the Government Would Agree Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	1	0	0	1
2003	0	0	0	0	0
2004	0	1	0	0	1
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement
Under Which the Government Would Agree Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	1	0	1
2003	0	0	1	0	1
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement
Under Which the Government Would Agree Not to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

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	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement
Under Which the Government Would Agree Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity,
Including at Least One White Victim

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

Attorney General Decisions
Overruling an Initial Request by a U.S. Attorney for Authorization of a Plea Agreement
Under Which the Government Would Agree Not to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But
Without Any White Victims

	White	Black	Hispanic	Other	Total
2001	0	0	0	0	0
2002	0	0	0	0	0
2003	0	0	0	0	0
2004	0	0	0	0	0
2005	0	0	0	0	0
2006	0	0	0	0	0

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47297.113

Explanatory notes:

i. The explanatory notes to Questions 8, 9, 10, and 11 apply to this response.

16. **In how many cases has the Attorney General approved a plea agreement that takes capital punishment off the table? In how many instances has the Attorney General refused to approve a plea agreement that takes capital punishment off the table? In each instance in which the Attorney General refused to approve such a plea agreement, why did he make that decision?**

17. **With respect to questions 15 through 16, please provide a break down of the race ethnicity of the defendants and the race/ethnicity of the victims.**

The requested information is provided in the tables and accompanying explanatory notes set forth below.

Decisions by the Attorney General
Approving a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

White	Black	Hispanic	Other	Total
4	5	0	0	8

Decisions by the Attorney General
Approving a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

White	Black	Hispanic	Other	Total
0	3	0	0	3

Decisions by the Attorney General
Approving a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

White	Black	Hispanic	Other	Total
0	0	10	0	10

Decisions by the Attorney General

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Approving a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

White	Black	Hispanic	Other	Total
0	0	0	2	2

Decisions by the Attorney General
Approving a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

White	Black	Hispanic	Other	Total
0	1	0	0	1

Decisions by the Attorney General
Approving a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

White	Black	Hispanic	Other	Total
0	0	0	0	0

Decisions by the Attorney General
Overruling a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively White Victim(s)

White	Black	Hispanic	Other	Total
3	0	0	0	3

Decisions by the Attorney General
Overruling a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Black Victim(s)

White	Black	Hispanic	Other	Total
0	6	0	0	6

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Decisions by the Attorney General
Overruling a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively Hispanic Victim(s)

White	Black	Hispanic	Other	Total
1	0	2	0	3

Decisions by the Attorney General
Overruling a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Exclusively "Other" Victim(s)

White	Black	Hispanic	Other	Total
0	0	1	0	1

Decisions by the Attorney General
Overruling a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, Including at Least One White Victim

White	Black	Hispanic	Other	Total
0	1	0	0	1

Decisions by the Attorney General
Overruling a U.S. Attorney Request to Enter a Plea Agreement Under Which the Government Would Withdraw a Previously-filed Notice of Intention to Seek the Death Penalty
Defendant Race/Ethnicity – Multiple Victims of More than One Race/Ethnicity, But Without Any White Victims

White	Black	Hispanic	Other	Total
0	1	0	0	1

Explanatory notes:

i. The explanatory notes to Questions 8, 9, 10, 11, and 15 apply to this response.

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COMMONWEALTH OF PUERTO RICO

Department of Justice

ROBERTO J. SÁNCHEZ RAMOS
SECRETARY

ANSWERS TO QUESTIONS
POSED BY SENATOR ARLEN SPECTER

TO ANÍBAL ACEVEDO VILÁ
GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO
AND ROBERTO J. SÁNCHEZ RAMOS
SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"OVERSIGHT OF THE FEDERAL DEATH PENALTY"

Submitted by e-mail on July 30, 2007

ANSWERS TO QUESTIONS
POSED BY SENATOR ARLEN SPECTER

TO ANÍBAL ACEVEDO VILÁ
GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO
AND ROBERTO J. SÁNCHEZ RAMOS
SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"OVERSIGHT OF THE FEDERAL DEATH PENALTY"

Submitted by e-mail on July 30, 2007

On June 27, 2007, I appeared before the Subcommittee on the Constitution on behalf of the Governor of the Commonwealth of Puerto Rico ("Commonwealth"), Aníbal Acevedo Vilá, to present the Commonwealth's position on the federal government's application of the death penalty to jurisdictions, such as Puerto Rico, which have outlawed capital punishment. Today, we reiterate that Congress should abandon the death penalty as punishment for federal offenses or, at least, establish a rule of deference barring the imposition of this penalty within jurisdictions, such as Puerto Rico, that do not allow it locally.

The testimony generated some questions from Senator Arlen Specter, which we have the opportunity to answer today, with the goal of generating a constructive debate over an issue that demands immediate action by Congress. The Commonwealth understands that Congress, in the exercise of its broad powers under the Constitution of the United States of America, should legislate an absolute, or at least severe, statutory limit on the imposition of the death penalty in federal cases in Puerto Rico, as well as in those other United States jurisdictions that vehemently reject capital punishment.

47297.118

Having reiterated the Commonwealth's institutional rejection of the death penalty as a form of punishment for criminal activity, we proceed to answer the questions submitted by Senator Arlen Specter in the belief that a robust debate will help establish laws and a criminal justice system premised on higher principles that demonstrate an absolute respect for human life, even for the life of a murderer.

FIRST QUESTION:

In your testimony, you assert that the death penalty is not an effective deterrent because most criminals don't expect to get caught. Can you give us any evidence to support this theory?

At the outset, it is important to point out that the Commonwealth's institutional rejection of the death penalty as a form of punishment for criminal activity is founded on a number of different reasons, the majority of which do not depend on empirical data. As we stated in our testimony, in our estimation, those reasons significantly outweigh whatever deterrence effect the imposition of the death penalty might have.

First, moral considerations of high regard urge that we, as a democratic society, establish a criminal justice system predicated on an absolute, not conditional, respect for human life. These moral considerations, in the case of Puerto Rico, were expressly included in the Constitution of the Commonwealth of Puerto Rico, which, in synchronicity with the culture and values of our citizens, categorically provides in Article II, Section 7, that "the death penalty shall not exist" in Puerto Rico. This commitment against the death penalty for moral considerations is not the product of scientific research or empirical evidence, but the natural result of the deeply spiritual nature of our people, the religious convictions of the majority of Puerto Ricans, their

strict adherence to the guarantee of the equal protection of the law and the grounding of our legal system on the principles of a continental European model which has moved away from the death penalty.

Second, there is considerable evidence that an alarming number of persons have been incorrectly sentenced to death by various jurisdictions within the United Stated. See James S. Liebman et al., A Broken System: Error Rates in Capital Cases 1973-1995, available at www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. See also Innocence Project, Benjamin N. Cardozo School of Law, Facts on Post Convictions DNA Exonerations. This well-documented margin of error makes the death penalty an unacceptable form of punishment. Capital punishment is irrevocable by nature and provides no reparation for the victims of mistakes.

Third, capital cases are notoriously protracted and expensive, and they constitute a significant drain on the resources of a prosecutor's office. See http://www.deathpenaltyinfo.org (last visited June 18, 2007). See also Katherine Baicker, National Bureau of Economic Research, The Budgetary Repercussions of Capital Convictions, available at www.nber.org/papers/w.8382.

Fourth, objective empirical evidence unequivocally illustrates the lack of uniformity in the imposition of the death penalty across the country. See John Gleeson, Supervising Federal Capital Punishment: Why the Attorney General Should Defer when U.S. Attorneys Recommend Against the Death Penalty, Va. L. Rev. 1697 (2003); John Brigham, Unusual Punishment: The Federal Death Penalty in the United States, 16 Wash. U. J. L. & Pol'y 195 (2005); Death Penalty Doubts, N.Y. Times, December 12, 2000. This lack of uniformity responds to a variety of

reasons; for example, the discretion with which prosecutors are invested and the fact that some of them are directly politically accountable to their communities. As a matter of fact, it is highly questionable whether, in the American legal system, it is possible, or indeed desirable, to achieve a reasonable level of uniformity in the way similar cases are addressed in different jurisdiction. Thus, it is important to realize that a rigid statute, such as the Federal Death Penalty Act, cannot, and should not, provide a single national uniform policy regarding this issue.

Fifth, there are practical problems and risks associated with the pursuit of the death penalty in jurisdictions that are opposed to that form of punishment. For example, defendants in jurisdictions without local capital punishment confront a greater challenge in obtaining proper legal representation by experienced lawyers. Also, the extraordinary level of attention these cases receive makes the selection of a jury capable of objectively applying the law very problematic. As we discussed in detail in our previous testimony, all these factors are aggravated and amplified in Puerto Rico, where most of the population does not speak English fluently, while proceedings at the United States District Court are conducted in English.

As we stated in our testimony, the factors mentioned above significantly outweigh whatever deterrent effect, if any, the imposition of the death penalty might have. Also, in our estimation, reliable empirical evidence does not support the use of deterrence as a justification for the imposition of the extreme penalty of capital punishment.

Based on the every-day experience of the Puerto Rico Department of Justice, which prosecutes locally dozens of first-degree murder cases every year, we can state with confidence that the threat of a specific type of punishment (even execution) at some future date is unlikely to

enter the mind of killers acting under the influence of drugs or alcohol, in the grip of fear, rage, passion, or jealousy, or who may panic while committing another crime (such as robbery or carjacking). Also, there is scientific evidence in support of the proposition that many murderers have cognitive, organic and neuropsychological impairments, making it unlikely that they are aware of the threat of execution. See Jeffrey Fagan, Columbia Law School, Public Policy Choices on Deterrence and the Death Penalty: A Critical Review of New Evidence, Testimony before the Joint Committee on the Judiciary of the Massachusetts Legislature on House Bill 3834, "An Act Reinstating Capital Punishment in the Commonwealth" (July 14, 2005), and studies cited at footnote 33 of said testimony.

There can be little doubt that a legitimate objective of punishment is deterrence. However, other considerations should be balanced by the policy-maker as part of the equation before resorting to extreme measures that are morally problematic and inconsistent with the liberal values which underlie our society. In the case of a remedy as extreme and morally problematic as capital punishment, the State must bear and satisfy the burden of proving significant deterrent value before even considering it. However, after years of research, scientists have failed to provide evidence that executions have a greater deterrent effect than other forms of severe punishment, such as life imprisonment. See John J. Donohue and Justin Wolfers, The Death Penalty: No Evidence for Deterrence, Economists' Voice (April, 2006). Some studies have identified significant statistical problems with the data analysis used to support recent studies claiming to show that executions deter crime in the United States. Id. See also Richard Berk, New Claims about Executions and General Deterrence: Déjà Vu All Over Again?, Journal

of Empirical Studies, vol. 2, issue 2, at pp. 303-330 (July 2005). These statistical problems include the disproportionate influence of atypical data from some jurisdictions. Id. Finally, it has also been noted that some studies omit relevant information that, if included, would change their results. See Fagan, supra.

In conclusion, there is no reliable and conclusive evidence standing for the proposition that the death penalty is an effective deterrent. In any case, even if such evidence existed, any such deterrent value would be significantly outweighed by moral considerations, the risk of wrongful executions, the inequitable application of the death penalty, and the additional economic, moral, cultural and social cost to our citizenry.

SECOND QUESTION:

In your testimony you state that the use of the death penalty actually increases the likelihood of murders, though you concede that the relationship between the higher murder rates in the United States and the lower murder rates in Canada and European countries that have outlawed the death penalty is merely a correlation, not a definitive causal relationship.

a. Given that the relationship is an unsubstantiated correlation and there is no evidence of a causal relationship, to what extent can it really be taken into consideration when discussing the death penalty?

b. Can you point to any evidence that supports your theory that use of the death penalty actually increases the murder rate?

In our testimony, we state the simple, irrefutable, fact that the United States, with the death penalty, has a higher murder rate than Canada and various European countries that have outlawed the death penalty. In our testimony, we explicitly conceded that correlation does not

always entail causation. However, we invited Congress to give these interesting correlations due consideration.

It is worth noting that this curious pattern also holds true when we compare the average murder rate by population in death penalty states *vis à vis* non-death penalty states during the period between 1992 and 2002. See www.deathpenalty.info.org/article.php?scid=12&did=168. Some reports also show that law enforcement officers are most in danger in southern states, which accounted for 80% of all executions during the period under scrutiny. Id. (citing FBI, Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted 1998).

The correlation seems to be so repetitive across different jurisdictions that it is our responsibility to point it out and to invite the members of this Subcommittee to take it into consideration to the extent that Congress, in its wisdom, understands appropriate. Scientific certainty is not necessary for congressional deliberation. In fact, the deterrent value of the death penalty has never been supported by adequate and reliable scientific evidence, yet Congress has deemed it appropriate to allow the imposition of the death penalty by the federal government all across the United States. However, if Congress understands it appropriate to gather more information regarding this matter, it has the authority and the responsibility to commission a study to analyze the interesting correlation that consistently illustrates a lower murder rate in non-death penalty jurisdictions.

In our testimony, we state that the value of the death penalty in decreasing criminal activity is highly questionable. For example, a 2005 study illustrates that executions are as likely to be followed by an increase in homicides as by a reduction in homicides. See Joanna M.

Shepherd, Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States, 104 Michigan L. Rev. 203 (2005). Moreover, some states exhibit an increase in homicides following executions in some periods while the opposite is true in others. Id.

More recently, a 2006 study illustrates that, using the same data as studies that claimed to show a deterrent effect, while applying different methodology for analyzing said data, the exact opposite conclusion can be reached: that the death penalty actually increases the number of murders. Donohue and Wolfers, supra. For a particular state case study, see Michael J. Godfrey and Vicents Schiraldi, Center on Juvenile and Crime Justice, How Have Homicide Rates Been Affected by California's Death Penalty? (April, 1995).

As stated before, at best, the empirical data in this area is not conclusive, with studies reaching inconsistent and even contradictory results. Therefore, as previously stated, there is no clear evidence that the death penalty is an effective deterrent. Given the myriad counterarguments previously mentioned against the death penalty, we believe that said form of punishment should be eliminated.

THIRD QUESTION:

In your testimony you emphasize that because the federal death penalty statute stands in tension with the Constitution, the laws and/or the popular will of Puerto Rico, the Puerto Rican Constitution, laws and/or popular will should take precedence and the federal death penalty should not be enforced there.

a. Do you take this position only with respect to the death penalty, or do you believe that any federal law that stands in conflict with the Puerto Rican Constitution, laws and/or popular will should not be applicable in Puerto Rico?

b. If a majority of Puerto Ricans think that abortion should be illegal under all or most circumstances, and a law is passed to that affect,

> *than [sic] do you believe that abortion rights should be similarly waived? If an amendment to the Puerto Rican Constitution outlawing abortion is passed, do you believe that abortion rights should be waived?*

As we explained in our testimony, the United States and the Commonwealth of Puerto Rico share a special political relationship and have established a set of rules to govern that relationship based primarily on the provisions of the Puerto Rican Federal Relations Act and the Constitution of the Commonwealth. At the founding of the Commonwealth, the United Stated explicitly recognized that Puerto Rico would be autonomous with regard to issues that were rooted in Puerto Rican culture and society.

This unique political agreement stands over a balance of power and comity that gives rise to the expectation from the People of Puerto Rico that, when Congress is to enact a controversial or burdensome legislation, the free will of the People will be heard and taken into consideration. Furthermore, in those instances were the implementation of the legislation is particularly problematic for Puerto Rico and in which a national public policy is not mandatory or realistically achievable, as in the case of the federal imposition of the death penalty, it is expected by the People of Puerto Rico that Congress, in an act of deference and respect to our special political relationship, will act to promote and restore the delicate balance of power envisioned as a fundamental part of the relationship between the United States and the Commonwealth.

More specifically, however, we are asked whether, if an amendment to the Puerto Rican Constitution outlawing abortion is passed, "abortion rights should be waived". This question is

predicated on the erroneous premise that controversies regarding abortion rights are of the same nature before the law as the issue of the congressional imposition of the federal death penalty.

The issue of abortion rights, however, was addressed by the United States Supreme Court in the landmark case of Roe v. Wade, 410 U.S. 113 (1973), and its progeny. In Roe v. Wade, the Supreme Court established that, even when the United States Constitution does not specifically enumerate an independent "right of privacy", it does establish in multiple sections different guarantees that protect certain areas or zones of privacy. This right of privacy, under the Supreme Court's current interpretation of the United States Constitution, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy under certain circumstances. Said interpretation is not subject to change through an act of Congress. Consequently, abortion rights are primarily a matter of jurisprudential construction of constitutional law, not of congressional action.

On the other hand, the imposition of federal capital punishment in the Commonwealth of Puerto Rico, as well as in other non-death penalty jurisdictions within the United States, is predicated on a discretionary act of Congress through the enactment of the Federal Death Penalty Act. The issue before this Subcommittee, as we explained in our testimony, is not of a constitutional or legal nature. The issue is a political one. Therefore, Congress, in the exercise of its broad powers under the Constitution of the United States, has broad authority to abandon altogether the death penalty or legislate an absolute, or at least severe, statutory limit on the imposition of the death penalty in federal cases in Puerto Rico, as well in other United States jurisdictions that vehemently reject it. Said power, and the political propriety of exercising it, is

well clear of any hypothetical quandaries regarding other controversial subjects which are not within the scope of the hearings being held by this Subcommittee on the issue of congressional oversight of the federal death penalty, and we respectfully decline further comment on these other matters.

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July 30, 2007

The Honorable Arlen Specter
United States Senate
Committee on the Judiciary
Washington DC 20510

via e-mail

Dear Senator Specter;

Thank you for submitting follow-up questions to my testimony before the Senate Judiciary Subcommittee on the Constitution on June 27, 2007. I appreciate your interest in the thoughts and views of the NAACP. I shall try here to answer your questions in the order in which they were posed to me:

(1) You ask about the 120 people who had been released from death row since the 1970's. What I said, specifically, was "Since 1973, over 120 people have been released from death row with evidence of their innocence" and I cited a fact sheet by the Death Penalty Information Center entitled, "Facts About the Death Penalty" dated June 19, 2007. You asked if these people were proven innocent, or if they had just been exonerated.

As you know, there is no judicial process by which a finding of "innocence" can occur. However, there have been 124 instances since 1973 in which all charges were dropped and the presumption of innocence was restored.

You also ask how many innocent people have actually been executed. Unfortunately, this number is not readily available since the court process, as well as the investigative and legal resources available, usually stops once a person has been put to death. Thus, while there are several cases in which people whose guilt was clearly in question when they were executed, once they were put to death most, if not all of the exoneration process ended.

(2) In this question, you ask about my assertion that it is likely that more African Americans are falsely executed. To again reiterate my statement, what I specifically said was "...considering the disparities in the number of African Americans on death row, it is likely that more African Americans are falsely executed, a fact that once again contributes to the mistrust that is endemic among the African American community of the American criminal justice system."

While as I indicated in my response to the first question, it is very difficult to determine the exact number of innocent people who are put to death. One number that I would point to to support this assertion, however, is the disparate

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number of African Americans who have been cleared of all charges. Of the 124 who have been freed from death row since the 1970s, exactly half, or 62, have been African American. This is a clear "rush to judgment" with deadly consequences.

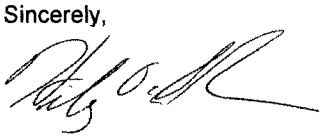
Perhaps more important, however, than statistical data is the context in which I made the statement and, indeed, the underlying theme of my testimony that day. Given our Nation's sorry history of bigotry and African Americans being treated much more harshly by the judicial system, and that half of all those people who have spent a good part of their lives on death row only to be freed later are African American, it can be little wonder that African Americans have a basic distrust of the American criminal justice system. This mistrust and suspicion , in turn, only fosters ill will between law enforcement at every level and the communities they serve.

(3) Lastly, you ask about my assertion that "According to the DoJ's own figures, 48% of the defendants in federal cases in which the death penalty was sought between 2001 and 2006 were African Americans. What we don't know, unfortunately, is whether or not this number is representative of the number of criminal defendants who are accused of crimes in which the death penalty may be sought. And, since there are several layers that must be examined to even begin to assess this number, including whether a crime is tried at the local or federal level, it is not an easy number to attain."

I provided this statistic as part of my testimony (both written and oral) as I believe it is not only valuable but also extremely relevant to the NAACP's concerns about the Death Penalty. As I stated at the end of question #2, African Americans and other racial and ethnic minorities continue to distrust law enforcement officials at all levels. That is why, if there must be federal executions, I believe it would behoove the United States government to look at all the possible reasons for the racial disparities that currently exist in the application of the death penalty. It is incumbent upon the government to explain, and possibly address and even mitigate, the glaring disparities that exist if they ever hope to have the full confidence of the populations they serve.

Thank you again for allowing me to elaborate on some of the points I made in my testimony. I look forward to continuing to work with you on issues of mutual importance to our constituencies.

Sincerely,



Hilary O. Shelton
Director

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The Persistent Problem of Racial Disparities in The Federal Death Penalty

Introduction

In 1991, in the first federal death penalty prosecution post-Furman,[1] the federal government obtained a death sentence against David Ronald Chandler. Although Chandler's death sentence ultimately was commuted, apparently because of serious questions about his guilt,[2] the government has proceeded with federal death prosecutions at an ever-accelerating pace.[3] This paper details the profoundly troubling evidence that racial disparities continue to plague the modern federal death penalty. Of the next six federal inmates scheduled for execution, all are African-American defendants. Defendants of color make up the majority of federal death row and the majority of modern federal executions. Furthermore, modern Attorneys General seek the death penalty at far higher rates if the victim is White, and White federal defendants are far more likely to have their death charges reduced to life sentences through plea bargaining. Given this evidence, Congress should take four steps: (1) implement an immediate moratorium on federal executions and prosecutions; (2) fund a thorough study of the federal death penalty and its racial disparities; (3) enact a federal Racial Justice Act permitting capital defendants to use statistical evidence as proof of racial bias; and (4) enact legislation requiring the Department of Justice to provide regularly information about implementation of the federal death penalty, including statistical data about the race of victims and defendants in cases submitted and recommended for capital prosecutions.

The Evidence

1. ALL SIX OF THE NEXT SCHEDULED FEDERAL EXECUTIONS ARE AFRICAN-AMERICAN INMATES.

Six African-American federal death row inmates — Richard Tipton, Cory Johnson, James H. Roane Jr., Bruce Webster, Orlando Hall, and Anthony Battle — all face impending execution. Three defendants, Richard Tipton, Cory Johnson, and James H. Roane, Jr., were sentenced to death in February 1993 in Richmond, Virginia. Their executions were scheduled in May 2006, but the executions have been stayed because of litigation challenging the constitutionality of the government's lethal injection protocol.[4] Bruce Webster was sentenced to death in November 1995 in Fort Worth, Texas. His execution date was scheduled for April 16, 2007, but it is currently stayed.[5] Orlando Hall was sentenced to death in June 1996, also in Forth Worth, Texas. Anthony Battle was sentenced to death in March 1997 in Atlanta, Georgia. Scheduling of execution dates for Hall and Battle are also stayed pending the lethal injection litigation.[6]

2. TWO OF THE THREE MEN EXECUTED IN THE MODERN FEDERAL DEATH PENALTY ERA WERE MEN OF COLOR.

The United States federal government has executed three individuals since 1976: Timothy McVeigh, a White defendant executed in 2001; Juan Garza, a Latino defendant executed in 2001; and Louis Jones, an African-American defendant executed in 2003.[7]

3. THE DEATH PENALTY HAS BEEN REDUCED TO LIFE SENTENCES THROUGH PLEA BARGAINS FOR WHITE DEFENDANTS AT ALMOST *TWICE* THE RATE AS FOR DEFENDANTS OF COLOR.

A 2000 U.S. Department of Justice study of the federal death penalty found that a far greater percentage of White defendants were able to avoid the death penalty through plea bargains than Black defendants or Hispanic defendants.[8] According to the study, 48% of White defendants received a sentence less than death through plea bargains while only 25% of Black defendants and 28% of Hispanic defendants pled to life sentences. Rory Little, a former federal prosecutor and member of the Department of Justice Capital Case Review Committee,[9] attributed these "racially disparate capital punishment statistics" to the exercise of federal prosecutorial discretion and "the exercise of leniency."[10]

A follow-up report in 2001 by the Department of Justice nonetheless asserted that it is "unwarranted" to suspect racial discrimination played a role in generating these sharp racial disparities in plea-bargaining because "it takes two to make a plea agreement."[11] The clear implication of this statement is that Black and Hispanic defendants have rejected plea offers at a greater rate than White defendants. The Department of Justice, however, did not come forth with any evidence in either its initial 2000 report or its follow-up 2001 report showing that Black and Hispanic defendants have been offered life pleas at the same rate as White defendants, but have rejected them at a greater rate.[12] Thus, there is no reason to believe that the "racially disparate capital punishment statistics" regarding plea bargains is the result of Black and Hispanic defendants rejecting plea bargains at a greater rate than White defendants.

4. U.S. ATTORNEYS GENERAL HAVE BEEN FAR MORE LIKELY TO SEEK THE DEATH PENALTY IN CASES INVOLVING WHITE VICTIMS, AND THE PROBLEM IS GETTING WORSE.

Like the overwhelming majority of state death penalty systems,[13] there is strong evidence that the federal death penalty discriminates on the basis of the race of the victim, with the U.S. Attorney General far more likely to seek a death sentence in White victim cases than in cases with victims of color. Federal regulations require that United States Attorneys submit for the Attorney General's review all cases indicted for federal crimes that could qualify for the federal death penalty.[14] The Attorney General then authorizes[15] death penalty prosecutions in cases from this group of death-eligible cases.[16] Data about authorization rates is available for Attorneys General Reno, Ashcroft, and Gonzales. Each was substantially more likely to seek the death penalty in White victim cases, defined as a case with one or more White victims.[17]

Attorney General Reno authorized the death penalty in one out of every five cases if no victim was White, but she authorized the death penalty in more than one out of every three cases if at least one victim was White.[18] In other words, a federal defendant's odds of facing the death penalty went from one out of five to one out of three if a victim was White.[19] Attorney General Ashcroft also authorized the death penalty in a greater percentage of cases with White victims than victims of color. He authorized the Department of Justice to seek the death penalty in roughly the same proportions as Attorney General Reno.[20]

The statistics from Attorney General Gonzales are even more troubling. To date, he has authorized the death penalty in only one out of every six cases with no White victim, but almost one out of every two cases with a White victim.[21]

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Across all three Attorneys General, the AG death penalty seek rate was 35% (146/416) in White victim cases, compared with 19% (212/1090) in all other cases.[22] This represents a statistically significant 16-percentage point disparity between the two rates. It means that the risk of a death penalty authorization is 1.8 times higher (35%/19%) in White victim cases than in other cases. It also means that the risk of a death penalty authorization is 84% higher (16/19) in White victim cases than in other cases.

By continuing to authorize the death penalty disproportionately for cases with White victims, the federal government is sending the intolerable message that it values the life of a White person more than the life of a person of color.

5. THE MAJORITY OF DEFENDANTS SENTENCED TO DEATH IN THE MODERN ERA OF THE FEDERAL DEATH PENALTY ARE PERSONS OF COLOR.

As noted above, fifty-four individuals[23] have been sentenced to death in the modern federal death penalty era: of these, thirty-three defendants — more than half[24] — are persons of color. Twenty-seven African-American defendants, twenty-one White defendants, five Latino defendants and one Native American defendant have been sentenced to death under the federal death penalty laws.[25] These percentages reflect larger disparities than those observed on many state death rows.[26] Furthermore, the disparities also represent a significant shift from the pre-Furman death penalty era. Before Furman, the federal government executed thirty-four individuals between August 17, 1927, and March 15, 1963.[27] Of those executed, twenty-eight were White, two were Native American and three were African-American.[28] While these disparities alone do not prove bias in the federal system, they raise serious questions about it.

Recommendations

This evidence of racial disparities in the implementation of the federal death penalty fundamentally challenges its legitimacy and requires immediate action. First, Congress should implement a moratorium on federal death penalty prosecutions and executions. A moratorium is necessary until it is clear that the federal death penalty can be implemented without racial bias. Second, Congress should fund a federal study to examine racial disparities and the implementation of the federal death penalty. The study should examine, among other issues, why cases are selected for the death penalty and why cases are selected for federal prosecution instead of state prosecution.[29]

Third, Congress should enact a federal Racial Justice Act, similar to the statute adopted by the State of Kentucky.[30] This legislation would allow capital defendants to use statistical evidence as proof of racial bias.[31] Under current federal law, although an employee can use statistical evidence in civil rights litigation as evidence of discrimination, a capital defendant cannot challenge his capital charge, conviction or death sentence with persuasive statistical proof of racial bias.[32] The Racial Justice Act is necessary to ensure that the question of life or death for federal defendants does not turn on the race of the defendant or the victim.

Fourth, Congress should enact reporting legislation that would require the Department of Justice to provide annually information about the implementation of the federal death penalty. This information should include statistical data relevant to studying racial disparities, including: (1) for each United States Attorney's office, the number of homicide cases reviewed by the office, broken down by race of defendant and race of victim, the number of cases indicted with capital-eligible crimes by race of defen-

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dant and race of victim, and the number of cases submitted to the Attorney General's Review Committee on Capital Cases by race of defendant and race of victim; (2) information about cases approved and rejected by the Attorney General for capital prosecution, broken down by race of defendant and race of victim; and (3) information about plea bargaining, including the numbers of plea offers extended and entered, by race of defendant and race of victim. The reporting legislation should also require the Department of Justice to provide financial information, including the cost of prosecuting federal capital and non-capital homicide cases. Transparency about the implementation of the federal death penalty is a critical step towards ensuring that the death penalty is not administered in an arbitrary or discriminatory manner.

APPENDIX A

All Federal Defendants Sentenced to Death in the Modern Death Penalty Era (Post-*Furman*)

LAST NAME	FIRST NAME	D-RACE	YEAR	EXECUTED
Agofsky	Shannon	W	2004	
Allen	Billie	B	1998	
Barnette	Aquilia	B	1998	
Barrett	Kenneth	W	2005	
Basham	Branden	W	2004	
Battle	Anthony	B	1997	
Bernard	Brandon	B	2000	
Bolden	Robert	B	2006	
Bourgeois	Alfred	B	2004	
Brown	Meier	B	2003	
Caro	Carlos	L	2007	
Corley	Odell	B	2004	
Davis	Len	B	1996	
Fell	Donald	W	2005	
Fields	Edward	W	2005	
Fields	Sherman	B	2001	
Fulks	Chadrick	W	2004	
Gabrion	Marvin	W	2002	
Garza	Juan	L	1993	Y (2001)
Hall	Orlando	B	1995	
Hammer	David	W	1998	
Hardy	Paul	B	1996	
Higgs	Dustin	B	2000	
Holder	Norris	B	1998	
Honken	Dustin	W	2004	
Jackson	David	B	2006	
Jackson	Richard	W	2001	
Johnson	Angela	W	2004	
Johnson	Cory	B	1993	
Johnson	Darryl	B	1997	
Jones	Louis	B	1995	Y (2003)
Kadamovas	Jurijus	W	2007	
Lawrence	Daryl	B	2006	
LeCroy	William	W	2001	
Lee	Daniel	W	1999	
Lighty	Kenneth	B	2005	
McVeigh	Timothy	W	1997	Y (2001)

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Mikhel	Iouri	W	2007
Mikos	Ronald	W	2005
Mitchell	Lezmond	N	2003
Nelson	Keith	W	2001
Ortiz	Arboleda	L	2000
Paul	Jeffrey	W	1997
Purkey	Wesley	W	1998
Roane	James	B	1993
Robinson	Julius	B	2002
Rodriguez	Alfonso	L	2006
Sampson	Gary	W	2003
Sinisterra	German	L	2000
Stitt	Richard	B	1998
Tipton	Richard	B	1993
Vialva	Christopher	B	2000
Webster	Bruce	B	1996
Wilson	Ronell	B	2007

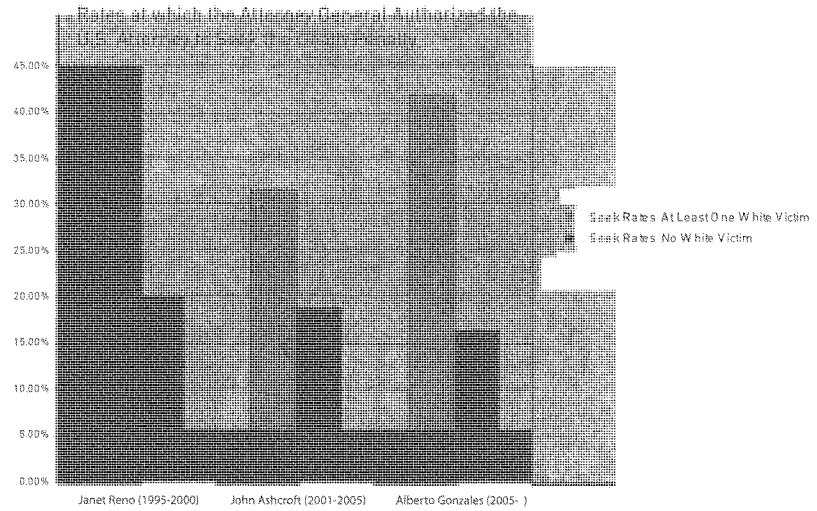
Re-sentenced/Commuted to Life Sentence

LAST NAME	FIRST NAME	D-RACE	YEAR
Chandler	David	W	1991
Chanthadara	Boutaem	A	1995
McCullah	John	W	1993

TOTAL	54
White	21
Black	27
Asian	0
Native American	1
Latino	5

APPENDIX B
Seek Rates by Attorney General and Race of the Victim

	Considered (N)	Authorized (N)	Seek Rates	Seek Rate Difference
Janet Reno (1995-2000)[33]				
All Cases	600	149	24.83%	
Cases ≥ 1 White Victim	185	66	35.68%	15.68%
Cases with no White Victim	415	83	20.00%	
John Ashcroft (2001-2005)[34]				
All Cases	623	138	22.15%	
Cases ≥ 1 White Victim	164	52	31.71%	12.97%
Cases with no White Victim	459	86	18.74%	
Alberto Gonzales (2005- present)[35]				
All Cases	328	71	21.65%	
Cases ≥ 1 White Victim	67	28	41.79%	25.31%
Cases with no White Victim	261	43	16.48%	



ENDNOTES

[1] In *Furman v. Georgia*, 408 U.S. 238, 241 (1972), the Supreme Court held the Georgia statutory death penalty unconstitutional. Four years later, in 1976, the Court upheld the constitutionality of Georgia's substantially revised statute. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). The "modern death penalty era" is used throughout this paper to refer to those cases prosecuted after *Furman* under revised death penalty statutes.

[2] *See United States v. Quinones*, 205 F. Supp. 2d 256, 266 n.13 (S.D.N.Y. 2002), *rev'd on other grounds*, 313 F.3d 49 (2d Cir. 2002) ("[A]s the government concedes, at least one of the 31 federal death row inmates, David Ronald Chandler, had a colorable claim of actual innocence, but his sentence was commuted by President Clinton ... [and] seemingly prompted by serious doubts about Chandler's guilt[.]")

[3] *See* Marcia Coyle, *Federal Death Penalty Stalls*, NAT'L L. J. (April 30, 2007) ("There is no question that the Bush administration has been more aggressive than prior administrations in pursuing federal death sentences. And there is no question that the federal death row has been growing because of that effort even as state death rows decline.")

[4] *See* Death Penalty Information Center (DPIC), *Federal Death Row Prisoners* (April 11, 2007), *available at* http://www.deathpenaltyinfo.org/article.php?scid=29&did=193 (hereinafter DPIC); *see also, Roane v. Gonzales*, No. 1:05-CV-2337 (RWR) (D.D.C. Feb. 27, 2006) (order granting motion for preliminary injunction barring execution of James Roane, Jr., Richard Tipton, and Cory Johnson).

[5] *See* DPIC *supra*, note 4; *Roane v. Gonzales*, Case No. 1:05-CV-2337 (RWR) (D.D.C. Feb. 21, 2007) (order granting motion for preliminary injection barring execution of Bruce Webster).

[6] *Roane v. Gonzales*, No. 1:05-CV-2337 (RWR) (D.D.C. June 11, 2007) (order granting motion for preliminary injunction barring scheduling of execution dates for Anthony Battle and Orlando Hall)

[7] *See* DPIC, *supra* note 4.

[8] *See* U.S. Dept. of Justice, *The Federal Death Penalty System, A Statistical Survey*, 34-35 (September 12, 2000) *available at* http://www.usdoj.gov/dag/pubdoc/dpsurvey.html.

[9] Attorney General Janet Reno established the Death Penalty Review Committee in 1995. *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 409-410 (1999). U.S. Attorneys submit cases which they have charged as capital-eligible crimes to the Review Committee, which in turn makes advisory recommendations to the Attorney General about whether the government should seek the death penalty. The Attorney General appoints the Committee members, usually senior attorneys within the Department of Justice. *Id.*

[10] *See id.* at 487 (quoting Kenneth Culp Davis, "the power to be lenient is the power to discriminate").

[11] *See* U.S. Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, 14-15 (June 6, 2001) (hereinafter DOJ 2001 report) *available at* http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm.

[12] *Id; supra* note 8.

[13] *See, e g.*, Stephanie Hindson, Hillary Potter, Michael Radelet, *Race, Gender, Region and Death Sentencing In Colorado 1980-1999*, 77 U. COLO. L. REV. 549, 549 (finding that the death penalty is sought at significantly higher rates for White victims than Black victims); Michael J. Songer, Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 188 (2006) (finding that prosecutors in South Carolina were 3.5 times more likely to seek the death penalty if the victim was White and the defendant Black than in any other combination, a statistically significant finding); Isaac Unah and John Charles Boger, *Preliminary Report of the Findings of the North Carolina Death Penalty Study 2001* (2001), available at http://www.unc.edu/~iunah/prelim_rpt_nc_dpp.pdf (concluding that the race of the victim was statistically significant in predicting who will receive the death sentence in North Carolina); U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparateness* (1990) (GAO report concluding that race of the victim was "found to influence the likelihood of being charged with capital murder or receiving the death penalty" and noting that this "finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques."); *see also* David C. Baldus, George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 No. 2 Crim. L. Bull. 6 (April 2005) (reviewing studies, including the Baldus study of Georgia discussed in *McKleskey v. Kemp*, 481 U.S. 279 (1987)).

[14] Failure to submit cases for consideration may mask additional racial disparities by removing from scrutiny the potentially discriminatory decisions by United States Attorneys whether to charge a particular case with a federal, death-eligible crime.

[15] The Attorney General's Review Committee first reviews submitted cases, but its recommendations are not binding on the Attorney General's decision. *See Rory, supra* note 9, at 409-410.

[16] Scholars sometimes refer to the rate at which the Attorney General authorizes cases as the "seek rate." For example, if an Attorney General reviewed 100 cases and authorized 50 cases, that would constitute a 50% seek rate.

[17] *See* Appendix B.

[18] Attorney General Reno authorized the death penalty in 66 of the 185 cases with White victims, a seek rate of 36%, compared with 83 of the 415 cases with no White victim, a seek rate of 20%. This difference in the seek rates is 16% and is statistically significant. *See* Appendix B.

[19] In 2006, the RAND Corporation released a study of the federal death penalty in which it concluded that the observed racial disparities disappear after adjusting for case characteristics, including aggravating factors. *See* Stephen Klein, Richard Berk, & Laura Hickman, *Race and the Decision to Seek the Death Penalty in Federal Cases*, at iii, xvii (2006), *available at* www.ncjrs.gov/pdffiles1/nij/grants/214730.pdf. This study was limited to cases during Attorney General Janet Reno's term, and its methodology has been heavily criticized. *See, e.g.*, Professor David Baldus, *Review of 'Race and the Decision to Seek the Death Penalty in Federal Cases,'* submitted February 19, 2006 (criticizing, *inter alia*, the study's methodology for analyzing race). *See also* Stephen B. Bright, et al., *The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 341 (1995) (GAO statistician Dr. Harriet Ganson explaining that the conclusion by lead researcher Steven Klein that no disparities were observed in a similar study of California's death row was inconsistent with the data).

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[20] Attorney General Ashcroft authorized the death penalty in 52 of the 164 cases with White victims, a seek rate of 32%, compared with 86 of the 459 cases with no White victim, a seek rate of 19%. The difference in the seek rates based on the race of the victim is 13% and is statistically significant. *See* Appendix B.

[21] Attorney General Gonzales authorized the death penalty in 28 of the 67 cases with White victims, a seek rate of 42%, compared with 43 out of the 261 cases with no White victim, a seek rate of 16%. The difference in these seek rates is 25% and is statistically significant. *See* Appendix B. The seek rate difference for Attorney General Gonzales between cases with White victims and cases with no White victims is significantly higher than the seek rate differences for Attorneys General Reno and Ashcroft. *Id.*

[22] *See* Appendix B.

[23] An additional three individuals initially received sentences of death but subsequently received life sentences, either through new sentencing hearings or commutation. Two of these individuals are White and one is Asian-American. *See* DPIC, Federal Death Row Prisoners (April 11, 2007); Appendix A.

[24] Sixty-one percent of all individuals sentenced to death under the modern federal death penalty have been people of color. *See* Appendix A, compiled with information from DPIC, Federal Death Row Prisoners (April 11, 2007).

[25] *Id.*

[26] *See* U.S. Dept. of Justice, *supra* note 8, at 36 n. 28 (reporting the percentages of state defendants awaiting execution in 1998 by race: White, 55%; Black, 43%; Other, 2%). *See also* DPIC (2007), *available at* http://www.deathpenaltyinfo.org/article.php?scid=5&did=184#inmaterace (reporting the percentage of state defendants awaiting execution as of 2007 by race. White, 45%; Black, 42%; Latino, 11%; Other, 2%). *Compare* Appendix A (reporting the percentage of federal death row defendants as of 2007 by race: White, 39%; Black 50%; Latino, 9%; Native American, 2%).

[27] *See* Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615, 1615 (2004).

[28] *Id.*

[29] *See, e.g.*, National Institute of Justice, *Strategic Planning Meeting on Research Involving the Federal Death Penalty System, Summary of Proceedings*, 2-3 (Jan. 10, 2001) ("[Participant researchers] noted that research focusing on cases within Federal jurisdiction should draw upon all potential capital cases coming to Federal prosecutors, not just those submitted for death penalty review. . . . [A]n ideal study would include decision making at every juncture in the case process leading to a death sentence [and] . . . all State and Federal capital-eligible cases should be combined for analysis in order to more fully understand whether race/ethnicity is a neutral factor[.]"). These issues were not addressed by the 2006 RAND study, discussed *supra* note 19. Congress should also request the release of the RAND data so that it may be examined by outside statisticians.

[30] Ky. Rev. Stat. Ann. § 532.300 (West 2006).

[31] *Id.*

[32] *See* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 519-520, 525-27 (1995) (comparing the goals and methods of proof in the proposed federal Racial Justice Act with those in the 1964 Civil Rights Act); *but cf. McCleskey v. Kemp*, 481 U.S. 279, 306, 313 (1987) (holding that statistical proof is inadequate to prove a constitutional violation of race discrimination in capital cases).

[33] This data is from the RAND study. *See* Klein, Berk & Hickman, *supra* note 19.

[34] The data for this section of the data is from information collected by the Federal Death Penalty Resource Counsel.

[35] *Id.* This information includes all cases through May 10, 2007.

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June 27, 2007

Senator Russell D. Feingold, Chair
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U.S. Senate Committee on the Judiciary
506 Hart Senate Office Building
Washington D.C. 20510

Senator Sam Brownback, Ranking Member
Subcommittee on the Constitution
U.S. Senate Committee on the Judiciary
303 Hart Senate Office Building
Washington, D.C. 20510

Re: National Institute of Justice (NIJ) Rand Study of the Federal Death Penalty (2006)

Dear Chairman Feingold and Senator Brownback:

During the past 25 years, my colleague George Woodworth, Department of Statistics and Actuarial Science, University of Iowa and I have conducted five empirical studies that are comparable to the Rand 2006 study of the federal death penalty. A copy of my resume is attached.

My first involvement in the NIJ study was as an invited participant in the January 10, 2001 meeting convened by NIJ to consider the issues associated with the conduct of an empirical study of the administration of the federal death penalty. Thereafter, I filed a grant application to conduct the study authorized by the National Institute of Justice (NIJ). Obviously, my application was not accepted.

Thereafter, I accepted along with five other scholars an invitation from the Rand investigators to act as an "expert consultant" on their study. In this capacity, I submitted early on detailed suggestions for the conduct of the analysis, few if any of which were followed. In January 2006, I received a draft of the final report, which I reviewed in the two or three weeks that Rand gave its consultants to respond to the draft. A copy of that review (February 19, 2006) is attached to this memo (the page references in my review do not track the page numbers in the final report but the references to the tables and figures still appear to be current).

None of my suggestions were incorporated into the final draft – Klein, Berk, and Hickman, Race and the Decision to Seek the Death Penalty in Federal Cases (2006) ("the study"). It appears to me that the request for the opinions of the consultants with a two or three week turn around time was a pure formality. This opinion is shared by four of the other consultants with whom I have communicated about the matter (Professors Alfred Blumstein, Sam Gross, Ray Paternoster, and Frank Zimring). To my knowledge, most of the other consultants were unable to reply to the request for comments on the January 2006 draft because of the short time frame authorized for the submission of comments.

My familiarly with the literature in this field and my review of the RAND report suggest the following. (My views do not necessarily reflect the views of the other consultants who have not participated in the preparation of this letter).

1. The evidence in the report is suspect because the models that produced it are not based on good practices for this type of research.

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a. The race variables used in the study do not address the core concerns about race discrimination that motivated the authorization of the study in the first place – discrimination against black defendant, defendants in white victim cases generally, and more specifically black defendant whose victims are white.

b. The non-racial variables that inform the core models are not based on the statutory aggravating and mitigating circumstances that guide the exercise of prosecutorial discretion.

2. Given the quality of the data available in the Department of Justice (DOJ) and the resources that were devoted to data collection, I believe the RAND database is of high quality for the variables on which data were collected.

3. The RAND investigators are competent social scientists. However, none is legally trained or has extensive experience with the legal details of capital charging and sentencing systems at either the state of federal level that is essential to the creation of a valid study of a capital sentencing system. This limitation in the expertise of the research team has important bearing on the credibility of the study's results.

4. The evidence in the report, even assuming the relevance of the database does not support its bottom line conclusion that there is *no* evidence of systemic race discrimination in the federal system. In fact there is evidence in the report that both supports and refutes the discrimination hypothesis. Rather than recognizing the evidence on both sides of the issue, the study reports only one side of the story. As a result it reads more like a DOJ brief than a balanced report of evenhanded social scientists.

5. Finally the study fails to address the bottom line issue of systemic race effects in the imposition of death sentences among all death eligible cases. The report's explanation for this omission is the few number of death sentences in the database. While that sample is small, 17 or 18, it is large enough to shed important light on the issue.

6. These issues clearly suggest that the database for this study should be archived at the University of Michigan's Inter-University Consortium for Political and Social Research so other interested scholars may have an opportunity to evaluate the RAND database.

I appreciate your attention to these important issues of law and policy. Please let me know if I can be of service to you in any way.

Sincerely,

David C. Baldus
Joseph B. Tye Distinguished Professor of Law
College of Law, University of Iowa

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REVIEW OF "RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES (JAN. 2006)"

David Baldus
College of Law
University of Iowa

February 19, 2006

A. Introduction

1. I appreciate the opportunity to review this report, even if the time available for the task is short, which explains the brevity of my comments.

2. You are right that there are very few death sentences imposed among the Reno cases (n = 17 or 18, with two estimates on p. 34). However, it is a pity to ignore them all together. It would be good to have your take on two questions: (a) race effects in death sentences imposed among all death eligible cases in the study, and (b) race effects in the jury penalty trial decisions of which there were probably about 40 or 50. Unadjusted race effects would be illuminating as would effects adjusted for the measures of criminality that you have developed for the main event, prosecutorial charging decisions. You have small models that could handle these outcomes.

3. I believe the analysis of the USAO decisions is core to the inquiry because there is a very much higher probability that those decision makers were aware of the racial characteristics of the cases.

In that regard, T. 3.8 (USAO Recommendations) indicates that your dependent variables should include a measure which captures whether death seek cases advanced to a guilt trial with the government seeking a death sentence (n = 77) or terminated in a plea bargain thereby avoiding the risk of a death sentence (n = 68). You will be missing a lot of the texture of this process if you overlook this decision point. The 26 cases that were acquitted at trial should be excluded from the database because they were not in fact death eligible.

4. I cannot relate the technical notes 4. B. and 5 databases to the discussion on p. xvii, which describes a "public use database" from which two different sets of variables were created. (I may have missed something here.) I suggest that you list the variables in the "public" use database as well as those in the technical notes listed above. There should also be a frequency distribution for each variable in these three databases, with the rate of missings indicated for each variable.

5. It is obvious that the three papers in your report raise some complicated statistical issues. What is missing from the list of outside reviewers ("Expert Consultants"), pp. 155-58, is a senior statistician with experience in this field using this

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type of methodology who is competent to address the very technical issues, especially the propensity analysis in the Schonlau paper.

B. Race variables

1. The literature and the law highlight four race variables that are salient to this research – black defendants v. all other defendants, white victim cases v. all other cases, black victim cases v. all other cases, and black defendant/white victim cases v. all other cases. Other racial contrasts, like white and Asian victim cases v. other victim cases, p. 88, white defendants v. other defendants, pp.36-37, white or Asian defendants v. other defendants, p.88, and minority defendants v. other defendants, T. 4.7, p.43, are off the mark of what this research is all about. They should only be used in the alternative after their relevance has been justified in terms of the law and the literature.

2. The use of a defendant victim interaction based on the black defendant and white victim variables is also appropriate if the findings are carefully interpreted. The interaction term (based on a white victim and a minority defendant), p. 41, is off the mark.

3. A principal concern in American death sentencing systems is with discrimination against black defendants, particularly when the victim is white. It astonishes me therefore that I could locate no models in the entire report that included a variable for a black defendant. The minority defendant variable is simply not an equivalent. *See* T. 3.5, p. 31. Nor could I locate a single model with a variable for a black defendant with a white victim. The white victim/minority defendant interaction term in a model with the white victim and the minority defendant variable is simply not an equivalent.

4. Also, the white defendant variable will not capture black defendant effects in the system. In fact, it is misleading to dwell at any length on models with the white defendant variable that do not also include the white victim variable in the analysis. There is neither theory nor data to suggest that white defendants are being systematically discriminated against in this or any other American death penalty system. The white defendant effects documented, for example, in T. 5.14, p. 88, T.5.16, p. 89, T. 5.19, p. 90, T. 21, p. 91, and Tbls. 5.23 and 5.25, p. 93, are most likely the product of race of victim effects in the federal charging system, since most whites are killed by white defendants. T. 4.2, p. 37. This is clearly established in the literature. For the charging decision addressed in this report, it is clearly documented in T. 5.7, p. 79, a model that contains both a white- defendant variable and a white-victim variable. It documents a zero white defendant effect and a substantial and significant white victim effect. This is what one routinely sees across the literature.

C. The KFB paper. p. 35

1, This paper refers to models, p. 59, that included statistically significant race of victim effects and other models that did not. This highlights the importance of variable

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selection for the core logistic models. In the face of these statements, I don't see how you can say that "there was no evidence of a race effect." p. 59.

2. In this situation, good practice calls for a comparison of the models that did and did not document significant race of victim effects with the black defendant and white victim variables. Good practice also calls for an alternative presentation of models with only the black D/white victim racial variable in it.

3. Good models fit the data well and have legal coherence. We are not in the dark about what variables are legally relevant to this inquiry. There is extensive law and literature pointing the way.

4. In this regard, there is no convincing justification given for placing principal reliance on a model with counts of the number of aggravating and mitigating circumstances that were identified in "univariate analyses," p. 38.

5. At a very minimum, the report should include a model that contains all of the variables in tables 4.3 and 4.4, pp. 39 and 40, (a) with the black defendant and white victim variables and (b) an alternative model with the black defendant/white victim racial variable. It is very difficult to assess the extent to which the aggravator and mitigator counter variables reflect the weight that decision makers actually place on the aggravation and mitigating circumstances they are called on to apply in individual cases. Courts and practitioners are particularly concerned about counter measures that do not reflect the differential weights that actors in the system place on individual aggravating and mitigating circumstances.

6. The US attorney model, T. 4. C.2, p. 66, reports a significant race of victim effect. Table 4. C. 4, a model including the interaction term between minority defendant and white victim, suggests a loss of significance for the white victim variable even though the beta is a shade larger. The reason for this loss of significance appears to be that the standard error for the white victim variable has increased from .26 to .35 because of the collinearity between the white victim variable and the interaction term. There is also a suggestion in the report (p. 43) that the white victim coefficient has the same meaning in the models with and without the interaction term. In fact, the inference supported by the white victim coefficients is quite different in the presence of the interaction term. This should be explained in the report.

7. Given the size and significance of the coefficients reported in T. 4.9, I don't understand the suggestion that there "appear to be only modest differences in the probabilities of a seek decision across districts," p. 60. I suggest you report the odds ratios for those coefficients.

8. Also why do controls for district reduce the significance (cf. T. 4.8 & T4.9) and sometimes the significance and magnitude of the race of victim effects (cf. T. 4.C. 2 & T. 4. C. 3.)?

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9. The matching of cases reported on page p. 52 raises a red flag about the core model in that it apparently does not include a variable for whether the defendant was the trigger person in the case.

10. In a "middling probabilities" analysis, p. 50, the report looks at only 6% of the cases with a predicted likelihood of a seek decision between .4 and .6. This is a cramped view of the mid-range hypothesis, which is actually based on death sentencing outcomes rather that charging decisions. Table 6.1, p. 114 gives one a much better clue about were the interaction between race of victim effects and the severity of the offenses actually lies, i.e., in cases with four or more aggravating factors. Most helpful here would be models focusing on the 48% of the cases with four or more aggravators with the appropriate race variables.

11. It would also be useful to go beyond logistic modeling of the entire database and identify subgroups of cases defined in term of crimes of conviction, see T. 3.7, and similar statutory aggravating circumstances. Here is where the narrative summaries of the type mentioned in the "case control" summaries would be useful. The case summary form apparently did not make it to p. 187. I assume the whole group of those 600 odd forms will be available for future analysis when the database becomes public.

D. The Berk and He paper

1. The technical note 5 database of predictors looks good. It should also have a frequency distribution for each variable with an indication of the level of missing values for each variable.

2. Para 5.1 – delete "white"

3. The listings of the aggravators should distinguish between the "statutory" and non-statutory aggravating circumstances related to homicide. I assume the factors relating to drug offenses are viewed as non-statutory aggravators since all of your cases involve murder. Each statutory aggravator should indicate the code section number, for example, "(c) (1), which gives it legal relevance. I had a hard time locating all of the statutory aggravators and assessing how the statistical models incorporated them.

4. The statutory mitigators should be similarly identified and the "(a) (8) Other factors" mitigators should be presented as a group.

5. I agree that the best approach is to identify control variables based on their association with the outcome variable rather than the race of the victim. However, I don't agree that there is no a priori model to guide this process. p. 72. In fact, the statute provides the basis in its specification of the statutory aggravating and mitigating circumstances that that prosecutors should consider. Those case characteristics should be the point of departure, supplemented by other factors that have a significant association with the outcome variable.

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6. My principal concern with the models is how the non-racial variables were identified and the selection of racial variables, which, as noted above, should be (a) white victim v. other victims and black defendants v. others or (b) black defendant/white victim v. other racial combinations, or (c) a black defendant/white victim interaction term in combination with the white victim and black defendant variables.

7. Model 1, p.79. How did you get the variables in T. 5.7, p. 79? Is it stepwise regression? Why is it inadequate? Is this evidence of a race of victim effect?

8. Potential Model 2, pp. 83-84. In spite of their limitations, the variables in T. 5.11 have a coherent theory for their selection. Why not use them as predictors of seek death in a model with the proper race variables.

9. Model 3. The random trees method is pure data dredging to estimate "forecasting accuracy" p. 87, guided by no theory that I can see of what the appropriate variables should be. But it does have the virtue of producing a well fitted model of the outcome measure. Thus, you should indicate what the variables in the model are, their associations with the seek decisions, and defend their substantive coherence for such an analysis.

10. As for the substantive analysis, it is not good practice to include in a model with race variables the phats from a screening model of non-racial factors estimated without the core race variables. T. 5.17, p. 89. To the extent that the non-racial predictors are correlated with the race of the victim or the race of the defendant, their inclusion in the phats may diminish the race of victim effect that would otherwise appear in a model which includes the individual non-racial variables and the correct racial variables. In any event, the phats should be logit phats.

11, Tables 5.14 and 5.15, p. 88 should be reported with the proper race variables – black defendant and white victim – together in the same model.

12. Pages 87- 88 use as a measure of discrimination, the impact of racial variables on forecasting accuracy. This is not a generally accepted measure of discrimination in the law or in the literature on race discrimination in the administration of the death penalty or in any other legal setting of which I am aware.

13. Similarly, at note 25 you refer to a model with the districts included (with no evidence of race effects). It would be helpful to present the model and explain why the inclusion of the districts explains away the race effects.

14. Interaction of race of victim effects with offender culpability – "Results for the Data Subsets.". Given the evidence on p. 114 that any race of victim effects are likely concentrated in the top 48% of the cases in terms of aggravation level, a helpful alternative analysis would focus on those cases with all of the variables in the model along with the proper race variables. You see part of what you would be likely to find in

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such an analysis in the "top third" analyses reported in T. 5.20, p. 91, and T. 5.24, p. 92. Do these race effects disappear when you control for districts?

15. As for capriciousness, the focus on probabilities on p.96 is appropriate, but it requires more than a statistical analysis. This exercise is comparable to proportionality reviews conducted by a handful of state supreme courts. It requires close analysis of factually similar cases. This is not just a statistical issue.

16. Even with these limitations of the methodology, which appear to minimize the evidence of a systemic race of victim effect, what you do present suggests that the race of the victim very likely matters in some seek decisions, particularly at the US Attorney level. I have never seen a study in which race effects were uniform across the entire sample of cases.

E. The Schonlau paper, p. 108

1. The propensity analysis in this paper is beyond me. For one thing it is a non-standard method that I have not seen used in any discrimination research. The weighted logistic regression method appears to be ad hoc, highly experimental, and of unestablished validity. The proper way to understand a system is to search for a well-specified model.

2. In contrast to the KFB and Berk/Lu reports, this paper's application is opaque. There is no indication of how the weighted logistic regression was run. The use of estimated weights is risky, since estimated propensities near zero or one will, in effect, put most of the weight on a very few observations. I also don't understand why you can't identify and list the variables identified that are correlated with the white victim variable and then run a "garden variety" logistic regression analysis with those variables and the proper race variables in the model and see what you get in terms of race of victim effects.

3. As currently written, it is hard for me to envision the audience that will understand or be in a position to evaluate the "findings" of this paper. I fear, therefore, that it will jeopardize the view that statistical methods have something useful to contribute to our understanding of the role of race in the administration of the death penalty.

4. There are, however, two useful features of this paper. The first is T. 6.1, p. 114, which documents the interaction between possible race of victim effects in the system and the level of culpability of the defendants. However, rather than noting how this relates to similar findings in the literature, the author trivializes the findings by characterizing the "average difference as only 10 percent." The overall difference in seek rates is 10 "percentage points." But this represents a difference of 50% both in the overall seek rates (22% v. 33%) and in the seek rates in the four or more aggravating cases where the race of victim effects appear to be concentrated (36% v. 54%).

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5. Another useful feature of this paper is the classification of cases in T. 6.8, p. 128, in terms of offender culpability. This could provide a good point of departure for an analysis of the consistency of how similarly situated offenders are treated with an analysis of the narrative summaries of these cases.

F. Conclusions

1. I have no idea what race of victim effects you would see if you applied the procedures with well understood properties that I have suggested. However, I think that even on the basis of the findings presented in your report, your conclusions on pp. xxiv, 142-43 (which is all that most people will ever read) regarding race of victim effects in the system are over stated. They suggest that there is no evidence whatsoever of race of victim effects once controls for offender culpability and geography are introduced.

2. Your conclusions overlook the evidence that for the whole data base, especially at the US Attorney level, the extent to which statistical controls for offender culpability reduce the race of victim effects depends on the specific controls that are used, p. 37. In one analysis statistically significant race effects persist suggesting that the odds of a seek decision by the US Attorney are, on average, 1.7 times higher in white victim cases, T. 4. C. 2, p. 66, while in other analyses the race effects loose both statistical significance and magnitude.

3. The conclusion should mention that, like most studies, any possible race effects do not appear across all of the cases and that to the extent they exist in this system, they are most likely concentrated among the more aggravated cases. For example, one analysis of the 200 most aggravated cases, suggested that within those cases the odds of a seek decision were 2.1 times higher in the white victims cases.
T. 5.20, p. 91. Another analysis that controls only for the number of aggravating circumstances in the cases suggests that race of victim effects, to the extent they exist, are likely confined to the top half of the cases in terms of offender culpability, T. 6.1, p. 114.

4. The data show that controls for geography further reduce the race of victim effects, although the mechanism producing this result is not clear. The conclusion could also state that even in the face of controls for both offender culpability and geography, the data suggest that the odds of a seek decision across all of the cases may, on average, be 1.5 times higher in white victim cases. T. 4.9, p. 44. However, because this effect is not statistically significant, it may be the product of random factors operating in the system.

5. In contrast, T. 5.7, p. 79, documents that the race of the defendant (as measured by the white defendant variable) has zero effect in a model that controls for offender culpability.

6. In short, your conclusions do not tell both sides of the story. They read more like a DOJ brief than the balanced conclusions of a social scientist.

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DAVID C. BALDUS Curriculum Vitae - 11/1/2006

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BOOKS AND MONOGRAPHS

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Miscellaneous

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Board of Editors: Evaluation Quarterly (1976-79); Law & Policy Quarterly (1978-79); Law and Human Behavior (1984-); Psychology, Public Policy and Law (1994-).

Board of Trustees, Law and Society Association (1992-94).

Grant Recipient, N.S.F. Law and Social Science Program
1974-75--"Quantitative Proof of Discrimination."

Invited Participant, N.S.F. Sponsored Conference on the Use of Scientific Evidence in Judicial Proceedings, November 1977.

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Expert witness in McCleskey v. Kemp, 105 S.Ct. 1756 (1987), a capital case challenging the constitutionality of Georgia's capital sentence process.

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Member, AALS Committee on Curriculum and Research (1994-97).

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TESTIMONY OF

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United States Senate
Committee on the Judiciary
Subcommittee on the Constitution

June 27, 2007
Dirksen Senate Office Building

ADMINISTRATION OF THE FEDERAL DEATH PENALTY

Chairman Feingold, Senator Brownback, I would first like to thank you for the opportunity to appear again before the Subcommittee today as you take up once more the question of how the federal government has been implementing the death penalty statutes passed by Congress since 1988.

Like an increasing number of Americans, I am personally convinced that the death penalty has failed as public policy and will eventually be abolished as a by-product of our country's search for more effective responses to the problem of violent crime. But today's hearing is devoted to oversight of a death penalty system which already exists, and which must, for now, be administered. For this reason, I will do my best to steer clear of the broad debate over the death penalty, and will focus on the difficult issues raised by current Administration policy in this

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divisive and still-unsettled area of federal criminal law.

As I explained when this Committee last held oversight hearings on the federal death penalty almost exactly six years ago, I have been a close observer of the federal death penalty since 1992. In January of that year, the federal defender system contracted with me and Kevin McNally, a colleague in Frankfort, Kentucky, to provide expert assistance on as "as-needed" basis to federal defenders and court-appointed counsel in federal capital cases brought under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e). Over the fifteen-and-a-half years since then, Mr. McNally and I (joined by several other attorneys over the years) have worked part-time to provide assistance to lawyers who have been appointed to defend the increasing numbers of federal death penalty prosecutions brought under § 848(e) and later under the Federal Death Penalty Act of 1994 (18 U.S.C. §§ 3591 et seq.). In addition to working with individual court-appointed lawyers, our responsibilities as Resource Counsel still include, as they did in 2001:

> identification and recruitment of qualified, experienced defense counsel for possible appointment by the federal courts in death penalty cases,
>
> monitoring and data-collection concerning the implementation of the federal death penalty throughout the nation's 94 federal districts,
>
> development of training programs and publications, including a web site, www.capdefnet.org, to assist federal defenders and court-appointed private counsel in death penalty cases;
>
> responding to Congressional inquiries addressed to th federal defender system concerning proposed capital punishment legislation, and

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> maintaining, to the extent possible, a liaison between the federal public defender system and the Department of Justice regarding the administration of federal death penalty statutes.

This effort has led to our Project's involvement, to a greater or lesser extent, in almost every federal death penalty case brought by the federal government since the beginning of 1992. My testimony today, then, is based on a decade-and-a-half of close observation and participation in the day-to-day reality of the federal death penalty system. My comments, of course, reflect my own views, and not those of any agency or judicial entity.

Two major changes have occurred in the administration of th federal death penalty since this Committee last conducted oversight hearings in 2001. The most important, and the one that I will focus on today, is that the Department of Justice under Attorneys General Ashcroft and Gonzales have greatly increased its centralized control over the death penalty-related decisions of federal prosecutors, primarily by directing reluctant United States Attorneys and line prosecutors to seek death in cases where the prosecuting attorneys themselves had recommended against doing so. The second, which has accompanied the first, is a greatly reduced flow of information from the Department of Justice to the public concerning the rate of death penalty prosecutions and their actual results.

INCREASED CONTROL OF DEATH PENALTY DECISION-MAKING BY THE ATTORNEY GENERAL

Prior to 1995, Justice Department regulations specified only that the death penalty could not be sought without the written

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authorization of the Attorney General. Individual United States Attorney's Offices had unfettered and unreviewed discretion to decline to seek the death penalty in any case: unless a local federal prosecutor wished to seek the death penalty, no rule or protocol required Main Justice involvement in the question of whether death would be sought.

This changed in January, 1995, when Attorney General Reno promulgated a more complex set of regulations governing the exercise of discretion by the federal government in death-eligible cases. Under the 1995 protocol, U.S. Attorneys were required to submit to the Attorney General the question of whether death would be sought in any prosecution for an offense carrying a potential death sentence, regardless of whether the local U.S. Attorney wished to seek the death penalty. The regulation created a multi-tiered decision-making process at both the district and Main Justice levels, culminating in a recommendation from a newly-created Capital Case Review Committee and an ultimate decision by the Attorney General that the government would or would not file notice of intent to seek the death penalty.

After this system had operated for about five-and-a-half years, and in response to public and Congressional concern about what appeared to be an unexpectedly large proportion of death penalty authorizations against African-American and Hispanic defendants, Attorney General Reno released a report containing a detailed accounting of the processing of federal capital cases

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through the Attorney General's decision to seek the death penalty.[1] This report revealed that of some 682 defendants whose cases were processed under the 1995 death penalty protocol, Attorney General Reno had authorized or directed government attorneys to seek the death penalty 159 times, or 23 percent of the total. Attorney General Reno overruled U.S. Attorney recommendations only rarely, and the cases in which she did so were evenly balanced between disapproving U.S. Attorneys' requests to seek the death penalty (27 defendants), and authorizing the death penalty where such authorization had not been requested (26 defendants).[2] Furthermore, because the U.S. Attorneys retained discretion to negotiate guilty pleas for non-capital sentences without further Main Justice review or approval, no case that Attorney General Reno authorized for death over a local prosecutor's recommendation actually proceeded to trial as a capital case during the 1995-2000 period. In other words, the Attorney General's newly-codified power to "require" local prosecutors to seek the death penalty was sparingly used, and had had no actual impact on the number of death sentences imposed.

This changed with the advent of the Bush Administration in 2001. First, a revision to the protocol in June of that year specified that the death penalty could not be withdrawn by reason

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[1]U.S. Department of Justice, Survey of the Federal Death Penalty System (1988-2000) (September 12, 2000).

[2]Id. at 41.

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of a plea bargain without the Attorney General's express permission. The Department has recently disclosed that the Attorney General has disapproved plea agreements for some 15 defendants since 2001, and more generally, the number of negotiated non-capital dispositions of cases following death penalty authorizations dropped markedly after adoption of the new rule. The overall effect of the requirement of Attorney General approval for negotiated settlements in death-eligible cases has been that a decision to authorize the death penalty now means, for the first time, a very high likelihood that the case will actually proceed to trial with the government seeking death.[3]

In addition, Attorneys General Ashcroft and Gonzales both exercised their power to overrule local death penalty decisions largely in one direction, choosing to require death penalty trials in cases where U.S. Attorneys had not recommended death 73 times, while overruling death recommendations for only 16 defendants. These 73 "required" death prosecutions represent a remarkably large proportion--one-third--of the 216 defendants authorized for the death penalty since 2001.

Taken together, these changes in the letter and implementation of the federal government's death penalty procedures represent all tend in a single direction: greater centralization of decision-making authority in the Attorney

[3]Although this policy is not reflected in the U.S. Attorney's Manual, the Department has also been observed to require the personal approval of the Attorney General before a U.S. Attorney who is seeking the death penalty may waive jury sentencing and submit the issue of sentence to a district judge.

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General and Main Justice, deployed to produce a greater number of death penalty trials and sentences than would be occurring if the actual prosecuting attorneys in the 94 federal districts were calling the shots. The policy does seem to have succeeded in generating more capital trials, but it is by no means clear that this in turn has produced significantly more actual death sentences. The data recently produced by the Department of Justice in response to Chairman Feingold's inquiry indicate that between 2001 and the end of 2006, the 73 "AG overrulings" in favor of seeking death have produced only 6 additional death sentences, while four times as many (24) such cases have ended in non-death sentences (the remainder, presumably, are still pending). In other words, if one were to treat both the U.S. Attorneys' recommendations and the Attorney General's final decision as predictions of how juries would ultimately sentence the defendants involved, the local prosecutors' recommendations against death were proven correct, and the Attorney General wrong, in 80 percent of the cases in which the Attorney General required the government to seek death against the local prosecutors' recommendation. It seems fair to conclude, therefore, that the main effect of the Bush Administration's greater micro-management of death penalty prosecutions from Washington has been a lot of wheel-spinning without large effects on the ultimate outcomes of the cases under consideration.

The Department has succeeded in securing eight death sentences in six jurisdictions where the death penalty is

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unavailable under state law. These have occurred in one case each in Iowa (two co-defendants), Massachusetts, Michigan, North Dakota, Vermont, and West Virginia (two co-defendants). The Department's response to Senator Feingold's question (No. 13) concerning the number of "authorizations" in such cases appears not to answer the precise question asked, but rather reports the number of cases in which the government has "tried and sought the death penalty," a figure (26) which would apparently not include cases in which the death penalty request was withdrawn due to plea negotiations or otherwise terminated prior to trial. The DOJ response also refers to "non-death penalty states," a term which does not on its face include the District of Columbia and Puerto Rico, two non-death penalty jurisdictions in which U.S. Attorneys General have authorized the death penalty to be sought on many occasions, but so far without success in even a single case.

The fact that federal juries have now imposed death sentences in six different abolitionist jurisdictions should not be especially surprising, since such juries are, as in all death penalty trials, systematically culled of all jurors who would refuse to impose the death penalty in any case. These cases illustrate the simple fact that, no matter what how well-settled and widespread local opposition to capital punishment may be, it lies within the power of the U.S. Attorney General to deploy federal death penalty statutes so as to occasionally circumvent or nullify state policy against the death penalty. This is so

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even in jurisdictions that abolished the death penalty as early as the 1840s (such as Michigan) or where long-established constitutional prohibitions (Puerto Rico) or relatively recent popular votes (the District of Columbia) indicate widespread public opposition to the practice.

This brings up the ostensible justification for so much centralization of federal death penalty decision-making, which is the supposed importance of enforcing a single nationwide standard to guide prosecutorial discretion. At the outset, it is by no means self-evident that our federal constitutional system actually contemplates such one-size-fits-all nationwide standards to be dictated and enforced from Washington. The Sixth Amendment to the Constitution expressly requires that federal prosecutions be conducted before local juries drawn from the jurisdiction in which the federal offense was alleged to have been committed, and the indictment clause of the Fifth Amendment further implies a constitutional appreciation of the value of local control over the exercise of the federal government's charging power in criminal cases. It can hardly be doubted that the Framers of the Bill of Rights intended these vicinage and indictment requirements to stand as safeguards against excessive and oppressive centralization of the criminal justice apparatus of the national government. Furthermore, given the very serious weakening of this safeguard in capital cases that results from the "death-qualification" requirement for service on a federal jury where the death penalty is sought, a policy which accorded a

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presumption of validity to local prosecutorial decision-making against seeking the death penalty in individual cases (or one which simply declines to review such decisions, as was the practice before 1995) is arguably more in keeping with the values of our federal system than one which attempts to establish a single nationwide standard to be enforced by a central remote decision-maker in Washington.

Morever, the experience of the last six years demonstrates that such attempts at uniformity are unlikely to succeed. Even though fully one-third of the Ashcroft and Gonzales authorizations have occurred against the recommendations of local federal prosecutors, the 73 additional death penalty case generated by this policy have so far yielded only 6 additional death sentences--an average of one per year in the entire country. In jurisdictions such as the District of Columbia and Puerto Rico (where, incidentally, the people's elected representatives had no vote whatever when the Congressional decision to restore the federal death penalty was made), well over a decade of trying and six full-fledged capital trials involving nine defendants have yet to produce a single death sentence. The simple fact is that local attitudes toward the death penalty represent a formidable barrier to implementing any broad "national" death-sentencing policy, and by refusing to acknowledge this fact, current Administration policy appears to be drawing the federal courts into a prolonged and extremely costly culture war over this divisive issue without any

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appreciable results (other than financial ones which, judging by its recent response to Chairman Feingold's inquiry, the Department refuses to tally or acknowledge).

I do not mean to suggest that the Attorney General should simply cede all responsibility for the evenhanded administration of the federal death penalty to United States Attorneys. But neither should the Department treat the federal death penalty as a sort of parallel structure that simply duplicates the states' systems for trying and punishing murder, or that compensates for the lack of capital punishment in abolitionist states and districts. Rather, the solution to this seeming conflict between nationwide consistency and respect for local practices and attitudes lies in a renewed commitment to federalism as a first principle in the exercise of prosecutorial discretion. Simply put, a decision to seek the death penalty in federal court should require an especially strong federal interest, one sufficient to override the historic primacy of state government in the prosecution and punishment of homicide.

This shift in emphasis from current policy could be achieved without changing the death penalty protocol, simply by applying more rigorously the existing provision that any decision to invoke the federal death penalty requires "a more substantial interest in federal as opposed to state prosecution of the offense." USAM 9-10.070. However, since federal prosecution will often be motivated by practical reasons (such as the availability of witnesses, the identity of the investigating

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agency, or legal barriers to successful prosecution in state court) that do not easily match up with the special requirements of consistency and evenhandedness associated with the death penalty, this implies that the "federal interest" requirement for seeking the death penalty in federal court should be substantially greater than that required for federal prosecution in the first instance. In other words, where the question is whether to seek the death penalty, as opposed to simply whether to take jurisdiction of a case, the federal charging decision should embrace the undeniable legal and political truth that on a national scale, "Death is different."

THE QUESTION OF RACIAL AND ETHNIC DISPARITY

An indirect but important benefit of a more rigorous application of the "federal interest" requirement for federal death penalty prosecution would be that it would essentially solve the enervating and still-unresolved controversy over whether the persistence of large African-American and Hispanic majorities among those defendants against whom the federal government has sought the death penalty reflects racial and ethnic bias. Before explaining why this is so, a quick review of this controversy is in order.

The central concern of the hearings that this Committee conducted June of 2001 was race, and more particularly with the unexplained fact that the overwhelming majority of criminal defendants whom the federal government was seeking to execute was drawn from racial and ethnic minority groups. Nine months

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earlier, then-Attorney General Reno and then-Deputy Attorney General Eric Holder had issued a report summarizing a massive amount of data on the previous five years' processing of capital cases by the Department of Justice, and had both expressed concern over what appeared to be a racially and ethnically lop-sided pattern of capital prosecution. This concern at the highest levels of federal law enforcement eventually led to a RAND Corporation analysis of the 1995-2000 data,[4] but in the meantime six more years have elapsed, the federal death penalty remains primarily focused on African-American and Hispanic defendants, and the Department of Justice has moved from a policy of relative transparency and openness (as evidenced by unprompted decision to issue the September, 2000 report) to one of greater secrecy in its implementation of the Federal Death Penalty Act. At the same time, the federal death penalty system has become ever-larger, slower, more bureaucratic and more expensive, and we are no closer than we were in 2001 to understanding why, out of all the murders that occur in the United States each year, the federal system appears disproportionately to single out for death penalty prosecution those accused murderers who happen to be African-American and Hispanic.

To be sure, we now have hundreds of pages of tables, charts and statistical analysis of the Clinton Administration's death penalty record. But that was seven years and many hundreds of

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[4]Stephen P. Klein, Richard A. Berk, and Laura J. Hickman, "Race and the Decision to S ek the Death Penalty in Fed ral Cases" (2006).

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cases ago. More importantly, the research that has been done so far sheds little or no light on the most basic question: why is the pool of federally-indicted homicide defendants from which federal capital prosecutions are drawn itself so overwhelmingly African-American and Hispanic? The RAND study declined to examine this question at all, confining its analysis to the processing of those capital-eligible defendants already in the federal criminal justice system. The authors of a second study financed by the National Institute of Justice[5] interviewed state and federal decision-makers in four federal districts in an effort to better understand the process by which homicides become federal cases (and thus subject to the Federal Death Penalty Act), but this study was descriptive rather than quantitative, and did not even attempt to answer the question of whether the wide array of current policies respecting the "federalization" of homicide prosecutions had either the intent or the effect of singling out minority defendants. Thus the factual question that still must be answered before we can know whether the racial and ethnic composition of the pool of federal defendants from which death penalty prosecutions are drawn is "disproportionately" African-American or Hispanic when compared to the racial and ethnic composition of the much larger group of persons who are charged with homicides that could have been (but are usually not) brought into federal rather than state court.

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[5]Phyllis J. Newton, Candace M. Johnson, and Timothy M. Mulcahy, "Investigation and Prosecution of Homicide Cases in the U.S.: The Process for Federal Involvement" (May 31, 2006).

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I have to acknowledge that identifying the true "pool" of potential federal capital defendants out of all of those defendants who are charged with murder each year will be an extremely difficult undertaking. But if the federal death penalty were confined to something more resembling its traditional scope, the urgency of this question (at least for evaluating the fairness of future cases) would be much reduced. From the first federal "crime bill" in 1790 until quite recently, federal jurisdiction over violent crime was limited to offenses committed on federal land or that could not be prosecuted in state court. Now, with the Federal Death Penalty Act of 1994 and other recent expansions of federal criminal jurisdiction over violent crime, the federal government has concurrent jurisdiction with state courts over many hundreds and even thousands of murders each year. What we do not yet have is a principled method of determining which murder cases should be prosecuted capitally by the federal government, and which should be left to the states.

It is just as true now as when this Committee last considered the administration of the federal death penalty six years ago that the current controversy over racial disparity would never have arisen had the Department of Justice embraced federalism as its guiding principle in the exercise of prosecutorial discretion in capital cases. Terrorist attacks, bombings of federal buildings, murders of federal law enforcement personnel, assassinations of federal officials, murders in the

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course of large scale international or nationwide drug trafficking operations--these are the truly federal capital crimes where the justification for federal prosecution and federally-authorized punishment is self-evident, and where race and geography simply do not matter. If the federal death penalty was limited to cases such as these--as it largely has been for most of our nation's history--the persistent controversy over race and ethnicity in the application of the federal death penalty would resolve itself.

The alternative is what we have now, and what we have now isn't working. In the absence of a rigorously-enforced "federal interest" requirement, the application of the federal death penalty will continue to follow local fashion: as has already occurred, it will be invoked frequently in states where death sentences and executions are routine, and rarely or never in states where they are infrequent or unknown. The efforts of the current Administration since 2001 show that it is simply beyond the power of the federal government to override local opposition to the death penalty in any substantial number of cases, so long as these cases are "ordinary" aggravated homicides of the type that local and state courts are themselves used to adjudicating. Narrowing the scope of the federal death penalty to truly national crimes will not solve the insoluble problem of geographical consistency, but it can be expected to drain less of the time and resources of the federal courts and of federal law enforcement, while reducing needless friction and conflict. And

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it will also solve, in a color-blind way, the seemingly intractable problems of racial and ethnic disparity that afflict the system today.

I would be happy to answer any questions that the Committee may have.

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9–10.000

CAPITAL CRIMES

9–10.010 Federal Prosecutions in Which the Death Penalty May be Sought

This Chapter sets forth the policies and procedures for all Federal cases in which a defendant is charged, or could be charged, with an offense subject to the death penalty. The provisions of this Chapter apply regardless of whether the United States Attorney intends to charge the offense subject to the death penalty or to request authorization to seek the death penalty for such an offense. The provisions in this Chapter are effective July 1, 2007, and they apply to any case currently under indictment.

9–10.020 Relevant Statutory Provisions

Federal death penalty procedure is based on the Federal Death Penalty Act of 1994, codified at 18 U.S.C. § 3591 *et seq.*

The death penalty procedures introduced by the Anti-Drug Abuse Act of 1988, codified in Title 21, were repealed on March 6, 2006, when President Bush signed the USA PATRIOT Improvement and Reauthorization Act of 2005. A district indicting a Title 21 capital offense, *see* 21 U.S.C. § 848, that occurred before March 6, 2006, should consult with the Capital Case Unit of the Criminal Division regarding indictment and procedure.

9–10.030 Purposes of the Capital Case Review Process

The review of cases under this Chapter culminates in a decision to seek, or not to seek, the death penalty against an individual defendant. Each such decision must be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors -- such as a defendant's race, ethnicity, or religion -- will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.

9–10.040 General Process Leading to the Attorney General's Determination

In all cases subject to the provisions of this Chapter, the Attorney General will make the final decision about whether to seek the death penalty. The Attorney General will convey the final decision to the United States Attorney in a letter authorizing him or her to seek or not to seek the death penalty.

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The decision-making process preliminary to the Attorney General's final decision is confidential. Information concerning the deliberative process may only be disclosed within the Department and its investigative agencies as necessary to assist the review and decision-making. This confidentiality requirement does not extend to the disclosure of scheduling matters or the level at which the decision is pending within the Department during the review process. The scope of confidentiality includes, but is not limited to: (1) the recommendations of the United States Attorney's Office, the Attorney General's Review Committee on Capital Cases (hereinafter the "Capital Review Committee"), the Deputy Attorney General, and any other individual or office involved in reviewing the case; (2) a request by a United States Attorney that the Attorney General authorize withdrawal of a previously filed notice of intent to seek the death penalty; (3) a request by a United States Attorney that the Attorney General authorize not seeking the death penalty pursuant to the terms of a proposed plea agreement; and (4) the views held by anyone at any level of review within the Department.

In no event may the information identified in this paragraph be disclosed outside the Department and its investigative agencies without prior approval of the Attorney General. The United States Attorneys may exercise their discretion, however, to place additional limits on the scope of confidentiality in capital cases prosecuted in their Districts.

9–10.050 Preliminary Consideration in the United States Attorney's Office

Prior to seeking an indictment for an offense subject to the death penalty, the United States Attorney is strongly advised, but not required, to consult with the Capital Case Unit.

If possible, before obtaining an indictment charging a capital offense, the United States Attorney should make a preliminary determination of whether he or she will recommend that the death penalty be sought. If the case is sufficiently developed to allow the United States Attorney to make a pre-indictment determination that he or she will not recommend seeking the death penalty, the United States Attorney should submit the case expeditiously for review under the provisions of this Chapter prior to obtaining an indictment charging a capital-eligible offense, unless public safety requires obtaining the indictment more quickly.

In all cases, the United States Attorney must immediately notify the Capital Case Unit when a capital offense is charged and provide the Unit with a copy of the indictment and cause number, even if the materials described in § 9–10.080, *infra*, are not yet ready for submission.

In any post-indictment case in which the United States Attorney is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, for the consideration of the United States Attorney.

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9–10.060 Special Findings in Indictments

For all charged offenses subject to the provisions of this Chapter, regardless of whether the United States Attorney ultimately recommends that the Attorney General authorize seeking the death penalty for the charged offense, the indictment shall allege as special findings: (1) that the defendant is over the age of 18; (2) the existence of the threshold intent factors specified in 18 U.S.C. § 3591(a)(2); and (3) the existence of the statutory aggravating factors specified in, as relevant, 18 U.S.C. §§ 3592(b), (c), or (d).

The indictment shall allege threshold intent and statutory aggravating factors that meet the criteria for commencing prosecution as set forth in USAM §§ 9-27.200, 9-27.220. Prosecuting Assistant United States Attorneys are encouraged to consult with the Capital Case Unit regarding the inclusion of special findings in the indictment.

9-10.070 Consultation with the Family of the Victim

Unless extenuating circumstances exist, the United States Attorney should consult with the family of the victim, if reasonably available, concerning the decision on whether to seek the death penalty. The United States Attorney should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney should notify the family of the victim of all final decisions regarding the death penalty. This consultation should occur in addition to notifying victims of their rights under 18 U.S.C. § 3771.

9–10.080 Submissions from the United States Attorney

The United States Attorney must submit to the Assistant Attorney General for the Criminal Division every case in which an indictment has been or will be obtained that charges an offense punishable by death or alleges conduct that could be charged as an offense punishable by death.

The United States Attorney must make submissions to the Assistant Attorney General as expeditiously as possible following indictment, but no fewer than 90 days before the Government is required, by an order of the court, to file a notice that it intends to seek the death penalty. In the absence of a court established deadline for the Attorney General's death penalty decision, the United States Attorney must make the submission sufficiently in advance of trial to allow for both the 90 day time period encompassed by the review process plus any additional time necessary to ensure that a notice of intent to seek the death penalty is timely filed under 18 U.S.C. § 3593(a). If a case is not submitted 90 days in advance of a deadline for the Attorney General's decision or 150 days in advance of a scheduled trial date, the prosecution memorandum should include an explanation of why the submission is untimely.

The prosecution memoranda, death penalty evaluation forms, non-decisional information forms and any other internal memoranda informing the review process and the Attorney General's decision are not subject to discovery by the defendant or the defendant's attorney.

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Submissions should include the following documents:

A. Prosecution memorandum. This should be sufficiently detailed to fully inform reviewers of the basis for the United States Attorney's recommendation. The prosecution memorandum should include:

(1) Unusual circumstances. To ensure that subsequent review is appropriately directed, the first page of the memorandum should note plainly whether the case fits any of the following unusual circumstances:

a. The case is submitted for "expedited review," as described in § 9–10.000, *infra*.

b. The case involves extradition of the defendant from a country where waiver of the authority of the United States to seek the death penalty is necessary for extradition.

c. The case presents a significant law enforcement reason for not seeking the death penalty (such as the defendant's willingness to cooperate in an important but otherwise difficult prosecution).

d. The case has been submitted for pre-indictment review as suggested in § 9–10.050, *supra*.

(2) Deadlines. Any deadline established by the Court for the filing of a notice of intent to seek the death penalty, trial dates, or other time considerations that could affect the timing of the review process should also be noted on the first page of the memorandum.

(3) A narrative delineation of the facts and separate delineation of the supporting evidence. Where necessary for accuracy, a chart of the evidence by offense and offender should be appended.

(4) Discussion of relevant prosecutorial considerations.

(5) Death penalty analysis. The analysis must identify applicable threshold intent factors under 18 U.S.C. § 3591, applicable statutory aggravating factors under the subsections of 18 U.S.C. §§ 3592(b)-(d), and applicable mitigating factors under 18 U.S.C. § 3592(a). In addition, the United States Attorney should include his or her conclusion on whether all the aggravating factor(s) found to exist sufficiently outweigh all the mitigating factor(s) found to exist to justify a sentence of death, or in the absence of mitigating factors, whether the aggravating factor(s) alone are sufficient to justify a sentence of death.

(6) Background and criminal record of the capital defendants.

(7) Background and criminal record of the victim.

(8) Victim impact. Views of the victim's family on seeking the death penalty and other victim impact evidence should be provided.

(9) Discussion of the federal interest in prosecuting the case.

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(10) Foreign citizenship. The memorandum should include a discussion on whether the defendant(s) are citizens of foreign countries, and if so, whether the requirements of the Vienna Convention on Consular Relations have been satisfied.

(11) Recommendation of the United States Attorney on whether the death penalty should be sought.

B. Death-penalty evaluation form. The Department will specify a standardized death-penalty evaluation form, which should be completed by the United States Attorney for each capital-eligible offense charged against each defendant. *See* http://10.173.2.12/usao/eousa/ole/usabook/deat/01deat.htm

C. Non-decisional information form. This form should be submitted in a sealed envelope clearly labeled as containing the non-decisional information.

D. Indictment. Copies of all existing and proposed superseding indictments should be attached. As described in 9–10.060, *supra*, the indictments should include the special findings necessary for the death penalty to be authorized by statute.

E. Draft notice of intention to seek the death penalty. This document is to be included in the submission only if the United States Attorney recommends seeking the death penalty.

F. Materials provided by defense counsel. Any documents or materials provided by defense counsel to the United States Attorney in the course of the United States Attorney's Office death penalty review process should be provided.

G. Point-of-contact. The name of the assigned attorney in the United States Attorney's Office who is responsible for communicating with the Capital Case Unit about the case should be provided.

H. Relevant court decisions. The first page of the memorandum should highlight court orders and deadlines. The point-of-contact in the United States Attorney's Office is under a continuing obligation to update the Capital Case Unit about developments or changes in court scheduling or any other material aspect of the case.

9-10.090 Substantial Federal Interest

When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities. *See* Principles of Federal Prosecution, USAM § 9–27.000 *et seq.* The judgment as to whether there is a more substantial interest in Federal, as opposed to State, prosecution may take into account any factor that reasonably bears on the relative interests of the State and the Federal Governments, including but not limited to the following:

A. The relative strength of the State's interest in prosecution as indicated by the Federal and State characteristics of the criminal conduct. One jurisdiction may have a

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particularly strong interest because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by its investigators or through its informants or cooperators, or the possibility that prosecution will lead to disclosure of violations that are peculiarly within the jurisdiction of either Federal or State authorities or will assist an ongoing investigation being conducted by one of them.

B. The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction. Relevant to this analysis are the nature, extent, and impact of the criminal activity upon the jurisdictions, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other States or foreign countries.

C. The relative ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction. Relevant to this analysis are the ability and willingness of the authorities in each jurisdiction, the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively, legal or evidentiary problems that might attend prosecution, conditions, attitudes, relationships, and other circumstances that enhance the ability to prosecute effectively or, alternatively, that cast doubt on the likelihood of a thorough and successful prosecution.

9–10.100 Expedited Review Procedures

A. Certain defendants and categories of cases are appropriate for summary disposition on an expedited basis. These include: (1) cases in which the defendant is ineligible for the death penalty because the evidence is insufficient to establish the requisite intent under 18 U.S.C. § 3591 or an applicable statutory aggravating factor under 18 U.S.C. § 3592 (b)-(d); (2) cases that involve the extradition of a defendant or crucial witness from a country that, as precondition to extradition, requires assurances that the death penalty will not be sought for the defendant or the evidence obtained from the witness will not be used to seek the death penalty; (3) cases in which, but for proffer protected evidence, the evidence is insufficient to convict the defendant of the capital offense to which he will plead guilty; (4) cases that involve a potential cooperator whose testimony is necessary to indict the remaining offenders; and (5) cases that have been submitted for pre-indictment review under § 9-10.050, *supra.*

B. The cover of the submission should indicate in bold lettering that the United States Attorney is seeking expedited review, and it should also indicate the basis on which the case qualifies for expedited review. The accompanying memorandum may be abbreviated, but it should be sufficiently thorough to make clear the basis upon which the case qualifies for expedited review.

C. The Capital Case Unit will screen all cases in which the United States Attorney's Office seeks expedited review to ensure that such review is appropriate. The Unit will then give priority to cases so designated. If the Capital Case Unit finds that the case does not qualify for expedited review, it will be scheduled for review on a non-expedited basis or returned to the United States Attorney's Office for later submission.

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9–10.110 Plea Agreements

Absent the authorization of the Attorney General, the United States Attorney may not enter into a binding plea agreement that precludes the United States from seeking the death penalty with respect to any defendant falling within the scope of this Chapter.

The United States Attorney, however, may agree to submit for the Attorney General's review and possible approval, a plea agreement relating to a capital eligible offense or conduct that could be charged as a capital eligible offense. At all times, the United States Attorney must make clear to all parties that the conditional plea does not represent a binding agreement, but is conditioned on the authorization of the Attorney General. The United States Attorney should not inform the defendant, court, or public of whether he or she recommends authorization of the plea agreement.

For proposed plea agreements that precede a decision by the Attorney General to seek or not to seek the death penalty, the United States Attorney should send a request for approval to the Assistant Attorney General for the Criminal Division as early as possible. Absent unavoidable circumstances, the United States Attorney must send the request no later than 90 days prior to the date on which the Government would be required, by an order of the court or by the requirements of 18 U.S.C. § 3593(a), to file a notice that it intends to seek the death penalty. (Proposed plea agreements that would require withdrawing a previously filed notice of intent to seek the death penalty should follow the procedures described in 9–10.150, *infra*.)

Unless a potential capital defendant's testimony is necessary to indict the remaining offenders or other circumstances compel separate consideration, review of the case against the prospective cooperator will occur simultaneously with the review of the cases against the remaining offenders who would be indicted for the offenses at issue. Submissions in support of requests for approval of plea agreements under this section should include a prosecution memorandum that includes an explanation of why the plea agreement is an appropriate disposition of the charges, a death penalty evaluation form for each capital eligible offense that has been or could be charged against the prospective cooperator, and a non-decisional information form. The Capital Review Committee will review requests for authorization to enter into a plea agreement under this subsection and may request a submission from defense counsel and schedule the case for a hearing before the Committee.

See USAM § 9–16.000 for more information on the topic of pleas and plea agreements.

9–10.120 Department of Justice Review

Upon receipt of the materials submitted by the United States Attorney, the Assistant Attorney General for the Criminal Division will forward the materials to the Criminal Division's Capital Case Unit.

In any case in which (1) the United States Attorney recommends that the Attorney General authorize seeking the death penalty, or (2) a member of the Capital Review Committee requests a Committee conference, a Capital Case Unit attorney will confer

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with representatives of the United States Attorney's Office to establish a date and time for the Capital Review Committee to meet with defense counsel and representatives of the United States Attorney's Office to consider the case. No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.

The Capital Review Committee shall review the materials submitted by the United States Attorney and any materials submitted by defense counsel. The Capital Review Committee will consider all information presented to it, including any allegation of individual or systemic racial bias in the Federal administration of the death penalty. After considering all information submitted to it, the Committee shall make a recommendation to the Attorney General through the Deputy Attorney General.

If the Committee's recommendation differs from that of the United States Attorney, the United States Attorney shall be provided with a copy of the Committee's recommendation memorandum when it is transmitted to the Deputy Attorney General. The United States Attorney may respond to the Committee's analysis in a memorandum directed to the Deputy Attorney General. The Deputy Attorney General will then make a recommendation to the Attorney General. The Attorney General will make the final decision whether the Government should file a notice of intent to seek the death penalty.

9–10.130 Standards for Determination

The standards governing the determination to be reached in cases under this Chapter include fairness, national consistency, adherence to statutory requirements, and law-enforcement objectives.

A. Fairness requires all reviewers to evaluate each case on its own merits and on its own terms. As with all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin play no role in any recommendation or decision as to whether to seek the death penalty.

B. National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice. For this reason, the multi-tier process used to make determinations in this Chapter is carefully designed to provide reviewers with access to the national decision-making context, and thereby, to reduce disparities across districts.

C. In determining whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, and the Attorney General will determine whether the applicable statutory aggravating factors and any non-statutory aggravating factors sufficiently outweigh the applicable mitigating factors to justify a sentence of death or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. Reviewers are to resolve ambiguity as to the presence or strength of aggravating or mitigating factors in favor of the defendant. The analysis employed in weighing the aggravating and mitigating factors

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should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Reviewers may accord weak aggravating or mitigating factors little or no weight. Finally, there must be substantial, admissible, and reliable evidence of the aggravating factors.

D. In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, the Deputy Attorney General, and the Attorney General may consider any legitimate law-enforcement or prosecutorial reason that weighs for or against seeking the death penalty.

9–10.140 Post-Decision Actions

In any case in which the Attorney General has authorized the filing of a notice of intention to seek the death penalty, the United States Attorney shall not file or amend the notice until the Capital Case Unit of the Criminal Division has approved the notice or the proposed amendment. The notice of intention to seek the death penalty shall be filed as soon as possible after transmission of the Attorney General's decision to seek the death penalty.

The United States Attorney should promptly inform the district court and counsel for the defendant once the Attorney General has made the final decision. Expeditious communication is necessary so that the court is aware, in cases in which the Attorney General authorizes the United States Attorney not to seek the death penalty, that appointment of counsel under 18 U.S.C. § 3005 is not required or is no longer required. In cases in which the Attorney General authorizes the United States Attorney to seek the death penalty, the district court and defense counsel should be given as much opportunity as possible to make proper scheduling decisions.

9–10.150 Withdrawal of the Notice of Intention to Seek the Death Penalty

Once the Attorney General has authorized the United States Attorney to seek the death penalty, the United States Attorney may not withdraw a notice of intention to seek the death penalty filed with the district court unless authorized by the Attorney General.

If the United States Attorney wishes to withdraw the notice, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request. The United States Attorney should base the withdrawal request on material changes in the facts and circumstances of the case from those that existed at the time of the initial determination.

Reviewers should evaluate the withdrawal request under the principles used to make an initial determination, and limit the evaluation to determining if the changed facts and circumstances, had they been known at the time of the initial determination, would have resulted in a decision not to seek the death penalty. For this reason, information or arguments that had been advanced initially are not normally appropriate bases for withdrawal requests. In all cases, however, reviewers should consider all necessary

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information to ensure every defendant is given the individualized consideration needed for full review and appropriate decision-making.

The Assistant Attorney General for the Criminal Division will review any request by a United States Attorney for reconsideration of the decision to seek the death penalty or authorization to withdraw the notice of intent to seek the death penalty. The Assistant Attorney General will make a recommendation to the Attorney General through the Deputy Attorney General on whether the notice of intent to seek the death penalty should be withdrawn. In making that recommendation, the Assistant Attorney General will be advised by the Capital Case Unit.

In all cases, the Attorney General shall make the final decision on whether to authorize the withdrawal of a notice of intention to seek the death penalty. Until such a decision is made, the United States Attorney should proceed with the case as initially directed by the Attorney General. As with all communications between United States Attorneys and the Department of Justice, the fact that a withdrawal request has been made is confidential and may not be disclosed to any party outside the Department of Justice and its investigative agencies.

9–10.160 Approval Required For Judicial Sentencing Determination

In cases in which the Attorney General has authorized seeking the death penalty, the United States Attorney must obtain the approval of the Assistant Attorney General for the Criminal Division before agreeing to a request by the defendant pursuant to 18 U.S.C. § 3593(b)(3) for the sentence to be determined by the trial court rather than a jury.

9–10.170 Reporting Requirements

Each United States Attorney's Office must identify a point-of-contact who will be responsible for ensuring compliance with the following reporting requirements.

The Capital Case Unit must be immediately notified when:

A A capital offense is charged or when an indictment is obtained pertaining to conduct that could be, but has not been, charged as a capital offense. The point-of contact should provide the Unit with a copy of the indictment and cause number.

B. A deadline for filing a notice of intent to seek the death penalty or a trial date is established or modified.

C. There are any developments that could affect the ability to file a notice of intent to seek the death penalty sufficiently in advance of trial to allow the defense and prosecution to prepare for a capital punishment hearing.

D. A verdict and sentence are reached in a case in which the Attorney General authorized seeking the death penalty.

E. The Government intends to accept a guilty plea to a capital offense when, but for the defendant's protected proffer, there would be insufficient evidence to charge

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the offense. The Capital Case Unit may authorize the United States Attorney to proceed with such pleas without submitting the cases to the review process.

The victim's family must be notified of all final decisions regarding the death penalty.

9–10.180 Forms and Procedures

The Assistant Attorney General for the Criminal Division, the Deputy Attorney General, and the Attorney General may promulgate forms and procedures to implement the provisions of this Chapter. The United States Attorney should contact the Capital Case Unit to discuss the applicable procedures and obtain the appropriate forms.

9–10.190 Exceptions for the Proper Administration of Justice

To ensure the proper administration of justice in an appropriate case, the Attorney General may authorize exceptions to the provisions of this Chapter.

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Testimony of
Paul K. Charlton

Oversight of the Federal Death Penalty

United States Senate
Judiciary Committee

Subcommittee
on the Constitution

The Hon. Russell D. Feingold, Chairman
June 27, 2007

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Chairman Feingold, Ranking Member Brownback, and distinguished Members of the Committee, thank you for inviting me to testify about the death penalty and my experience with its implementation during my time as U.S. Attorney for the District of Arizona.

Prior to leaving my position as U.S. Attorney, I served as a career prosecutor with over 16 years of experience. I loved the job of prosecutor. It is a profession that allows you to get up each morning with the single goal of doing what is right, and affords you the opportunity to go to bed each night knowing that you have contributed in some way to the betterment of society.

While there are surely a number of professions that can provide the same rewards, few carry the enormous responsibility and power that a prosecutor possesses. The decisions a prosecutor makes may alter or destroy reputations and careers. Where appropriate, a prosecutor will bring charges in order to deprive a criminal of his liberty interest.

But it is the ultimate penalty that marks the profession of prosecutor as unique. Federal law allows a prosecutor to seek to take another persons life, and to do so methodically and intentionally. Of all of the decisions that a prosecutor will make in his or her career, none will be more important than the whether to seek the death penalty.

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In all cases it is important that prosecutors strive to do right as well as be right about the cases they bring. Before a case is presented to a grand jury, and long before a case makes its way to a petit jury, it is the prosecutor's responsibility to weigh the evidence of a prospective case. In order to assure that a prosecutor correctly decides to seek the death penalty, that prosecutor must carefully look at all of the evidence and take into consideration the opinions of all who have special knowledge of the case and facts.

To illustrate this point, I wish to share my experience with you on a case which is currently set for trial. In that case, *United States v. Rios Rico,* the Attorney General ordered that the Arizona U.S. Attorney's office seek the death penalty. I disagree with the Attorney General's decision in *Rios Rico*. I understand, however, that it is a decision for the Attorney General, not me, to make.

The object of my testimony is not argue with the ultimate decision of the Attorney General, though, as I say, it is one with which I disagree. My goal, instead, is to illuminate the process, or lack thereof, that went into supporting the decision of the Attorney General to seek the death penalty. In arriving at its decision to seek the death penalty in *Rios Rico*, I believe that the Department of Justice erred in two ways. First, the Department failed to consider the quality of the evidence underlying the charges in the case. Second, the Department did not

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adequately take into consideration the opinions of the U.S. Attorney or the line prosecutors. Failing to consider these issues raises the risk that we will execute someone who is not deserving of the death penalty, and that is a mistake that we as a society cannot make.

The facts underlying the case of *United States v. Rios Rico* allege that the defendant, a methamphetamine dealer, murdered his supplier. The majority of the government's case relies on the testimony of cooperating witness, witnesses who have pleaded guilty to a charge and agreed to testify against the defendant. This evidence justifies, in my opinion, bringing a case against the defendant and, in the event of a conviction, seeking a term of prison for a term of years or life.

What removes *Rios Rico* from the realm of a death penalty case is the lack of forensic evidence directly linking the defendant to the victim's death. That means, for example, that there is no gun, no ballistics, no victim's DNA on the defendant. In fact, there is no body.

This paucity of forensic evidence, evidence that doesn't forget and cannot lie, means, in my opinion, that *Rios Rico* should not be a death penalty case. If a government seeks to take another person's life it should do so on only the best of evidence. I argue, therefore, that it is right to consider not just that the government is likely to win a prosecution, here I believe that there is a great likelihood of success, I argue that it is right to consider the quality of the evidence before

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seeking death. Where the evidence is largely testimonial, and forensic evidence is lacking, the risk that we are wrong, that we might convict and execute the wrong man, however slight, is too high.

Just as compelling though, is this additional fact: the government knows where the body lies. The victim is buried in a landfill in Mobile, Arizona. For the price of between $500,000 to $1,000,000, the government can exhume the body. While I served as the U.S. Attorney, we asked DOJ to pay for the exhumation. DOJ refused.

The body of the victim, were it recovered, might provide the forensic evidence that would ensure sufficient evidence to allow the government to seek the death penalty in good conscience. The body might, on the other hand, provide evidence that exculpates the defendant in some manner. Either way, it is wrong for the government to both seek the death penalty and at the same time refuse to provide funds to obtain evidence that could prove a vital link in supporting or negating its position.

With this in mind, I sought to convince the Death Penalty Committee not to recommend death in this case. The line Assistant U.S. Attorney's, the prosecutors assigned to the case, made their arguments to the Death Penalty Committee in person and we submitted a written memorandum setting out the reasons in support of my view that the death penalty was not appropriate.

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Under the previous Attorney General, when the Death Penalty Committee disagreed with my decision, I was notified of that disagreement. Here, the Death Penalty Committee rejected my position and that of the line Assistants. I received no word of their disagreement until I received a letter from Attorney General Gonzales "authorizing" me to seek the death penalty. No one had sought my opinion or provided me with an opportunity to give additional input after our initial presentation to the Death Penalty Committee.

Once I received the Attorney General's letter, I asked to have the decision reconsidered. In so doing I spoke with a number of individuals, including people within the Office of the Attorney General and the Assistant Attorney General for the Criminal Division. My most memorable discussion took place with Deputy Attorney General Paul McNulty. After speaking with McNulty, I received a call from his chief of staff, Mike Elston. Elston indicated that McNulty had spoken to the Attorney General and that McNulty wanted me to be aware of two things. First, that McNulty had spent a significant amount of time on this issue with the Attorney General, perhaps as much as 5 to 10 minutes. Second, McNulty wanted me to know that in presenting my view, he, McNulty, had remained neutral, neither supporting nor opposing my position. I was struck that on an issue as important as whether to execute someone, so little time would be devoted to the topic and that

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the Deputy Attorney General would maintain a neutral position. Elston reported that the Attorney General remained in favor of seeking the death penalty.

When I asked to speak with the Attorney General personally on this issue, he denied my request.

The *Rios Rico* case is instructive for a number of reasons. The Department should consider the quality of the evidence before determining whether to seek the death penalty. That did not happen here. The Department should give great weight to the opinions of the line prosecutors who are prosecuting the case. That did not happen here. The Attorney General should provide the U.S. Attorney with the opportunity to speak with the Attorney General personally on the issue of whether to seek the death penalty. That did not happen here.

These issues are not so unique that they cannot be repeated. My hope is that my testimony will provide this Subcommittee and the Department with an opportunity to reflect on the current process for deciding which cases merit seeking the death penalty and to make changes where appropriate.

Thank you again for the opportunity and privilege of testifying before you.

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Paul K. Charlton

Paul K. Charlton is a shareholder at the Phoenix law firm of Gallagher & Kennedy. Previously, Mr. Charlton served as the United States Attorney for the District of Arizona from 2001 - 2007. Mr. Charlton was a career prosecutor who began his legal career in 1989 as an Assistant Attorney General with the Arizona Attorney General's Office. In March of 1991, Mr. Charlton joined the U.S. Attorney's Office as an Assistant U.S. Attorney where he prosecuted a wide variety of matters from homicides to complex fraud cases.

In November of 2001, President George W. Bush nominated Mr. Charlton as the U.S. Attorney for the District of Arizona. While in that office, Mr. Charlton oversaw an office with a budget of approximately $20 million, a staff of more than 220 employees, and four offices located throughout the state.

Mr. Charlton's top priorities for the U.S. Attorney's Office included terrorism, illegal immigration and public corruption. As a result, Mr. Charlton created a National Security Section within the U.S. Attorney's office and the statewide Anti-Terrorism Advisory Committee. He sought and received funding for additional manpower to help address the problems associated with Arizona's 370 mile border with Mexico. When Mr. Charlton began as the U.S. Attorney in 2001, the office obtained 3847 criminal convictions. In his last year, 2006, the office obtained 9982 convictions. In March of 2007, USA Today ranked Mr. Charlton as number 1 for prosecutions and convictions by the nations 93 U.S. attorneys.

Mr. Charlton also brought attention to public corruption, greatly increasing the investigations into and prosecutions of those individuals who have betrayed the public's trust.

One of Mr. Charlton's other top priorities was crime on Arizona's 21 Indian Reservations. During his tenure, Mr. Charlton developed a number of initiatives to reduce violence in Indian country by attacking the twin problems of drug and alcohol abuse. Mr. Charlton also entered into an agreement with the Arizona Department of Gaming and the state's tribes to create the nation's first federal prosecution unit dedicated solely to gaming and gaming related crimes. To address the needs of victims of crime, Mr. Charlton oversaw the creation of a model program that will be used throughout the nation.

Fluent in Spanish, Mr. Charlton has taught many classes in Latin America, at the request of the U.S. Department of Justice, providing instruction to Latin American prosecutors and judges on the American criminal justice system.

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Bar & Court Admissions

Arizona, 1989

U.S. Court of Appeals, Ninth Circuit, 1991 U.S. District Court, District of Arizona, 1991

Associations & Memberships

Anti-Terrorism Advisory Committee 2001-2007 Chairman

Chariman of the Border and Immigration Subcommittee, for the Attorney General's Advisory Committee 2005-2007

University of Arizona School of Law 2005-2006 Adjunct Assistant Professor

Sandra Day O'Connor Inn of Court 2001

Member

Colegio de Abogados de Caracas

Miembro Honorio

Honors & Awards

United States Secret Service Director's Recognition Award, Recipient, 2007 U.S. Attorney General's Special Commendation Award, Recipient, 2005 U.S. Forest Service Director's Award, Recipient, 2004 Recipient, Federal Law Enforcement Officer's Association National Prosecutor's Award, 1997

Published Works

Comment, Frank v. Superior Court, Purging the Law of Outdated Theories for Loss of Consortium Recovery, 29 Ariz. L. Rev. 541 (1987)

Casenote, The State of Mind Requirement for Prisoners Under the Due Process Clause of the Fourteenth Amendment, Daniels v. Williams and Davidson v. Cannon, 20 Creighton L. Rev. 291 (1986)

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DETERRENCE AND THE DEATH PENALTY: RISK, UNCERTAINTY, AND PUBLIC POLICY CHOICES

Testimony to the
Subcommittee on the Constitution, Civil Rights and Property Rights
Committee on the Judiciary
U.S. Senate

February 1, 2006

Jeffrey Fagan
Columbia Law School

Chairman Brownback, Senator Feingold, and Honorable members of the Subcommittee, thank you for inviting me to testify before you today on this most urgent topic. This is an important moment historically in the debate on capital punishment, both in the states and the nation. New developments in social science and law have rekindled the debate on the effectiveness of the death penalty as a deterrent to murder. Both legal scholars and social scientists have transformed this new social science evidence into calls for more executions that they claim will save lives.[1] Others challenge the scientific credibility of these new studies,[2] and warn about the moral hazards and practical risks of capital punishment.[3] Thus, public policy choices on capital punishment

[1] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. —, (2005). *See, also*, Richard Posner, The Economics of Capital Punishment, http://www.becker-posner-blog.com/archives/2005/12/the_economics_o.html#trackbacks (visted December 18, 2005); Gary Becker, More on the Economics of Capital Punishment, http://www.becker-posner-blog.com/archives/2005/12/more_on_the_eco.html#trackbacks (visited December 18, 2005).

[2] John Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 STAN. L. REV. 791 (2005) (reviewing the main study cited by Sunstein and Vermeule and finding "the empirical support for the proposition that the death penalty deters . . . to be quite weak"). *See, also*, Richard Berk, *New Claims About Executions and General Deterrence: Déjà vu All Over Again?*, 2 J. EMP. L. STUD. 303 (2005).

[3] Carol S. Steiker, No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty, 58 Stan. L. Rev. ___ (2005) (responding to claim of the "moral requirement" of Sunstein and Vermeule by stating that "...executions constitute a distinctive moral wrong (purposeful as opposed to non-purposeful killing), and a distinctive kind of injustice (unjustified punishment)" and concluding that ... "acceptance of 'threshold' deontology in no way requires a commitment to capital punishment even if ...deterrence is proven").

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may depend on the accuracy, reliability and certainty of this new social science evidence. I appear today to discuss significant errors and flaws that seriously undermine the new social science claims about deterrence, and render moot calls for a vigorous new application of the death penalty. The risks of error in capital punishment, the suspect evidence of its effectiveness as a deterrent, and its high costs that foreclose local investments in basic state and local services, are critical dimensions of public policy choices facing the states and the nation on how to punish those who commit the worst crimes.

Qualifications

I am a professor of law and public health at Columbia University. My research has examined the administration of the system of capital punishment in the U.S., and also changes in homicide rates in American cities over the past three decades. I received my PhD from The University at Buffalo, State University of New York, where I was trained in econometrics, statistics, and engineering. I am also a Fellow of the American Society of Criminology, and Vice Chair of the Committee on Law and Justice of the National Research Council. Among other courses, I teach Law and Social Science to Columbia's law students. My research and writing has been supported by federal research agencies and private foundations. I frequently publish in peer-reviewed journals, and I serve on the editorial boards of several peer-reviewed journals. I have served on numerous government advisory committees and scientific review boards. I have also received research grants and fellowships from numerous government agencies and private foundations.

Summary

Recent studies claiming that executions reduce murders have fueled the revival of deterrence as a rationale to expand the use of capital punishment. Such strong claims are not unusual in either the social or natural sciences, but like nearly all claims of strong causal effects from any social or legal intervention, the claims of a "new deterrence" fall apart under close scrutiny. These new studies are fraught with numerous technical and conceptual errors: inappropriate methods of statistical analysis, failures to consider all the relevant factors that drive murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, weak to non-existent tests of concurrent effects of incarceration, statistical confounding of murder rates with death sentences, failure to consider the general performance of the criminal justice system, artifactual results from truncated time frames, and the absence of any direct test of deterrence. These studies fail to reach the demanding standards of social science to make such strong claims, standards such as replication, responding to counterfactual claims, and basic comparisons with other causal scenarios. Social scientists have failed to replicate several of these studies, and in some cases have produced contradictory results with the same data, suggesting that the original findings are unstable, unreliable and perhaps inaccurate. This evidence, together with some simple examples and contrasts including the experience in my state of New York, suggest extreme caution before concluding that there is new evidence that the death penalty deters murders.

The costs of capital punishment are extremely high. Even in states where prosecutors infrequently seek the death penalty, costs of obtaining convictions and executions in

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capital cases range from $2.5 to $5 million dollars per case (in current dollars), compared to less than $1 million for each killer sentenced to life without parole. Local governments bear the burden of these costs, diverting $2 million per capital trial from local services – hospitals and health care, police and public safety, and education – or infrastructure repairs – roads and other capital expenditures – and causing counties to borrow money or raise local taxes. The costs are often transferred to state governments as "risk pools" or programs of local assistance to prosecute death penalty cases, diffusing death penalty costs to counties that choose not to use – or have no need for -- the death penalty in capital cases.

The high costs of the death penalty, the unreliable evidence of its deterrent effects, and the fact that the states that execute the most people also have the highest error rates[4], create clear public policy choices for the nation. If a state is going to spend $500 million on law enforcement over the next two decades, is the *best* use of that money to buy two or three executions or, for example, to fund additional police detectives, prosecutors, and judges to arrest and incarcerate murderers and other criminals who currently escape any punishment because of insufficient law-enforcement resources?

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[4] James Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973 – 1995*, 78 TEXAS LAW REVIEW 1839 (2000) (showing that 68% of all death sentences since *Furman v. Georgia* were reversed either on direct appeal, state direct appeal, or federal habeas review; most – 82% – of those reversed were re-sentenced to non-capital punishments, 7% were exonerated, and the remainder were re-sentenced to death); *see also* Brian Forst, BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES, 201-04 (2004) (noting that the errors in these cases were the result of misidentification of witnesses, prosecutorial or police misconduct, incompetent defense counsel, prejudicial instructions by judges, and biased jury selection procedures); James Liebman et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995* (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ ; James Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), *available at* http://www2.law.columbia.edu/ brokensystem2/report.pdf.

Also, most states rarely use the death penalty,[5] and both death sentences and executions have declined sharply over the past five years, even as murder rates have declined nationally. We cannot expect the rare use of the death penalty to have a deterrent effect on already declining rates of murder. Justice White noted long ago in *Furman v. Georgia* that when only a tiny proportion of the individuals who commit murder are executed, the penalty is unconstitutionally irrational: a death penalty that is almost never used serves no deterrent function, because no would-be murderer can expect to be executed. Accordingly, a threshold question for state legislatures across the country is whether their necessary and admirable efforts to avoid error and the horror of the execution of the innocent won't --- after many hundreds of millions of dollars of trying --- burden the state with a death penalty that will be overturned again because of this additional constitutional problem?

I. Introduction

Since 1996, more than a dozen studies have been published claiming that the death penalty has a strong deterrent effect that can prevent anywhere from three to 18 homicides.[6] But this is not a new claim. In 1975, Professor Isaac Ehrlich published an influential article saying that during the 1950s and 1960s, each execution averted eight murders.[7] Although Ehrlich's research was a highly technical article prepared for an audience of economists, its influence went well beyond the economics profession.

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[5] See, Richard Berk, New Claims about Executions and Deterrence, *supra* note 2.
[6] A list of these studies is appended to this testimony.
[7] Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 AMERICAN ECONOMIC REVIEW 397 (1975); Isaac Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, 85 JOURNAL OF POLITICAL ECONOMY 741 (1977)

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Ehrlich's work was cited in *Gregg v. Georgia*[8], the central U.S. Supreme Court decision restoring capital punishment. No matter how carefully Ehrlich qualified his conclusions, his article had the popular and political appeal of a headline, a sound bite and a bumper sticker all rolled into one. Reaction was immediate: Ehrlich's findings were disputed in academic journals such as the *Yale Law Journal*[9], launching an era of contentious arguments in the press and in professional journals.[10] In 1978, an expert panel appointed by the National Academy of Sciences issued strong criticisms of Ehrlich's work.[11] Over the next two decades, economists and other social scientists attempted (mostly without success) to replicate Ehrlich's results using different data, alternative statistical methods, and other twists that tried to address glaring errors in Ehrlich's techniques and data. The accumulated scientific evidence from these later studies also weighed heavily against the

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[8] *Gregg v Georgia*, 428 U.S. 153 (1976)

[9] See Editor's Introduction, Statistical Evidence on the Deterrent Effect of Capital Punishment, 85 *Yale Law Journal* 164 (1975); David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE LAW JOURNAL 170 (1975); William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE LAW JOURNAL 187 (1975); Isaac Ehrlich, Deterrence: Evidence and Inference, 85 *Yale Law Journal* 209 (1975).

[10] See, for critiques of Ehrlich's work, Michael McAleer & Michael R. Veall, *How Fragile are Fragile Inferences? A Re-Evaluation of the Deterrent Effect of Capital Punishment*, 71 REVIEW OF ECONOMICS AND STATISTICS 99 (1989); Edward E. Leamer, *Let's Take the Con out of Econometrics*, 73 AMERICAN ECONOMIC REVIEW 31 (1983); Walter S. McManus, *Estimates of the Deterrent Effect of Capital Punishment: The Importance of the Researcher's Prior Beliefs*, 93 JOURNAL OF POLITICAL ECONOMY 417 (1985); Jeffrey Grogger, The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts, 85 *Journal of the American Statistical Association* 295 (1990).
See, for support and extensions of Ehrlich's work, Stephen A. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 SOUTHERN ECONOMIC JOURNAL 68 (1985); James P. Cover & Paul D. Thistle, Time Series, Homicide, and the Deterrent Effect of Capital Punishment, 54 *Southern Economic Journal* 615 (1988). George A. Chressanthis, *Capital Punishment and the Deterrent Effect Revisited: Recent Time-Series Econometric Evidence*, 18 JOURNAL OF BEHAVIORAL ECONOMICS 81 (1989).

[11] See Lawrence R. Klein, Brian Forst, & Victor Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, pp. 336-60 in Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates. Washington, DC: National Academy of Sciences (1978)

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claim that executions deter murders.[12]

The new deterrence studies analyze data that span a 20 year period since the resumption of executions following the U.S. Supreme Courts decisions in *Furman v Georgia*[13] and *Gregg v. Georgia.*[14] The claims of these new studies are far bolder than the original wave of studies by Professor Ehrlich and his students.[15] Some claim that pardons, commutations, and exonerations cause murders to increase.[16] One says that even murders of passion, among the most irrational of lethal acts, can be deterred.[17] Another says that the deterrent effects of executions are so powerful that it will reduce robberies and even some non-violent crimes.[18] Thus, the deterrent effects of capital punishment apparently are limitless, leading some proponents to offer execution as a cure-all for everyday crime.[19]

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[12] Id. See, also, William C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711 (1998); Jon Sorenson, Robert Wrinkle, Victoria Brewer, & James Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas,* 45 CRIME & DELINQUENCY 481 (1999).
[13] *Furman v. Georgia*, 408 U.S. 238 (1972)
[14] *Gregg v Georgia*, 428 U.S. 153 (1976)
[15] Joanna Shepherd, an author of several studies finding a deterrent effect, has recently argued before Congress that recent research has created a "strong consensus among economists that capital punishment deters crime," going so far as to claim that "[t]he studies are unanimous." Terrorist Penalties Enhancement Act of 2003: Hearing on H.R. 2934Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 108th Cong. 10-11 (2004), available at http://judiciary.house.gov/media/pdfs/ printers/108th/93224.pdf.
[16] *See, for example*, H. Naci Mocan and R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 JOURNAL OF LAW AND ECONOMICS 453 (2003).
[17] Joanna M. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 JOURNAL OF LEGAL STUDIES 283 (2004).
[18] Zhiqiang Liu, Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence, 30 EASTERN ECONOMIC JOURNAL 237 (2004)
[19] Id.

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II. Less Than Meets the Eye

The bar is very high when science makes such causal claims.[20] Professors Leigh Epstein of Washington University and Gary King of Harvard University have written an important article that articulates the standards for making causal inferences in law and social policy.[21] Their standards are consistent with the demands of science generally, and reflect a consensus on causal inference that durably exists in the highest halls of science, including, for example, the National Academy of Science, the Institute of Medicine, the National Institutes of Health, and the American Association for the Advancement of Science.[22] These standards are neither technical nor mysterious. Rather, they reflect just a bit of common sense: the ability to replicate the original work under diverse conditions by an independent researcher, the use of measures and methods that avoid biases from inaccurate "yardsticks" and faulty "gauges," the ability to tell a simple and persuasive causal story, and the testing and rejection of competing causal factors. These hallmarks of science have been recognized by the U.S. Supreme Court in a series of cases that demand that scientific evidence meet these very high yet commonsense standards for science.[23]

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[20] See, Christopher Winship and Martin Rein, *The Dangers of 'Strong' Causal Reasoning in Social Policy*, 36 SOCIETY 38 (July/August 1999); Michael E. Sobel, *An Introduction to Causal Inference*, 24 SOCIOLOGICAL METHODS &RESEARCH 353 (1996); Richard A. Berk and David A. Freedman, *Statistical Assumptions as Empirical Commitments*, in T.G. Blomberg and S. Cohen (eds.), Punishment and Social Control (2nd ed.) 235 (2003); Paul A. Rosenbaum, Observational Studies (1995).
[21] Lee Epstein and Gary King, *The Rules of Inference*, 69 UNIVERSITY OF CHICAGO LAW REVIEW 1 (2002).
[22] See, for examples, Lee Epstein and Gary King, Creating an Infrastructure for the Creation, Dissemination, and Consumption of High-Quality Empirical Research, 53 THE JOURNAL OF LEGAL EDUCATION 311 (2003)
[23] *Daubert v Merrill Pharmaceuticals*, 509 US 579 (1993); *Kumho Tire Co v Carmichael*, 526 US 137 (1999); *General Electric Co. v. Joiner*, 522 US 136 (1997).

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A close reading of the new deterrence studies shows quite clearly that they fail to touch this scientific bar, let alone cross it. Consider the following:

- All but one of the new studies lump all forms of murder together, claiming that all are equally deterrable. But logic tells us that some types of murder may be poor candidates for deterrence, such as crimes of passion or jealousy. Yet the one study that looked at specific categories found that "domestic" homicides are more deterrable than others,[24] a claim that flies in the face of six decades of theory, research and facts on homicide[25] and especially murders of spouses and intimates.[26] Some homicide offenders simply are not responsive to threats of punishment.[27] It also belies the empirical fact that "domestic" or intimate partner homicides have been declining steadily since the early 1970's,[28] at a steady pace, regardless of fluctuations in the number of executions since capital punishment was reinstated following *Gregg*.

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[24] Joanna M. Shepherd, *Murder of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 JOURNAL OF LEGAL STUDIES 283 (2004).
[25] See, Franklin Zimring and Gordon Hawkins, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997).
[26] Kenneth Polk, WHEN MEN KILL SCENARIOS OF MASCULINE VIOLENCE (1994). See, also, Jeffrey Fagan and Angela Browne, "Violence toward Spouses and Intimates: Physical Aggression between Men and Women in Intimate Relationships," in UNDERSTANDING AND PREVENTING VIOLENCE, VOL.3 (A.J. Reiss, Jr., & J.A. Roth, eds.) 115 (1994).
[27] Jack Katz, SEDUCTIONS OF CRIME: THE MORAL AND SENSUAL ATTRACTIONS OF DOING EVIL (1988) (describing "stone cold killers" who are insensitive to punishment threats, and whose homicides can only be described as the pursuit of domination and pleasure). *See, also*, Richard B. Felson & Henry J. Steadman, *Situational Factors in Disputes Leading to Criminal Violence*, 21 CRIMINOLOGY 59-60 (1983); David F. Luckenbill, *Criminal Homicide as a Situated Transaction*, 25 SOCIAL PROBLEMS 176 (1977); Richard B. Felson, *Impression Management and the Escalation of Aggression and Violence*, 45 SOCIAL PSYCHOLOGY QUARTERLY 245 (1982); David F. Luckenbill & Daniel P. Doyle, *Structural Position and Violence: Developing a Cultural Explanation*, 27 CRIMINOLOGY 422-23 (1989); William Oliver, THE VIOLENT SOCIAL WORLD OF BLACK MEN 138-40 (1994).
[28] See, e.g., Laura Dugan, Daniel Nagin and Richard Rosenfeld, Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women's Status, and Domestic Violence Resources, 3 HOMICIDE STUDIES 187 (1999) (attributing the two-decades-long decline in the intimate partner homicide rate in the U.S. as a function of three factors that reduce exposure to violent relationships: shifts in marriage, divorce, and other factors associated with declining domesticity; the improved economic status of women; and increases in the availability of domestic violence services).

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- The studies produce erratic and contradictory results, and some find that there is no deterrent effect that can be attributed to executions.[29] For example, one of the studies shows that executions are as likely to produce an increase in homicides in states following execution as there are states where there seems to be a reduction in homicides.[30] Moreover, depending on the year, some states exhibit "brutalization" effects from executions in some periods and deterrent effects in others.[31] A constitutional and moral regime of capital punishment cannot tolerate such inconsistency in one of its bedrock theoretical and constitutional premises. Moreover, such inconsistencies are the antithesis of what social scientists and economists demand when considering causal inference: robustness in their conclusions, or consistency across a range of conditions and tests. When the hypothesized deterrent effects of executions are so unstable over time, one must reject a hypothesis of deterrence.
- Many of the same processes that produce murder rates also produce death sentences and executions,[32] so that determining the marginal causal effects of the death penalty is difficult. More important, the models used in most of the current studies conflate these effects by including homicide, social structure, death sentences and executions in the same model. This is what social scientists would decry as a "specification error": the piling on of correlated predictors – social

[29] Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AMERICAN LAW AND ECONOMICS REVIEW 318 (2003).
[30] Joanna M. Shepherd, Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States, 104 MICHIGAN LAW REVIEW 203 (2005).
[31] Id.
[32] Andrew Gelman, James S. Liebman, Valerie West and Alex Kiss, A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 209 (2004).

forces, homicides and executions – can defeat efforts to reliably estimate the effects of capital punishment or any other correlated set of predictors on murder rates.[33] These errors in modeling, a general sources of bias caused by multicollinearity and endogeneity, inflates regression results and undermines the reliability of estimates of deterrent effects.

- At the same time, many of these studies fail to account for a variety of explanations for the rise and fall of murders over time. For example, the current crop of studies ignores the contemporaneous and severe effects of drug epidemics on homicide rates,[34] and also on broader social conditions that elevate homicide rates.[35] In addition, many of the social structural factors that explain and predict homicide rates – demographic composition, concentrated poverty – at the state level also predict death sentencing rates.[36] A similar omission is the effect of firearms on murders. Nearly all of the increase and decline in the U.S. in

[33] *See*, e.g., Lauren J. Krivo & Ruth D. Peterson, The Structural Context of Homicide: Accounting for Racial Differences in Process, 65 AMERICAN SOCIOLOGICAL REVIEW 547 (2000); Kenneth C. Land et al., Structural Covariates of Homicide Rates: Are There Any Invariances Across Time and Social Space?, 95 AMERICAN JOURNAL OF SOCIOLOGY 922, 922-32 (1990). See generally Robert J. Sampson & Janet H. Lauritsen, Individual-, Situational-, and Community-Level Risk Factors, in UNDERSTANDING AND PREVENTING VIOLENCE, VOL. 3 (A.J. Reiss, Jr. & J.A. Roth eds.) 1 (1994).

[34] See, e.g., Jeffrey Grogger and Michael Willis, The Emergence of Crack Cocaine and the Rise in Urban Crime Rates, 82 REVIEW OF ECONOMICS AND STATISTICS 519 (2000); Graham Ousey and Matthew Lee, Examining the conditional nature of the illicit drug market-homicide relationship: A partial test of the theory of contingent causation, 40 CRIMINOLOGY 73 (2002); Daniel Cork, Examining Space-Time Interaction in City-Level Homicide Data: Crack Markets and the Diffusion of Guns Among Youth, 15 JOURNAL OF QUANTITATIVE CRIMINOLOGY 379 (1999); Eric Baumer et al., The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross- City, Longitudinal Analysis, 33 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 316 (1998).

[35] Roland Fryer, Paul Heaton, Steven Levitt and Kevin D. Murphy, Measuring the Impact of Crack Cocaine, Working Paper, Harvard University Department of Economics, http://post.economics.harvard.edu/faculty/fryer/papers/fryer_heaton_levitt_murphy.pdf (visited December 20, 2005).

[36] *See*, Liebman et al., A Broken System, Part II, *supra* note 4; Gelman et al., *supra* note 3.2 .

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homicides since 1985 was in gun homicides.[37] Yet none of the studies take into account the flat secular trend of decline in non-gun homicides since the early 1970s, none accounts for gun availability, and none control for the complex interaction of drug epidemics with gun violence.[38]

- All the studies fail to control for autoregression, which is the tendency of trends in longitudinal or time series data to be heavily influenced by the trends in preceding years.[39] In other words, the thing that tells us most about what the murder rate will be next year is what is was last year. Failing to account for autoregression leads to underestimates of standard errors that seriously bias results and give a misleading picture of precision. For example, ignoring autocorrelation means that each year in a longitudinal panel of years is treated as a separate case with no ties to similar cases. In fact, powerful social, economic and legal forces influence state homicide rates, and these forces operate dynamically over time and change at a relative slow pace. Statistically and conceptually, it is unlikely that effects of extremely rare events such as executions can influence these large forces, and in turn deflect trends that are so heavily influenced by their own history and context.[40] A change in statistical modeling techniques to account for the strong

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[37] See, e.g., Philip J. Cook and John H. Laub, The Unprecedented Epidemic in Youth Violence," 24 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH – YOUTH VIOLENCE 27 (1998); *See, also,* Jeffrey Fagan, Franklin Zimring, and June Kim, *Declining Homicide in New York: A Tale of Two Trends*, 88 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1277 (1998); Zimring and Hawkins, CRIME IS NOT THE PROBLEM, *supra* note __.

[38] *See, e.g.*, Eric Baumer, et al., supra note 33; *See, also*, Alfred Blumstein, *Youth violence, guns, and the illicit-drug industry,* 86 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 10 (1995).

[39] *See, e.g.*, William Greene, ECONOMETRIC ANALYSIS (5th edition) (2003)

[40] Richard Berk, *New Claims about Executions and General Deterrence: D'ej`a Vu All Over Again?* JOURNAL OF EMPIRICAL LEGAL STUDIES (forthcoming, 2005). See, also, Badi H. Baltagi, Econometric Analysis of Panel Data (2001); Badi H. Baltagi and Q. Li , *Testing AR(1) Against MA(1) Disturbances In An Error Component Model.* 68 JOURNAL OF ECONOMETRICS 133 (1995).

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year-to-year correlation of murder rates over time produces dramatic changes in the statistical significance and effect size of executions on murder rates.[41] Such instability in the coefficients under varying measurement and analytic conditions should be a serious warning sign to those who would embrace the new deterrence evidence.

- There are few statistical controls for the general performance of the criminal justice system, specifically clearance rates for violent crimes. Some of the studies control for punishment, such as imprisonment rates, but not for the ability of local law enforcement to identify homicide offenders or high rate offenders generally. Accordingly, it is hard to evaluate the deterrent effects of execution without first knowing the clearance rate for homicides. Decades of research confirms that such efficiency in homicide detection and apprehension would be a more effective deterrent than poorly publicized and infrequent executions. These important but omitted variables are potential sources not just of errors in these analyses, but they produce misleading results.[42]
- The studies ignore large amounts of missing data in important states such as Florida. Most of the studies rely on the same data, a compilation of death sentences published by the Bureau of Justice Statistics of the U.S. Department of Justice, and the published homicide rates from the Federal Bureau of

[41] Jeffrey Fagan, Death and Deterrence Redux: Science, Alchemy and Causal Reasoning on Capital Punishment, — OHIO ST. J. CRIM. L.— (forthcoming 2006).
[42] *See, e.g.*, Mocan and Gittings, *supra* note 9, reporting significant negative effects on deterrence for the homicide arrest rate. *See*, also, Katz et al., *supra* note 28.

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Investigation.[43] Yet the FBI's data for Florida is missing in these national archives for four years in the 1980s and another four years in the 1990s. By simply leaving out these states, the results are most likely to be heavily biased. The studies fail to investigate alternate data sources that might fill in important gaps in annual homicide rates.[44] For example, when a complete homicide victimization data set from the National Center for Health Statistics is substituted for the incomplete FBI homicide data in the Mocan and Gittings dataset and regression programs, model results change dramatically and the magnitude of a putative deterrent effect is reduced by nearly half.[45]

- The studies avoid any direct tests of deterrence. They fail to show that murderers are aware of executions in their own state, much less in far-away states, and that they rationally decide to forego homicide and use less lethal forms of violence. A few studies measure newspaper accounts of executions,[46] but no one knows the newspaper reading habits or television viewing preferences of murderers. Moreover, the extension of traditional rational choice theories to would-be murderers faces several conceptual and real challenges. Numerous studies that directly examine the reactions of individuals to punishment threats consistently show the limits of the assumptions of rationality that underlie deterrence,

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[43] See, Michael D. Maltz, The Effect of NIBRS Reporting on Item Missing Data in Murder Cases, 8 HOMICIDE STUDIES 193 (2004).
[44] Michael Maltz, Bridging Gaps in Police Crime Data (NCJ 176365), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/bgpcd.pdf (visited November 12, 2005). In some specifications with these data, the deterrent effect becomes insignificant.
[45] See, Jeffrey Fagan, *Science, Ideology and the Illusion of Deterrence, supra* note __.
[46] Joanna M. Shepherd, *Brutalization, supra* note 30.

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especially in the case of aggression or violence.[47] Many violent offenders have cognitive, organic and neuropsychological impairments, making it even more unlikely that they are aware of executions.[48] Others are prone to exponential discounting ("hyperdiscounting") of risks, especially the threat of punishments and short-term harms, as well as the inflation of potential rewards of crime.[49]

- Death sentences are rare, as are executions; they are a product of the jurisprudence that recognizes "death is different" and should therefore be reserved for only the most heinous murders.[50] Many states have narrowly tailored capital punishment laws that constrain the number and types of homicides that are eligible for the death penalty. However, there is no evidence that these extremely rare events would be deterrable. Consider, for example, the imposition of the death penalty for persons who kill law enforcement officers. Assuming rationality, for the moment, such rare events are unlikely to influence decision processes by motivating would-be killers to adjust to these punishment threats.[51]

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[47] *See*, for an overview, Francisco Parisi and Vernon Smith, Introduction, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR (Francisco Parisi and Vernon Smith, eds.) (2005).

[48] See, e.g, , Adriane Raine et al., Reduced prefrontal and increased subcortical brain functioning assessed using positron emission tomography in predatory and affective murderers, 16 BEHAVIORAL SCIENCES AND THE LAW 319 (1998); L. Gatzke, Adriane Raine, et al., Temporal lobe EEG deficits in murderers not detected by PET, JOURNAL OF NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES *(in press);* Dorothy Otnow Lewis, Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas, 32 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 408 (2004); Dorothy Otnow Lewis, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 AMERICAN JOURNAL OF PSYCHIATRY 584 (1988).

[49] Gary Becker, Kevin M. Murphy and Michael Grossman et al., The Economic Theory of Illegal Goods: The Case of Drugs. NBER Working Paper 10976, available at http://www.nber.org/papers/w10976 (visited January 14, 2006).

[50] Hugo Adam Bedau, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 55-59 (1987); Jeffrey Abramson, Death is Different and the Role of the Capital Jury, 2 OHIO STATE J. CRIM. L. 117 (2004).

[51] See, e.g., Paul Slovic, Howard Kunreuther and Gilbert White, Decision Processes, Rationality and Adjustment to Natural Hazards, in PERCEPTION OF RISK (Paul Slovic, ed,) 1 (2000).

Assassinations of law enforcement officers are rare events. The FBI reported that 52 police officers were feloniously killed in 2003.[52] Most of these deaths occurred in states and regions that more frequently use capital punishment: 28 occurred in the South, 13 in the West, and 8 in the Midwest. In the northeast, where most states do not have a valid death penalty statute or, if so, rarely use it, there were 3 assassinations of law enforcement officers in 2003. Evidently, the threat of execution has little influence on lethal assaults on police officers.

- Efforts to replicate the results of several of these studies have revealed their unreliability and instability. In one study, Professors John Donohue and Justin Wolfers[53] re-analyzed several datasets with several corrections: (1) using alternate model specifications to address autocorrelation, (2) correcting computational errors and coding anomalies,[54] and (3) subjecting the analyses to further tests using different samples of states, counties and years. They conclude that "...the existing evidence for deterrence is surprisingly fragile, and even small changes in specifications yield dramatically different results..... Our estimates suggest not just "reasonable doubt" about whether there is any deterrent effect of the death penalty, but profound uncertainty.....[W]hether one measures positive or negative effects of the death penalty is extremely sensitive to very small changes in econometric specifications"[55]

[52] FBI, Uniform Crime Reports, LEOKA files, various years.
[53] John Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, supra note 2.
[54] Two of the datasets, one from Mocan and Gittings and a second from Shepherd, used unconventional methods to address recurring problems of missing data and instances where some calculations required division by zero. In each case, Donohue and Wolfers made appropriate corrections.
[55] Donohue and Wolfers, supra note 2 at 836.

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- I obtained similar results analyzing the Mocan and Gitting dataset, correcting for: (a) biased coding of missing data[56], (2) replacement of missing cases (years with no murders) with true zero values, (3) use of alternate measures of homicide from national death registry data[57] to avoid missing data problems in the Department of Justice data from Florida and other states, (4) alternate model specifications that accounted for autoregression, and (5) model controls to isolate the effects of Texas, a state that accounts for more than one third of all executions. The analyses produced unstable results that varied in the size of the putative deterrent effect, with unstable levels of statistical significance. In about half of the 15 alternate analyses, there was no evidence of a statistically significant deterrent effect.
- An analysis of executions and murders by Professor Richard Berk also challenges the accuracy of the claims of deterrence.[58] Professor Berk also undertook alternate specifications, including one test that shows that nearly all of the presumed deterrent effects are confined to one state – Texas – and only for a handful of years when there were more than five executions. No other state has reached that rate of executions in a single year, and it is highly unlikely that any will in the future. The general conclusions in the new deterrence studies are heavily influenced by these few outlier observations.[59] In fact, Berk shows that

[56] Cases that were missing due to division by zero were recoded to .99 by Mocan and Gittings, instead of coding these cases to a value closer to zero. I recoded them to .01.
[57] Data were obtained from the National Center for Health Statistics.
[58] Richard Berk, *supra* note 2.
[59] *Id.* Not only are executions clustered in Texas, but most states in most years have no executions, a statistical burden that none of the new deterrence studies competently address. To address this problem statistically, one must first estimate a model that explains which states have any executions, and then a

eliminating Texas eliminates any hint of deterrence from the relationship between execution and homicide.[60] It would be a grave error to generalize from the Texas data to any other state. Professor Berk states that ..."it would be bad statistics and bad social policy" to generalize from 1% of the data to the remaining 99%. He concludes that "for the vast majority of states for the vast majority of years there is no evidence for deterrence" and that even for the remaining 1%, "credible evidence for deterrence is lacking"[61].

- Perhaps most important, the studies fail to take into account the deterrent effects of Life Without Parole sentences (LWOP). LWOP has the same incapacitative effect as does execution. For a few death row inmates, it has a deterrent effect: at least 100 executions since *Gregg* were "voluntary" – death row inmates who elected to not fight their execution, and at least some of these persons explicitly said that death was preferable to life in prison. When multiple murderers like

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second model to show the factors that predict the frequency of its use. Such models are called "hurdle" regressions. *See, e.g.*, Christopher J. Zorn, *An Analytic and Empirical Examination of Zero-Inflated and Hurdle Poisson Specifications*, 26 SOCIOLOGICAL METHODS AND RESEARCH 368 (1998). *See, also*, Yin Bin Cheung, *Zero-Inflated Models for Regression Analysis of Count Data: A Study of Growth and Development*, 21 STAT. IN MED. 1461, 1462-67 (2002). Statistical methods that fail to account for this two part process will produce unreliable and inflated results. There have been 965 executions from 1976 to June 2004, more than one in three (340) have occurred in Texas. One consequence of these data patterns is that computing deterrent effects based on a simple average would be deceptive. Even a simple estimate – there are 38 death penalty states, each with a valid law in effect for an average of 20 years since *Gregg* – suggests that on average, there is fewer than one execution per year per state. Since Texas accounts for more than one in three executions, the median state-year average is quite a bit lower. In Mocan and Gittings, *supra* note 9, for example, executions range from 0 to 18, with 859 of the 1000 over the 21 years (86%) equal to 0. As a result, the median is also 0. There are 78 values (8%) equal to 1. There are but 11 values (1%) larger than 5, ranging from 7 to 18 executions. Obviously, the distribution is highly skewed, and the mean is dominated by a few extreme values. Most states in most years execute no one.

[60] *See*, Berk, *Id.*

[61] *Id* at 328.

Michael Ross in Connecticut now say they prefer execution to life in prison, one must ask whether life without parole isn't a stronger deterrent than death.[62]

LWOP is a more frequent sentence in murder convictions today, far more frequent than death sentences. For example, there were 137 LWOP sentences in Pennsylvania in 1999, compared to 15 death sentences.[63] In 2000, there were 121 life sentences, compared to 12 death sentences.[64] In California, there were 3,163 inmates serving life without parole on February 29, 2004, compared to 635 on death row.[65] In North Carolina, when the state passed a law allowing capital murderers to plead guilty to first-degree murder and receive a sentence of life without parole rather than go to trial and risk the death penalty, death sentences fell from an average of 18.5 from 1999-2001 to seven in 2002, six in 2003, and four in 2004.[66] Analyses of the National Judicial Reporting Program in 2002 shows that LWOP sentences were more than three times more frequent in murder cases than were death sentences, and nearly 10 times more common than

[62] See, e.g., Court TV, *Died Willingly*, available at http://www.crimelibrary.com/serial_killers/predators/michael_ross/8.html?sect=2. See, also, Gene Warner, The Death Penalty Debate Goes On, BUFFALO EVENING NEWS, July 11, 2005, at A1 (quoting convicted murderer Michael Grinnell on the deterrent effects of his LWOP sentence in New York's Attica prison).
[63] Annual Statistical Report, Pennsylvania Department of Corrections, 1999, available at: http://www.cor.state.pa.us/stats/lib/stats/ASR1999.pdf (visited January 18, 2005).
[64] Annual Statistical Report, Pennsylvania Department of Corrections, 2000, available at: http://www.cor.state.pa.us/stats/lib/stats/Annual%20Report%202000.pdf (visited January 18, 2005).
[65] California Department of Corrections, Facts and Figures, Third Quarter 2004, available at http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp (visited January 18, 2005). Fewer than 100 of the LWOP sentences were "Three Strikes Convictions." See, Franklin Zimring et al., Punishment and Democracy: Three Strikes and You're Out in California (2003).
[66] North Carolina News and Record, November 7, 2005

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executions.[67] And Texas, where more than one execution in three takes place and where the locus of deterrent effects is thought to reside, had no life without parole statute until the 2005 legislative session. For that large and influential state, tests of the deterrent effects of execution are biased and unrepresentative of the norms in the states, and consequently, there has been no valid test of the incapacitative effects of LWOP compared to the death penalty.[68]

- The omission by researchers of this critical alternate and competing explanation for the decline in murder rates in California and other states is a fatal flaw in most of these studies. Integrating the potential effects of LWOP is critically important to fully understand "deterrence" and to compare the effects of incarceration to executions. Moreover, by examining declines in homicide rates in California, Texas and New York, since each state's peak homicide rate in the early 1990's, one can see the strong effects of such incapacitative sentences on murder rates. For example, in New York, a state with no death penalty until April 1995, 143 LWOP sentences from 1995 through 2004 and no executions, homicide rates declined over the next decade by 65.5% since the peak in 1990.[69] In comparison, homicide rates in Texas, a state that until last year did not permit juries to

[67] U.S. Dept. of Justice, Bureau of Justice Statistics. NATIONAL JUDICIAL REPORTING PROGRAM, 2002: [UNITED STATES] [Computer file]. Compiled by U.S. Dept of Commerce, Bureau of the Census. ICPSR04203-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2005-04-01.
[68] Texas Penal Code § 12.31, effective September 1, 2005.
[69] There have been 10 additional LWOP sentences in 2005, a year in which the murder rate in New York City and State are headed to new 50-year lows, despite the absence of executions and a declining incarceration rate.

sentence capital defendants to life without parole, declined by 61.4% since its peak rate in 1991.[70]

- Recent research suggests the importance of incapacitation – via efficient policing and effective use of imprisonment – in reducing rates of some crimes in recent panel studies identifying the sources of the nation's decline in crime.[71] Indeed, the only new deterrence study to directly test imprisonment patterns, by economists Lawrence Katz and colleagues, shows no deterrent effect from executions, but some type of suppression effect on murder from the rate of natural deaths in prison.[72] And, Mocan and Gittings find far larger (and statistically significant) effects for both incarceration and homicide arrests than for "deterrence," but they call no attention to this important finding.

The 1978 National Research Council Panel on Research on Deterrence and Incapacitation[73] noted the complex relationship between deterrence and incapacitation, and showed the difficulty of separating the effects of each. To claim deterrence when there are simultaneous incapacitation effects from LWOP is a particular type of social science error, that of omitted variable bias.[74] The omission of this alternate and competing explanation for the decline in murder

[70] See, Uniform Crime Reports, Federal Bureau of Investigation, U.S. Department of Justice, various years.
[71] Steven D. Levitt, Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error? 36 ECONOMIC INQUIRY 353 (1998).
[72] Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AMERICAN LAW AND ECONOMICS REVIEW 318 (2003).
[73] Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (1978)
[74] Omitted variable bias occurs when a regression estimate of a parameter does not have the appropriate form and data for other parameters that may also influence the observed phenomenon. See, http://economics.about.com/cs/economicsglossary/g/omitted.htm.

rates in most death penalty states obscures and inflates the effects of deterrence when no other explanation is included in the estimating models. Integrating the potential effects of LWOP is critically important to fully understand "deterrence" and to compare its effects to incapacitation effects on murder rates.

The central mistake in the enterprise of the new deterrence research is the attempt to make causal inferences from a very flawed and limited set of observational data. One cannot treat these data as an experiment, where all the competing influences are ruled out by randomly assigning states to specific conditions.[75] Murder is a complex and multiply-determined phenomenon, with cyclical patterns for over 40 years of distinct periods of increase and decline that are not unlike epidemics of contagious diseases.[76] There is no reliable, scientifically sound evidence that pits execution against a robust set of competing explanations to identify whether it can exert a deterrent effect that is uniquely and sufficiently powerful to overwhelm these consistent and recurring epidemic patterns in homicide. This new body of empirical work, based on infrequent capital punishment that is geographically spread across a large nation with little publicity and omits numerous competing but untested explanations of homicide changes, fails to provide a reliable, much less a dispositive, test of deterrence of murder.

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[75] *See, e.g.*, Franklin E. Zimring, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003). See, also, Richard A. Berk, *Knowing When to Fold 'Em: An Essay on Evaluating the Impact of CEASEFIRE, COMSTAT, and EXILE*, CRIMINOLOGY AND PUBLIC POLICY (2005, in press); Paul R. Rosenbaum, Observational Studies (1995).

[76] *See, e.g.*, Malcolm Gladwell, The Tipping Point (2nd ed.) (2001); Eric Monkkonen, MURDER IN NEW YORK CITY (2003); Jeffrey Fagan and Garth Davies, *The Natural History of Neighborhood Violence*, 20 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE *127(*2004).

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These are serious flaws and omissions in a body of scientific evidence that render it unreliable, and certainly not sufficiently sound evidence on which to base laws whose application leads to life-and-death decisions. The omissions and errors are so egregious that this work falls well within the unfortunate category of junk science. To accept it uncritically invites errors that have the most severe human costs.

III. The Costs of Capital Trials

The high costs of capital cases, from trial to execution, dramatically raise the stakes in the gamble on deterrence-based policies. A review of cost estimates across the country in the past decade shows that the trial, incarceration and execution of a capital case costs from $2.5 to $5 million dollars per inmate (in current dollars), compared to less than $1 million for each killer sentenced to life without parole.[77] Examples abound. In North Carolina, a 1993 study showed that *per execution* costs were $2.16 million greater than the costs of non-capital murder cases that produced life sentences.[78] Florida, for example, spent between $25 million and $50 million more per year on capital cases than

[77]See, e.g., Aaron Chambers, *Resources a Concern in Death Penalty Reform*, Chi. Daily L. Bull., Apr. 24, 1999, at 19, available in Westlaw, News Library, CHIDLB file (estimating that a capital case costs $5.2 million from pretrial proceedings to execution); Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS LAW REVIEW. 1268, 1268-70 (1985); Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUDIES IN LAW, POLICY & SOCIETY 71, 78 (1993) (reporting a $3.2 million cost per execution in Florida, and Kansas' rejection of the death penalty because of the cost); Paul W. Keve, *The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty*, FEDERAL PROBATION, Mar. 1992, at 11; Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, A.P. Newswires, Mar. 26, 2000, available in Westlaw News Library, APWIRES file (estimated $1 to $2 million cost per Tennessee execution); David Noonan, *Death Row Cost Is a Killer: Capital Cases Can't Be Handled Fairly and Affordably, Critics Claim*, N.Y. Daily News, Oct. 17, 1999, at 27, available in 1999 WL 23488045 (giving cost of prosecuting and defending New York capital cases at the trial phase, in a period during which only five capital sentences were imposed (from 1994 to 1999 as $68 million); A. Wallace Tashima, *A Costly Ultimate Sanction*, The Los Angeles Daily J., June 20, 1991 (cost per execution to California taxpayers is $4 to $5 million).

[78] See, e.g., Philip J. Cook & Donna B. Slawson, *The Costs of Prosecuting Murder Cases in North Carolina*, 1993.

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it would if all murderers received life without parole.[79] The Indiana Legislative Services Agency estimated that had the state sentenced its death row population to life without parole, Indiana taxpayers would have been spared approximately $37.1 million.[80] The excessive costs of capital trials and executions have led Gerald Kogan, Chief Justice to the Florida Supreme Court, to ask Florida citizens to "...seriously reconsider whether the death penalty is a truly viable remedy for first degree murder."[81] In Tennessee, the State Comptroller reported in 2004 that death penalty trials cost an average of 48% more than the average cost of trials in which prosecutors seek life imprisonment.[82] And in Kansas, a 2003 study by the state legislature estimated cost of a death penalty case was 70% more than the cost of a comparable non-death penalty case.[83]

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[79] S.V. Date, "*The High Price of Killing Killers*", Palm Beach Post, Jan. 4, 2000, at 1A. Based on the 44 executions in Florida from 1976 to 2000, the state has spent $51 million *per year* more on death penalty cases beyond what it would cost to obtain sentences of life without parole. The Post's figure was derived using estimate of how much time prosecutors and public defenders at the trial courts and the Florida Supreme Court spend on extra work needed in capital cases. It accounts also for the time and effort expended on defendants who are tried but convicted of a lesser murder charge and whose death sentences are overturned on appeal as well as those handful of condemned inmates who are actually executed.

[80] Kelly Lucas, "*Death Penalty is Fair and Proportionate*," THE INDIANA LAWYER, Nov. 21, 2001.

[81] Martin Dyckman, "*Death Penalty Repair*," St. Petersburg Times, Dec. 7, 1997 at 1D. Chief Justice Kogan noted that the Florida Supreme Court spends approximately half of its time devoted to death penalty cases, "an inordinate amount of time...when there is so much out there that affects the average citizen much more."

[82] John G. Morgan, *Tennessee's Death Penalty: Costs and Consequences* (2004), available at http://www.comptroller.state.tn.us/orea/reports/deathpenalty.pdf

[83] Legislative Post Audit Committee, Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections (2003), available at http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf.
Death penalty case costs were counted through to execution (median cost $1.26 million). Non-death penalty case costs were counted through to the end of incarceration (median cost $740,000).

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These extreme cost differentials for capital cases reflect the longer duration of capital trials.[84] These higher costs are generated by the high rate of reversals and retrials in capital cases, estimated at 68% in two recent studies by researchers at Columbia University[85]. Most of these defendants are sentenced to something less than death.[86] Thus, when these post-trial review costs are factored in, the average *per execution* cost is nearly $24 million dollars per prisoner, compared to $1 million for each inmate serving a sentence of life without possibility of parole.[87]

The burden of these costs are borne by local governments, diverting $2 million per capital trial from local services – hospitals and health care, police and public safety, and education -- or causing counties to borrow money or raise taxes, or diverting costs from

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[84] See, e.g., Philip J. Cook & Donna B. Slawson, *The Costs of Prosecuting Murder Cases in North Carolina*, 1993; Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS. LAW REVIEW 1221, 1257 (1985).

[85] James Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973 – 1995*, 78 TEXAS LAW REVIEW 1839 (2000) (showing that 68% of all death sentences since *Furman v. Georgia* were reversed either on direct appeal, state direct appeal, or federal habeas review; most – 82% – of those reversed were re-sentenced to non-capital punishments, 7% were exonerated, and the remainder were re-sentenced to death); *see also* Brian Forst, BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES, 201-04 (2004) (noting that the errors in these cases were the result of misidentification of witnesses, prosecutorial or police misconduct, incompetent defense counsel, prejudicial instructions by judges, and biased jury selection procedures); James Liebman et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995* (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ ; James Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), *available at* http://www2.law.columbia.edu/ brokensystem2/report.pdf.

[86] Liebman et al., *Capital Attrition, id.*

[87] *See* S.V. Date, *The High Price of Killing Killers*, Palm Beach Post, Jan. 4, 2000, at 1A, available in 2000 WL 7592885. *See also* Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts, With Their Lives at Stake*, Chi. Trib., Nov. 15, 1999, at N1, available in 1999 WL 2932352 ("in Illinois, the resources rallied on appeal often dwarf those summoned to keep a defendant off Death Row in the first place"); Armstrong & Mills, *Justice Derailed, supra* note 33, at N1 (discussing the "staggering" costs of capital case reversals and exonerations in Illinois: "Taxpayers have not only had to finance multimillion-dollar settlements to wrongly convicted Death Row inmates—[Dennis] Williams alone received $13 million from Cook County—but also have had to pay for new trials, sentencing hearings and appeals in more than 100 cases where a condemned inmate's original trial was undermined by some fundamental error.").

capital expenditures such as roads and other infrastructure.[88] The estimated increase in taxes and expenditures for capital trials from 1983-99 was more than $5.5 billion, borne by small and large counties alike.[89] The high costs to counties for death penalty cases has forced them to seek help from state legislatures, persuading them in some cases to create "risk pools" or programs of local assistance to prosecute death penalty cases. This has the net effect of diffusing death penalty costs to counties that choose not to use – or have no need for – the death penalty in capital cases.

Implications for the Nation

What do the experiences and cost burdens in other states forecast for the future? New York's recent experience may be the most appropriate example to anticipate the costs of a system of capital trials and punishment in the future. In the New York paradigm, before the New York State Court of Appeals invalidated New York's death penalty law in 2004 in *People v LaValle*[90], death sentences were rare and there were no executions.[91] As usual, things cost more in New York, but the lessons can be generalized to other states and communities. Between 1995 and 2004, New York spent about $200 million on the death penalty with *no* executions.[92] Of the 442 first-degree murder cases

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[88] See, e.g., Katherine Baicker, *The Budgetary Repercussions Of Capital Convictions*, 4 ADVANCES IN ECONOMIC POLICY AND ANALYSIS, No.1, Article 6 (2004).
[89] *Id* at 13.
[90] 3 N.Y.3d 88, 783 N.Y.S.2d 485 (June 24, 2004).
[91] Compared to states like Texas, Alabama, Pennsylvania and California, New York had relatively careful trial and appellate procedures. See, Liebman et al., *Capital Attrition, supra* note 63, and Liebman et al., *A Broken System Part II, supra* note 63. The New York model mixed high costs and low numbers of both death verdicts and executions. When New York's statute was invalidated in 2004 in *LaValle*, no executions were within a *decade* of occurring because of state and federal review proceedings that still remained to be exhausted.
[92] Gene Warner, "The Death Penalty Debate Goes On," BUFFALO EVENING NEWS, July 11, 2005, at A1.

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decided in New York while the death penalty statute was in effect, 153 were sentenced to life without parole.[93]

For most states to hold to this approach, the state would have to incur the same extremely high monetary costs.[94] Given the procedural and substantive restrictions in the proposed statute, there would be no more than one or two death sentences each year statewide. Given the pace of appeals, we would anticipate no more than two or three executions total in the next *15 to 20 years.* The expected cost to the State over that 20-year period would be at a minimum $100 million in current dollars --- or about $50-75 million per execution --- beyond what it would cost the State to rely on life without parole.[95] There may be a relatively low risk of executing innocent people – but only because of the low probability that *anyone* would be executed.

These cost estimates suggest a critical policy question that should guide the state legislatures as they debate the future of capital punishment. First, if a state is going to spend $500 million on law enforcement over the next two decades, is the *best* use of that money to buy two or three executions -- along with a dozen or two *initial* capital prosecutions that are most likely to end up in *non*-capital plea bargains and jury verdicts, and a predictable 10 court reversals, retrials, and lesser sentences for every execution? Does a state gain more public safety by spending half a billion dollars or more to execute two or three of the state's murderers during that period or, for example, by funding

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[93] *Id.*
[94] The proposed use of DNA and other forensic testing in each case will increase costs above the estimates in other state where these tests are less common.
[95] The emphasis on scientific testing of DNA and other evidence in the proposed bill will raise these costs even higher, especially given the necessity for high reliability in lab standards.

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additional police detectives, prosecutors, and judges to arrest and incarcerate the murderers, rapists, and robbers who currently escape any punishment because of insufficient law-enforcement resources?

IV. Conclusion

The threshold question for the future of capital punishment goes to the heart of the role of deterrence in American capital punishment law and joins with the problematics of cost. In 1972, in *Furman v. Georgia*,[96] the U.S. Supreme Court reversed every capital statute in the country. Its decision was fragmented among several opinions, but the clearest was Justice White's:

> "...that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death or so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.
>
> Most important, a major goal of the criminal law -- to deter others by punishing the convicted criminal -- would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. *But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct*

[96] 408 US 238 (1972)

> *and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted* (emphasis added). "[97]

When only a tiny proportion of the individuals who commit murder are sentenced to death, capital punishment is unconstitutionally irrational because it serves no identifiable penal function. A death penalty that is almost never used serves no deterrent function because no would-be murderer can expect to be executed. Nor can a rarely used death penalty serve a declarative or symbolic function to express the punishment society deems appropriate for murder, because that crime will almost never lead to that penalty. The lesson of *Furman* will once again haunt the present day reality of the 38 states that statutorily authorize capital punishment and raise critical constitutional concerns. Accordingly, a threshold question for the states and the nation is whether the necessary and admirable efforts to avoid error and the horror of the execution of the innocent won't – after many hundreds of millions of dollars of trying – burden the state with a death penalty that will be overturned because of this inevitable constitutional problem?

[97] *Id* at 311

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
June 27, 2007

Opening Statement of U.S. Senator Russ Feingold
Senate Judiciary Subcommittee on the Constitution Hearing
On "Oversight of the Federal Death Penalty"

June 27, 2007

Good morning, and welcome to this hearing of the Constitution Subcommittee entitled "Oversight of the Federal Death Penalty." We are honored to have with us this morning some very distinguished witnesses. I appreciate the effort they have made to be here today.

Let me start by making a few opening remarks and then we will turn to the representative from the Department of Justice who will be the sole witness on our first panel.

This is the first oversight hearing on the federal death penalty that the Senate Judiciary Committee has held in six years. Until recently, Congress has asked few questions about how the federal death penalty is being implemented, and we received little information as a result. Indeed, it is fitting that we will hear from some of the same organizations that testified at that last hearing in June 2001. That is because in some respects, we know little more today than we did six years ago.

That said, I appreciate that the Justice Department has responded to written questions that I sent in advance of this hearing. Those responses begin the process of Congress obtaining the information it needs to conduct oversight in this area.

And we have a lot of ground to cover. There have been many developments in the last six years. In 2001, the Justice Department made controversial changes to the protocols for Justice Department review of death-eligible cases. The new protocols required U.S. Attorneys for the first time to get Attorney General approval to enter into plea bargains that take the death penalty off the table. This resulted, in one New York case, in Attorney General Ashcroft nullifying a plea agreement in which a defendant had agreed to cooperate with the government in exchange for pleading guilty to a non-capital murder charge. This action was heavily criticized for jeopardizing future cooperation agreements, and Ashcroft finally reversed his decision more than a year later.

Those protocol changes also reversed the presumption against seeking the federal death penalty

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in a local jurisdiction that had already chosen to outlaw capital punishment, and instead stated that a lack of "appropriate punishment" in the local jurisdiction should be a factor in deciding whether to bring a federal capital case.

And just this week, we received another set of newly revised death penalty protocols, which contain broad new confidentiality rules that appear to pull the curtain on how the DOJ death penalty review process is working. I am troubled by this trend toward secrecy. These are public prosecutions brought by the United States of America. Congress and the American people give immense power to the Department of Justice to act in our name and for our protection. We are entitled to know how decisions to seek the ultimate punishment are made. So I will pursue this topic with our witness today to better understand the scope and necessity of these new rules.

What else has happened since 2001? A National Institute of Justice study ordered by Attorney General Reno at the end of the Clinton Administration was delayed for years. It was supposed to examine whether there were racial disparities in application of the federal death penalty, but when it was finally released in 2006, it didn't tell us much. In addition to being criticized by a number of experts for a faulty peer review process, the report left out the most important part of the decision-making process: the point where defendants are brought into the federal system in the first place. And of course, that study only covered 1995 to 2000, so no study has been conducted to evaluate these issues from 2001 forward.

And now, this Committee's investigation into the Department of Justice's firing of a number of well-respected, experienced U.S. Attorneys has revealed the inappropriate politicization of some of the department's most important functions.

The American people should be able to trust fully the ability of the Justice Department, and the Attorney General, to make difficult and nuanced decisions about whether the federal government should pursue the ultimate sentence of death. We should be able to trust that the Attorney General seeks input from all sides, and takes very seriously his decision whether to use the full weight of the United States Government to seek to put a person to death.

That is why we are holding this hearing – because that trust has been shaken. We need to know whether these responsibilities are being treated with the seriousness they deserve.

In particular, I am concerned that in the course of deciding whether to seek death in a case, neither the Deputy Attorney General nor the Attorney General meet personally with their own internal review committee that examines each case in detail. And according to what the Attorney General himself told this Committee earlier this year, a U.S. Attorney was fired, at least in part, because he asked the Attorney General to reconsider the decision to seek the death penalty.

I oppose the death penalty, but I recognize that reasonable people can differ on the question of capital punishment. And different Administrations can take different views about when it is appropriate to seek the federal death penalty. But I hope we can all agree that the decision whether to charge someone with a capital crime and seek to impose the death penalty is one of the most profound decisions our government officials can make. That power must be wielded carefully and judiciously. If carefully considered, law enforcement-based judgments are not winning the day, we need to know about it, and we need to know why. The stakes are simply too high.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
June 27, 2007

Statement of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee
Subcommittee Hearing on "Oversight of the Federal Death Penalty"
Wednesday, June 27, 2007

I would like to thank Senator Feingold for his leadership on the issue of the death penalty and for this important contribution to the Judiciary Committee's work this year to restore oversight to the Department of Justice – oversight that is long overdue. I have long shared Senator Feingold's concerns about the federal death penalty, and I am pleased to join him in working to ensure that decisions about capital punishment are made carefully and are subject to real oversight from Congress.

More than seven years ago, I came to the Senate floor to call attention to a national crisis in the administration of capital punishment. I noted that since the reinstatement of capital punishment in the 1970s, 85 people had been found innocent and released from death row. And I urged Senators on both sides of the aisle, both those who supported the death penalty and those who opposed it, to join in seeking ways to minimize the risk that innocent persons will be put to death.

At that time, I introduced the Innocence Protection Act of 2000, and I worked with many others for years until its passage as part of the Justice For All Act of 2004. That legislation made key strides in ensuring that capital defendants had access to DNA testing and to effective counsel, which greatly reduces the chance of innocent people being sentenced to death. That was an important achievement.

Since that time, though, as in so many other areas, the Bush Administration has proceeded on its own path and in secrecy. They have sought to increase the use of the federal death penalty nationwide, even in states that do not want it; they have consistently failed to allocate funding for Innocence Protection Act; and most disturbingly, they have apparently insisted on requesting the death penalty in cases lacking strong evidence over the strenuous objections of dedicated United States Attorneys.

I was struck by the testimony today of former U.S. Attorney Paul Charlton, who reports that he vigorously opposed seeking the death penalty in one case with no forensic evidence, but that his opposition was dismissed without any opportunity for him to discuss the matter with the

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Attorney General. Even more troubling, as Deputy Attorney General McNulty's chief of staff Michael Elston told Mr. Charlton at the time, Mr. McNulty and Attorney General Gonzales "had spent a significant amount of time on this issue ?, perhaps as much as 5 or 10 minutes."

It is beyond obvious to say that 5 or 10 minutes is not sufficient to make a careful decision about whether to seek to execute a person in a difficult case. But I worry that the Attorney General and the Deputy Attorney General may also have taken no more than 5 or 10 minutes in deciding to accept the recommendation from the White House or elsewhere that Mr. Charlton be fired in spite of his courageous and diligent service.

I also appreciate the testimony of Roberto Sanchez Ramos, the Secretary of Justice for Puerto Rico, for sharing his concerns about the imposition of the death penalty by the federal government on jurisdictions like Puerto Rico that have chosen not to have the death penalty in their state systems. I am sympathetic because Vermont, like Puerto Rico, is a non-death penalty state that nonetheless has seen this Justice Department seek the death penalty in that jurisdiction.

Through all of this, the leadership of the Department of Justice has kept its decision-making on these life or death issues quiet, out of the light of day. It is time for us to shine some light on these issues, and this hearing is an important start.

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The Senate Committee on the Judiciary Subcommittee on the Constitution

"Oversight of the Federal Death Penalty"

Wednesday, June 27, 2007

Statement by Congressman Daniel E. Lungren

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First of all, I would like to thank Chairman Feingold, and Ranking Member Brownback for this opportunity to share my views with the Judiciary Committee Subcommittee on the Constitution, concerning the responsibility for the enforcement of capital punishment in our society. As the former Attorney General of the State of California, this is an issue with which I have personal experience in that my office was responsible for handling capital case appellate litigation. For a period of eight years, it was my obligation to seek justice in these cases on behalf the families of murder victims, as well as the People of the State of California. In this regard, I would like to focus my comments on the need for prosecutorial accountability in the public policy process and to offer some additional comments regarding the issue of capital punishment.

The Responsibility for Public Policy

The office of Attorney General is an elective position in my state. During my campaign, I made it clear that if elected, it was my intention to alter the priorities of the California Department of Justice by reorienting the focus of the office towards a greater emphasis on criminal justice issues. I expressed my belief that the first responsibility of government is to protect innocent

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people from criminal violence. It was, and remains my conviction that the ameliorative potential of other aspects of the law could not be realized in communities which are wracked with violence and fear concerning the fundamental issue of survival itself. My support for capital punishment was an important element of this agenda which the voters ratified upon my election.

However, not long after assuming office, I discovered in the press that there was opposition within the California Department of Justice to the new priorities I intended to establish. I was then informed that there were a number of "conscientious objectors" in the criminal division who were unwilling to work on capital cases. Let me first of all be clear that I have a deep respect for those who happen to disagree with me on the question of the death penalty. However, this presented an interesting dilemma for a department which has the responsibility for enforcing a duly enacted statute concerning enforcement of the ultimate punishment allowed under the law. Furthermore, on a practical level, it soon became apparent that due to resource limitations, the refusal of some in the criminal division to work on a significant component of our caseload imposed an additional burden on the other attorneys in that section.

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Consequently, if I was to be successful in implementing an important element of an agenda which had been ratified by the voters of the State of California, changes in the conscientious objection policy would be necessary. Thus, we moved those who were unwilling to work on capital cases into other positions in the department and re-staffed their slots with individuals who were willing and able to carry out department policy. Although some within and outside of the Department of Justice criticized these changes, it was and remains my view that it was my job to establish policy and to determine how to best utilize the limited resources at our disposal to implement that policy.

An issue which has received some attention recently was also pertinent to this decision relating to the California Department of Justice. Should politics influence the conduct of those responsible for the prosecution and enforcement of the criminal law? In one sense, the answer to this question is clearly no. Pure politics, divorced from the interest of justice should never enter into decisions relating to the course of action taken in an individual case. The prosecution of individuals in the Duke lacrosse case is perhaps the most recent example of a case where political ambition trumped justice.

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Obviously, in capital cases where the question of life and death are involved, political considerations are entirely inappropriate.

However, in a very different sense, the prosecutorial role is one which exists within the larger institutional framework of the political process. In this regard, it was the political system itself which gave legitimacy to my actions relating to the change in policy of the California Department of Justice. As reflected in the Preamble of our nation's Basic Law, it is the people who are ultimately sovereign. The element of accountability is foundational to the democratic process and representative government. Ironically, this principle of accountability is even a factor underlying the deference of the federal judiciary in its exercise of the political question doctrine. It is understood that there are some questions which by their nature require resolution within the political branches because of the check on government power provided by political accountability. This is of particular importance with respect to the enforcement of our criminal laws where ultimate issues concerning liberty and life are at stake. In a democratic society the decisions of whether and how to proceed in such cases rest with policymakers who are accountable to the people.

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In the wake of the recent mid-term elections we have heard the comment that "elections matter." I certainly subscribe to that view and would add that they matter in a sense that is perhaps beyond what was intended by this brief observation. They matter because of the importance of the role of the public in the affirmation of public policy. In short, the people of California had every right to expect that I would take the necessary action to ensure that the policies that I presented for their approval were carried out.

The Question of Capital Punishment

On the more general question of the death penalty, as both the Attorney General of California and as a Member of Congress it has been my interaction with the survivors of those who have been victimized by murder which has profoundly affected my views on the question of capital punishment

In this regard, the availability of the ultimate punishment in first degree murder cases is necessary for society to express the premium it places on innocent human life. There are, in my estimation, justifiable grounds for government to clarify through the instrument of the law that if you intentionally take innocent human life, the price that you will pay will

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involve the forfeiture of your own life. To demand anything less would entail the devaluation of innocent human life itself.

I do not accept the blanket argument that life without the possibility of parole negates the need for capital punishment. As the Charles Ray Allen case demonstrated, permanent residence in a penal institution does not necessarily translate into the kind of incapacitation that we might hope for. Allen was already serving a life sentence for murder when he masterminded the additional murders of three innocent young people. Although he was finally executed after 25 years behind bars, this cold blooded killer should not have been in the position to kill three additional human beings while serving a life sentence.

My support for the death penalty is rooted in the conviction that it may be necessary to serve the interests of justice. Furthermore, there are a growing number of studies which point to the conclusion that the imposition of capital punishment results in anywhere between three and eighteen lives being saved by each execution.

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At the same time, the question relating to the possible innocence of someone being convicted of murder is a matter that all of us should take most seriously. We must devote ourselves to the proposition that no innocent person should suffer the imposition of capitol punishment. However, we must be equally committed to the notion that no guilty person should escape justice. As Cass Sunstein and Adriane Vermeule suggest in the December 2005 issue of Stanford Law Review, we must concern ourselves with the prospect that "foregoing any given execution may be equivalent to condemning some unidentified people to a premature and violent death." In short, the attempt by death penalty opponents to craft an unequivocal moral argument against capital punishment fails in that it does not adequately account for the potential impact on crime victims which would be entailed by its repeal.

Conclusion

Those engaged in capital litigation on behalf of the people are faced with the responsibility to seek justice. Regardless, of one's views concerning capital punishment there should be room for common ground concerning the paramount importance of a policy framework which maximizes accountability based upon a proximity to the political process. For this is the foundational source of legitimacy in a democratic society.

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Testimony of

Dr. David B. Muhlhausen

June 27, 2007

Statement of
David B. Muhlhausen, Ph.D.
Senior Policy Analyst
Center for Data Analysis
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Before the Subcommittee on
Constitution, Civil Rights, and Property Rights of the
Committee on the Judiciary of the United States Senate

Delivered June 27, 2007

Introduction

My name is David Muhlhausen. I am Senior Policy Analyst in the Center for Data Analysis at The Heritage Foundation. I thank Chairman Russell Feingold, Ranking Member Sam Brownback, and the rest of the subcommittee for the opportunity to testify today. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

While opponents of capital punishment have been very vocal in their opposition, Gallup opinion polls consistently demonstrate that the American public overwhelmingly supports capital punishment.1 (See Chart 1.) In Gallup's most recent poll, 67 percent of Americans favor the death penalty for those convicted of murder, while only 28 percent are opposed. From 2000 to the most recent poll in 2006, support for capital punishment consistently runs a 2:1 ratio in favor.

Despite strong public support for capital punishment, federal, state, and local officials must continually ensure that its implementation rigorously upholds constitutional protections, such as due process and equal protection of the law. However, the criminal process should not be abused to prevent the lawful imposition of the death penalty in appropriate capital cases.

Alleged Racial in Capital Punishment Sentences

As of December 2005, there were 37 prisoners under a sentence of death in the federal system.2 Of these prisoners, 43.2 percent were white, while 54.1 percent were African–American. The

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fact that African–Americans are a majority of federal prisoners on death row and a minority in the overall United States population may lead some to conclude that the federal system discriminates against African–Americans. However, there is little rigorous evidence that such disparities exist in the federal system.

Under a competitive grant process, the National Institute of Justice awarded the RAND Corporation a grant to determine whether racial disparities exist in the federal death penalty system. The resulting 2006 RAND study set out to determine what factors, including the defendant's race, victim's race, and crime characteristics, affect the decision to seek a death penalty case.3 Three independent teams of researchers were tasked with developing their own methodologies to analyze the data. Only after each team independently drew their own conclusions did they share their findings with each other.

When first looking at the raw data without controlling for case characteristics, RAND found that large race effects with the decision to seek the death penalty are more likely to occur when the defendants are white and when the victims are white.4 However, these disparities disappeared in each of the three studies when the heinousness of the crimes was taken into account.5 The RAND study concludes that the findings support the view that decisions to seek the death penalty are driven by characteristics of crimes rather than by race. RAND's findings are very compelling because three independent research teams, using the same data but different methodologies, reached the same conclusions.

While there is little evidence that the federal capital punishment system treats minorities unfairly, some may argue that the death penalty systems in certain states may be discriminatory. One such state is Maryland. In May 2001, then-Governor Parris Glendening instituted a moratorium on the use of capital punishment in Maryland in light of concerns that it may be unevenly applied to minorities, especially African–Americans. In 2000, Governor Glendening commissioned University of Maryland Professor of Criminology Ray Paternoster to study the possibility of racial discrimination in the application of the death penalty in Maryland. The results of Professor Paternoster's study found that black defendants who murder white victims are substantially more likely to be charged with a capital crime and sentenced to death.6

In 2003, Governor Robert L. Ehrlich wisely lifted the moratorium. His decision was justified. In 2005, a careful review of the study by Professor of Statistics and Sociology Richard Berk of the University of California, Los Angeles, and his coauthors found that the results of Professor Paternoster's study do not stand up to statistical scrutiny.7 According to Professor Berk's re-analysis, "For both capital charges and death sentences, race either played no role or a small role that is very difficult to specify. In short, it is very difficult to find convincing evidence for racial effects in the Maryland data and if there are any, they may not be additive."8 Further, race may have a small influence because "cases with a black defendant and white victim or 'other' racial combination are less likely to have a death sentence."9

The Deterrent Effect of the Death Penalty

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Federal, state, and local officials need to recognize that the death penalty saves lives. How capital punishment affects murder rates can be explained through general deterrence theory, which supposes that increasing the risk of apprehension and punishment for crime deters individuals from committing crime. Nobel laureate Gary S. Becker's seminal 1968 study of the economics of crime assumed that individuals respond to the costs and benefits of committing crime.10

According to deterrence theory, criminals are no different from law-abiding people. Criminals "rationally maximize their own self-interest (utility) subject to constraints (prices, incomes) that they face in the marketplace and elsewhere."11 Individuals make their decisions based on the net costs and benefits of each alternative. Thus, deterrence theory provides a basis for analyzing how capital punishment should influence murder rates. Over the years, several studies have demonstrated a link between executions and decreases in murder rates. In fact, studies done in recent years, using sophisticated panel data methods, consistently demonstrate a strong link between executions and reduced murder incidents.

Early Research. The rigorous examination of the deterrent effect of capital punishment began with research in the 1970s by Isaac Ehrlich, currently a University of Buffalo Distinguished Professor of Economics.12 Professor Ehrlich's research found that the death penalty had a strong deterrent effect. While his research was debated by other scholars,13 additional research by Professor Ehrlich reconfirmed his original findings.14 In addition, research by Professor Stephen K. Layson of the University of North Carolina at Greensboro strongly reconfirmed Ehrlich's previous findings.15

Recent Research. Numerous studies published over the past few years, using panel data sets and sophisticated social science techniques, are demonstrating that the death penalty saves lives.16 Panel studies observe multiple units over several periods. The addition of multiple data collection points gives the results of capital punishment panel studies substantially more credibility than the results of studies that have only single before-and-after intervention measures. Further, the longitudinal nature of the panel data allows researchers to analyze the impact of the death penalty over time that cross-sectional data sets cannot address.

Using a panel data set of over 3,000 counties from 1977 to 1996, Professors Hashem Dezhbakhsh, Paul R. Rubin, and Joanna M. Shepherd of Emory University found that each execution, on average, results in 18 fewer murders.17 Using state-level panel data from 1960 to 2000, Professors Dezhbakhsh and Shepherd were able to compare the relationship between executions and murder incidents before, during, and after the U.S. Supreme Court's death penalty moratorium.18 They found that executions had a highly significant negative relationship with murder incidents. Additionally, the implementation of state moratoria is associated with the increased incidence of murders.

Separately, Professor Shepherd's analysis of monthly data from 1977 to 1999 found three important findings.19

First, each execution, on average, is associated with three fewer murders. The deterred murders included both crimes of passion and murders by intimates.

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Second, executions deter the murder of whites and African–Americans. Each execution prevents the murder of one white person, 1.5 African–Americans, and 0.5 persons of other races.

Third, shorter waits on death row are associated with increased deterrence. For each additional 2.75-year reduction in the death row wait until execution, one murder is deterred.

Professors H. Naci Mocan and R. Kaj Gittings of the University of Colorado at Denver have published two studies confirming the deterrent effect of capital punishment. The first study used state-level data from 1977 to 1997 to analyze the influence of executions, commutations, and removals from death row on the incidence of murder.20 For each additional execution, on average, about five murders were deterred. Alternatively, for each additional commutation, on average, five additional murders resulted. A removal from death row by either state courts or the U.S. Supreme Court is associated with an increase of one additional murder. Addressing criticism of their work,21 Professors Mocan and Gittings conducted additional analyses and found that their original findings provided robust support for the deterrent effect of capital punishment.22

Two studies by Paul R. Zimmerman, a Federal Communications Commission economist, also support the deterrent effect of capital punishment. Using state-level data from 1978 to 1997, Zimmerman found that each additional execution, on average, results in 14 fewer murders.23 Zimmerman's second study, using similar data, found that executions conducted by electrocution are the most effective at providing deterrence.24

Using a small state-level data set from 1995 to 1999, Professor Robert B. Ekelund of Auburn University and his colleagues analyzed the effect that executions have on single incidents of murder and multiple incidents of murder.25 They found that executions reduced single murder rates, while there was no effect on multiple murder rates.

In summary, the recent studies using panel data techniques have confirmed what we learned decades ago: Capital punishment does, in fact, save lives. Each additional execution appears to deter between three and 18 murders. While opponents of capital punishment allege that it is unfairly used against African–Americans, each additional execution deters the murder of 1.5 African–Americans. Further moratoria, commuted sentences, and death row removals appear to increase the incidence of murder.

The strength of these findings has caused some legal scholars, originally opposed to the death penalty on moral grounds, to rethink their case. In particular, Professor Cass R. Sunstein of the University of Chicago has commented:

If the recent evidence of deterrence is shown to be correct, then opponents of capital punishment will face an uphill struggle on moral grounds. If each execution is saving lives, the harms of capital punishment would have to be very great to justify its abolition, far greater than most critics have heretofore alleged.26

Conclusion

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Americans support capital punishment for two good reasons. First, there is little evidence to suggest that minorities are treated unfairly. Second, capital punishment produces a strong deterrent effect that saves lives.

* * *

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Testimony of William Otis on the Federal Death Penalty: 06/25/07

Mr. Chairman, Ranking Member Brownback and distinguished Senators,

Thank you for inviting me to testify about issues relevant to the proposed Federal Death Penalty Abolition Act. Like the great majority of our citizens, I support keeping the death penalty for particularly gruesome and heinous murders. At the same time, Mr. Chairman, I want to thank you for your principled and forthright stand. You do not seek to disguise your views behind what some market as a death penalty "moratorium," but what is actually intended to be simply the first phase of wholesale abolition. You support abolition, and you say so. This makes an honest debate possible.

Today's discussion of the federal death penalty cannot be divorced from the broader national debate about capital punishment. Indeed, if anything, the federal government's death penalty procedures are widely recognized to be among the most careful and painstaking of any jurisdiction. So if the federal death penalty were to be abolished, it is difficult to see why capital punishment should exist anywhere in the country.

But it should, in federal law as elsewhere. The central reason for opposing abolition of the death penalty is that it is a one-size-fits-all proposition. It would intentionally turn a blind eye to the facts of any particular case, no matter how horrible the crime, how many victims, or how grotesque their fate. Yet more remarkably, it would refuse to consider the facts even where the typical objections to the death penalty, including those that inspire this hearing, have no application whatever. If the proposed legislation had been the law 10 years ago, for example, Timothy McVeigh would be with us today. Presumably he would still be seeking a national audience like the one he got on Sixty Minutes to explain why he was justified in murdering 168 of his fellow creatures, including 19 toddlers in the day care center at the Murrah Building.

It would be wrong to prohibit our juries -- the conscience of our communities -- from imposing the death penalty on a person like McVeigh. It would be especially wrong if it were the product of an a priori edict drafted in Washington. And to promulgate this edict on the basis of questions that might occur in some cases some of the time, but will often have nothing to do with the case at hand, would be incomprehensible. This was aptly explained by none other than Barry Scheck, the head of the Innocence Project, who told the Washington Post (May 2, 2001, p. A3) that, "in McVeigh's case, 'there's no fairness issue...There's no innocence issue. Millions of dollars were spent on his defense. You look at all the issues that normally raise concern about death penalty cases, and not one of them is present in this case, period.'" Mr. Scheck might have added explicitly what was implicit in his remarks, namely, that there was no racial issue either, a fact no serious person disputes. But today's proposed bill would have prevented McVeigh's execution, or the execution of others like him, notwithstanding the fact that the stated reasons for the bill, racial and otherwise, *were entirely irrelevant to his case, and will be entirely irrelevant to dozens if not hundreds of future cases.*

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Some will say it's unfair in the context of this hearing to use McVeigh as an example, but that is not so. There is nothing "unfair" in discussing at a hearing about the death penalty one compelling illustration of why we should keep it. Beyond that, McVeigh *is* fairly representative. Over the last 50 years, two-thirds of those executed by the federal government have been, like McVeigh, white. This largely mirrors the national experience: Since the death penalty was reinstated by the Supreme Court in 1976, nearly three-fifths of executed criminals have been white.

We understand all too well that al-Qaeda terrorists have butchered innocents across the globe, from Madrid to London to New York and Arlington. If today's proposed legislation becomes law, the federal government's ability even to ask a jury to consider the death penalty for terrorists will cease to exist, even if Osama bin Laden himself is in the dock. Millions of Americans would consider that an outrage, and a huge majority would consider it unjust. It is noteworthy that a majority of *even those who in general oppose the death penalty* thought it was appropriate for our domestic terrorist, Timothy McVeigh (USA Today/CNN/Gallup poll, published in USA Today, May 4, 2001, pp. A1 - A2). All told, slightly more than 80% of the public thought the death penalty was right in that case (Ibid). This bill would tell that 80% that, unbeknownst to them, their views are the stalking horse of racism. But that is not true, and it is not the American public I came to know in my years as a prosecutor. We are a fair-minded and conscientious people. When the moral compass of 80% of our fellow citizens says that the death penalty should be imposed, as it did for McVeigh and will for Osama and others, it is not for Congress to tell them -- as this bill would -- that their sense of justice doesn't count.

To preserve our country's heritage that justice must turn on the facts of each case individually considered, I respectfully submit that federal juries should continue to have discretion, acting out of conscience in egregious cases, to impose the death penalty.

I shall be pleased to answer any questions you may have. ###

Myth: We're executing the innocent.

Fact: There has been no demonstration that an innocent person has been executed in the United States at least since the death penalty was reinstated in 1976, and probably not for decades before then.

Despite numerous claims by abolitionists, there has been no showing accepted by a court or by any neutral group (that is, by any group not already opposed to the death penalty) that the United States has executed a single innocent person for more than a generation, if not for decades. Abolitionists thought they had their "poster boy" in Roger Keith Coleman, a Virginia inmate executed in 1992 for raping and murdering his sister-in-law. Coleman's case made national headlines as the model of the death penalty's supposed injustice -- a rural, Southern community in a rush to pin the murder on the first person it could find, especially if poor or "marginalized," while ignoring evidence of the "real killer."

The abolitionists' argument had a problem, however. It was false, as was proved by the DNA testing abolitionists (also falsely) claimed the state would never allow. When Coleman

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was shown by DNA to have been the killer the prosecutor, judge and jury said he was, the abolitionist lobby simply moved on, while still insisting that the rest of the country was an embarrassing anachronism for propping up a system that condemns and kills "innocent people."

The most stunning and comprehensive rebuttal to the notion that we execute the innocent was given by Justice Scalia in Part III of his concurring opinion in Kansas v. Marsh, 548 U.S. ___ (2006) (available at http://www.supremecourtus.gov/opinions/05pdf/04-1170.pdf). Unable to improve on Justice Scalia's work, I re-produce it below:

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There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently-and indeed, many of them would still have it if the democratic will prevailed.3 <http://www.law.cornell.edu/supct/html/04-1170.ZC.html#3>) It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. For that reason, I take the trouble to point out that the dissenting opinion has nothing substantial to support it.

It should be noted at the outset that the dissent does not discuss a single case-not one-in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has confirmed guilt.

This happened, for instance, only a few months ago in the case of Roger Coleman. Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the poster-child for the abolitionist lobby. See Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., Washington Post, Jan. 13, 2006, p. A1; Dao, DNA Ties Man Executed in '92 to the Murder He Denied, N. Y. Times, Jan. 13, 2006, p. A14. Around the time of his eventual execution, "his picture was on the cover of Time magazine ('This Man Might Be Innocent. This Man Is Due to Die'). He was interviewed from death row on 'Larry King Live,' the 'Today' show, 'Primetime Live,' 'Good Morning America' and 'The Phil Donahue Show.' " Frankel, Burden of Proof, Washington Post, May 14, 2006, pp. W8, W11. Even one Justice of this Court, in an opinion filed shortly before the execution, cautioned that "Coleman has now produced substantial evidence that he may be innocent of the crime for which he was sentenced to die." Coleman v. Thompson, 504 U. S. 188 <http://www.law.cornell.edu/supct-cgi/get-us-cite?504+188> , 189 (1992) (Blackmun, J., dissenting). Coleman ultimately failed a lie-detector test offered by the Governor of Virginia as a condition of a possible stay; he was executed on May 20, 1992. Frankel, supra, at W23; Glod & Shear, Warner Orders DNA Testing in Case of Man Executed in '92, Washington Post, Jan. 6, 2006, pp. A1, A6.

In the years since then, Coleman's case became a rallying point for abolitionists, who

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hoped it would offer what they consider the "Holy Grail: proof from a test tube that an innocent person had been executed." Frankel, supra, at W24. But earlier this year, a DNA test ordered by a later Governor of Virginia proved that Coleman was guilty, see, e.g., Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., supra, at A1; Dao, supra, at A14, even though his defense team had "proved" his innocence and had even identified "the real killer" (with whom they eventually settled a defamation suit). See Frankel, supra, at W23. And Coleman's case is not unique. See Truth and Consequences: The Penalty of Death, in Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case, 128-129 (H. Bedau & P. Cassell eds. 2004) (discussing the cases of supposed innocents Rick McGinn and Derek Barnabei, whose guilt was also confirmed by DNA tests).

Instead of identifying and discussing any particular case or cases of mistaken execution, the dissent simply cites a handful of studies that bemoan the alleged prevalence of wrongful death sentences. One study (by Lanier and Acker) is quoted by the dissent as claiming that " 'more than 110' death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and 'hundreds of additional wrongful convictions in potentially capital cases have been documented over the past century.' " Post, at 8 (opinion of Souter, J.). For the first point, Lanier and Acker cite the work of the Death Penalty Information Center (more about that below) and an article in a law review jointly authored by Radelet, Lofquist, and Bedau (two professors of sociology and a professor of philosophy). For the second point, they cite only a 1987 article by Bedau and Radelet. See Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21. In the very same paragraph which the dissent quotes, Lanier and Acker also refer to that 1987 article as "hav[ing] identified 23 individuals who, in their judgment, were convicted and executed in this country during the 20th century notwithstanding their innocence." Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psychology, Public Policy & Law 577, 593 (2004). This 1987 article has been highly influential in the abolitionist world. Hundreds of academic articles, including those relied on by today's dissent, have cited it. It also makes its appearance in judicial decisions-cited recently in a six-judge dissent in House v. Bell, 386 F. 3d 668, 708 (CA6 2004) (en banc) (Merritt, J., dissenting), for the proposition that "the system is allowing some innocent defendants to be executed." The article therefore warrants some further observations.

The 1987 article's obsolescence began at the moment of publication. The most recent executions it considered were in 1984, 1964, and 1951; the rest predate the Allied victory in World War II. (Two of the supposed innocents are Sacco and Vanzetti.) Bedau & Radelet, supra, at [illegible]. Even if the innocence claims made in this study were true, all except (perhaps) the 1984 example would cast no light upon the functioning of our current system of capital [illegible]. The legal community's general attitude toward criminal defendants, the legal [illegible] States afford, the constitutional guarantees this Court enforces, and the scope of federal habeas review, are all vastly different from what they were in 1961. So are the scientific means of establishing guilt, and hence innocence-which are now so striking in their operation and effect that they are the subject of more than one popular TV series. (One of these new means, of course, is DNA testing-which the dissent seems to think is primarily a [illegible] to identify defendants erroneously convicted, rather than a highly effective way to avoid [illegible] of the innocent.)

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But their current relevance aside, this study's conclusions are unverified. And if the support for its most significant conclusion-the execution of 23 innocents in the 20th century-is any indication of its accuracy, neither it, nor any study so careless as to rely upon it, is worthy of credence. The only execution of an innocent man it alleges to have occurred after the restoration of the death penalty in 1976-the Florida execution of James Adams in 1984-is the easiest case to verify. As evidence of Adams' innocence, it describes a hair that could not have been his as being "clutched in the victim's hand," Bedau & Radelet, supra, at 91. The hair was not in the victim's hand; "[i]t was a remnant of a sweeping of the ambulance and so could have come from another source." Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 131 (1988). The study also claims that a witness who "heard a voice inside the victim's home at the time of the crime" testified that the "voice was a woman's," Bedau & Radelet, supra, at 91. The witness's actual testimony was that the voice, which said " ' "In the name of God, don't do it" ' " (and was hence unlikely to have been the voice of anyone but the male victim), " 'sounded "kind of like a woman's voice, kind of like strangling or something U ." ' " Markman & Cassell, Protecting the Innocent, at 130. Bedau and Radelet failed to mention that upon arrest on the afternoon of the murder Adams was found with some $200 in his pocket-one bill of which "was stained with type O blood. When Adams was asked about the blood on the money, he said that it came from a cut on his finger. His blood was type AB, however, while the victim's was type O." Id., at 132. Among the other unmentioned, incriminating details: that the victim's eyeglasses were found in Adams' car, along with jewelry belonging to the victim, and clothing of Adams' stained with type O blood. Ibid. This is just a sample of the evidence arrayed against this "innocent." See id., at 128-133, 148-150.

Critics have questioned the study's findings with regard to all its other cases of execution of alleged innocents for which "appellate opinions U set forth the facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of the authors' conclusions." Id., at 134. (For the rest, there was not "a reasonably complete account of the facts U readily available," id., at 145.) As to those cases, the only readily verifiable ones, the authors of the 1987 study later acknowledged, "We agree with our critics that we have not 'proved' these executed defendants to be innocent; we never claimed that we had." Bedau & Radelet, The Myth of Infallibility: A Reply to Markman and Cassell, 41 Stan. L. Rev. 161, 164 (1988). One would have hoped that this disclaimer of the study's most striking conclusion, if not the study's dubious methodology, would have prevented it from being cited as authority in the pages of the United States Reports. But alas, it is too late for that. Although today's dissent relies on the study only indirectly, the two dissenters who were on the Court in January 1993 have already embraced it. "One impressive study," they noted (referring to the 1987 study), "has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984." Herrera v. Collins, 506 U. S. 390 <http://www.law.cornell.edu/supct-cgi/get-us-cite?506+390> , 430, n. 1 (1993) (Blackmun, J., joined by Stevens and Souter, JJ., dissenting).4 <http://www.law.cornell.edu/supct/html/04-1170.ZC.html#4>

Remarkably avoiding any claim of erroneous executions, the dissent focuses on the large numbers of non-executed "exonerees" paraded by various professors. It speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than as a consequence of the functioning of our legal system.

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Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

Of course even in identifying exonerees, the dissent is willing to accept anybody's say-so. It engages in no critical review, but merely parrots articles or reports that support its attack on the American criminal justice system. The dissent places significant weight, for instance, on the Illinois Report (compiled by the appointees of an Illinois Governor who had declared a moratorium upon the death penalty and who eventually commuted all death sentences in the State, see Warden, Illinois Death Penalty Reform: How It Happened, What It Promises, 95 J. Crim. L. & C. 381, 406-407, 410 (2006)), which it claims shows that "false verdicts" are "remarkable in number." Post, at 9 (opinion of Souter, J.). The dissent claims that this Report identifies 13 inmates released from death row after they were determined to be innocent. To take one of these cases, discussed by the dissent as an example of a judgment "as close to innocence as any judgments courts normally render," post, at 7, n. 2: In People v. Smith, 185 Ill. 2d 532, 708 N. E. 2d 365 (1999) the defendant was twice convicted of murder. After his first trial, the Supreme Court of Illinois "reversed [his] conviction based upon certain evidentiary errors" and remanded his case for a new trial. Id., at 534, 708 N. E. 2d, at 366. The second jury convicted Smith again. The Supreme Court of Illinois again reversed the conviction because it found that the evidence was insufficient to establish guilt beyond a reasonable doubt. Id., at 542-543, 708 N. E. 2d, at 370-371. The court explained:

"While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. . . . A not guilty verdict expresses no view as to a defendant's innocence. Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof." Id., at 545, 708 N. E. 2d, at 371.

This case alone suffices to refute the dissent's claim that the Illinois Report distinguishes between "exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact." Post, at 7, n. 2. The broader point, however, is that it is utterly impossible to regard "exoneration"-however casually defined-as a failure of the capital justice system, rather than as a vindication of its effectiveness in releasing not only defendants who are innocent, but those whose guilt has not been established beyond a reasonable doubt.

Another of the dissent's leading authorities on exoneration of the innocent is Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523 (2006) (hereinafter Gross). The dissent quotes that study's self-congratulatory "criteria" of exoneration-seemingly so rigorous that no one could doubt the study's reliability. See post, at 8, n. 3 (opinion of Souter, J.). But in fact that article, like the others cite it, is notable not for its rigorous investigation and analysis, but for the fervor of its belief that the American justice system is condemning the innocent "in numbers," as the dissent puts it, "never imagined before the development of DNA tests." Post, at 6 (opinion of Souter, J.). Among the article's list of 74 "exonerees," Gross 529, is Jay Smith of Pennsylvania. Smith-a school principal-earned three death sentences for slaying one of his students and her two young children. See Smith v. Holtz, 210 F. 3d 186, 188 (CA3 2000).

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His retrial for triple murder was barred on double jeopardy grounds because of prosecutorial misconduct during the first trial. Id., at 194. But Smith could not leave well enough alone. He had the gall to sue, under 42 U. S. C. §1983 <http://www.law.cornell.edu/supct-cgi/get-usc-cite/42/1983> , for false imprisonment. The Court of Appeals for the Third Circuit affirmed the jury verdict for the defendants, observing along the way that "our confidence in Smith's convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts." 210 F. 3d, at 198.

Another "exonerated" murderer in the Gross study is Jeremy Sheets, convicted in Nebraska. His accomplice in the rape and murder of a girl had been secretly tape recorded; he "admitted that he drove the car used in the murder U , and implicated Sheets in the murder." Sheets v. Butera, 389 F. 3d 772, 775 (CA8 2004). The accomplice was arrested and eventually described the murder in greater detail, after which a plea agreement was arranged, conditioned on the accomplice's full cooperation. Ibid. The resulting taped confession, which implicated Sheets, was "[t]he crucial portion of the State's case," State v. Sheets, 260 Neb. 325, 327, 618 N. W. 2d 117, 122 (2000). But the accomplice committed suicide in jail, depriving Sheets of the opportunity to cross-examine him. This, the Nebraska Supreme Court held, rendered the evidence inadmissible under the Sixth Amendment <http://www.law.cornell.edu/supct-cgi/get-const?amendmentvi> . Id., at 328, 335-351, 618 N. W. 2d, at 123, 127-136. After the central evidence was excluded, the State did not retry Sheets. Sheets v. Butera, 389 F. 3d, at 776. Sheets brought a §1983 claim; the U. S. Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment against him. Id., at 780. Sheets also sought the $1,000 he had been required to pay to the Nebraska Victim's Compensation Fund; the State Attorney General-far from concluding that Sheets had been "exonerated" and was entitled to the money-refused to return it. The court action left open the possibility that Sheets could be retried, and the Attorney General did "not believe the reversal on the ground of improper admission of evidence U is a favorable disposition of charges," Neb. Op. Atty. Gen. No. 01036 (Nov. 9), 2001 WL 1503144, *3.

In its inflation of the word "exoneration," the Gross article hardly stands alone; mischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of "innocence" in the death-penalty context suffer from the same defect. Perhaps the best-known of them isthe List of Those Freed From Death Row, maintained by the Death Penalty Information Center. See http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 This includes the cases from the Gross article described above, but also enters some dubious candidates of its own. Delbert Tibbs is one of them. We considered his case in Tibbs v. Florida, 457 U. S. 31 <http://www.law.cornell.edu/supct-cgi/get-us-cite?457+31> (1982) , concluding that the Double Jeopardy Clause does not bar a retrial when a conviction is "revers[ed] based on the weight, rather than the sufficiency, of the evidence," id., at 32. The case involved a man and a woman hitchhiking together in Florida. A driver who picked them up sodomized and raped the woman, and killed her boyfriend. She eventually escaped and positively identified Tibbs. See id., at 32-33. The Florida Supreme Court reversed the conviction on a 4-to-3 vote. 337 So. 2d 788 (1976). The Florida courts then grappled with whether Tibbs could be retried without violating the Double Jeopardy Clause. The Florida Supreme Court determined not only that there was no double-jeopardy problem, 397 So. 2d 1120, 1127 (1981) (per curiam), but that the very basis on which it had reversed the conviction was no

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longer valid law, id., at 1125, and that its action in "reweigh[ing] the evidence" in Tibbs' case had been "clearly improper," id., at 1126. After we affirmed the Florida Supreme Court, however, the State felt compelled to drop the charges. The State Attorney explained this to the Florida Commission on Capital Cases: " 'By the time of the retrial, [the] witness/victim U had progressed from a marijuana smoker to a crack user and I could not put her up on the stand, so I declined to prosecute. Tibbs, in my opinion, was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free. His 1974 conviction was not a miscarriage of justice.' " Florida Commission on Capital Cases, Case Histories: A Review of 24 Individuals Released From Death Row 136-137 (rev. Sept. 10, 2002) http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf. Other state officials involved made similar points. Id., at 137.

Of course, even with its distorted concept of what constitutes "exoneration," the claims of the Gross article are fairly modest: Between 1989 and 2003, the authors identify 340 "exonerations" nationwide-not just for capital cases, mind you, nor even just for murder convictions, but for various felonies. Gross 529. Joshua Marquis, a district attorney in Oregon, recently responded to this article as follows:

"[L]et's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate 027 percent-or, to put it another way, a success rate of 99.973 percent." The Innocent and the Shammed, N. Y. Times, Jan. 26, 2006, p. A23.

The dissent's suggestion that capital defendants are especially liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle. The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), none of cases included in the .027% error rate for American verdicts involved a capital defendant erroneously executed.

Since 1976 there have been approximately a half million murders in the United States. In the same time, [illegible],000 murderers have been sentenced to death; about 950 of them have been executed, and about 3,700 inmates are currently on death row. See Marquis, The Myth of [illegible] 95], Crim. L. & C. 501, 518 (2006). As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost [illegible] of all death sentences are overturned. See ibid. "Virtually none" of these reversals, however, are attributable to a defendant's " 'actual innocence.' " Ibid. Most are based on legal errors that have little or nothing to do with guilt. See id., at 519-520. The studies cited by the dissent demonstrate nothing more.

[illegible] are human institutions, courts and juries are not perfect. One cannot have a system [illegible] punishment without accepting the possibility that someone will be punished

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mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment-in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes-outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.

Notes

1 <http://www.law.cornell.edu/supct/html/04-1170.ZC.html#1ref> The dissent observes that Congress did not initially grant us the full jurisdiction that the Constitution authorizes, but only allowed us to review cases rejecting the assertion of governing federal law. See post, at 3-4, n. (opinion of Stevens, J.). That is unsurprising and immaterial. The original Constitution contained few guarantees of individual rights against the States, and in clashes of governmental authority there was small risk that the state courts would erroneously side with the new Federal Government. (In 1789, when the first Judiciary Act was passed, the Bill of Rights had not yet been adopted, and once it was, it did not apply against the States, see Barron ex rel. Tiernan v. Mayor of Baltimore, 7Pet. 243 (1833).) Congress would have been most unlikely to contemplate that state courts would erroneously invalidate state actions on federal grounds. The early history of our jurisdiction assuredly does not support the dissent's awarding of special preference to the constitutional rights of criminal defendants. Even with respect to federal defendants (who did enjoy the protections of the Bill of Rights), "during the first 100 years of the Court's existence there was no provision made by Congress for Supreme Court review of federal criminal convictions, an omission that Congress did not remedy until 1889 and beyond." R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 66 (8th ed. 2002). In any case, present law is plain. The 1988 statute cited by the dissent and forming the basis of our current certiorari jurisdiction places States and defendants in precisely the same position. They are both entitled to petition for our review.

2 <http://www.law.cornell.edu/supct/html/04-1170.ZC.html#2ref> Not only are the dissent's views on the erroneous imposition of the death penalty irrelevant to the present case, but the dissent's proposed holding on the equipoise issue will not necessarily work to defendants' advantage. The equipoise provision of the Kansas statute imposes the death penalty only when the State proves beyond a reasonable doubt that mitigating factors do not outweigh the aggravators. See ante, at 2. If we were to disallow Kansas's scheme, the State could, as Marsh freely admits, replace it with a scheme requiring the State to prove by a mere preponderance of the evidence that the aggravators outweigh the mitigators. See Tr. of Oral Rearg. 36. I doubt that any defense counsel would accept this trade. The "preponderance" rule, while it sounds better, would almost surely produce more death sentences than an "equipoise beyond a reasonable doubt" requirement.

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3 <http://www.law.cornell.edu/supct/html/04-1170.ZC.html#3ref> It is commonly recognized that "[m]any European countries U abolished the death penalty in spite of public opinion rather than because of it." Bibas, Transparency and Participation in Criminal Procedure, 81 N. Y. U. L. Rev. 911, 931-932 (2006). See also id., at 932, n. 88. Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union. See Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L. J. 487, 525 (2005); Demleitner, Is There a Future for Leniency in the U. S. Criminal Justice System? 103 Mich. L. Rev. 1231, 1256, and n. 88 (2005).The European Union advocates against the death-penalty even in America; there is a separate death-penalty page on the website of the Delegation of the European Commission to the U. S. A. See http://www.eurunion.org/legislat/deathpenalty/deathpenhome.htm (as visited June 17, 2006, and available in Clerk of Court's case file). The views of the European Union have been relied upon by Justices of this Court (including all four dissenters today) in narrowing the power of the American people to impose capital punishment. See, e.g., Atkins v. Virginia, 536 U. S. 304 <http://www.law.cornell.edu/supct-cgi/get-us-cite?536+304> , 317, n. 21 (2002) (citing, for the views of "the world community," the Brief for the European Union as Amicus Curiae).

4 <http://www.law.cornell.edu/supct/html/04-1170.ZC.html#4ref> See also Callins v. Collins, 510 U. S. 1141 <http://www.law.cornell.edu/supct-cgi/get-us-cite?510+1141> , n. 8 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Innocent persons have been executed, see Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173-179 (1987), perhaps recently, see Herrera v. Collins, 506 U. S. 390 <http://www.law.cornell.edu/supct-cgi/get-us-cite?506+390> (1993) , and will continue to be executed under our death penalty scheme").

Myth: The death penalty does not deter murder.

Fact: Anecdotal evidence, the historical relationship between executions and the murder rate, and numerous recent studies all show that the death penalty deters murder. The studies quantify this effect, demonstrating that between three and eighteen murders are deterred for every execution, thus saving innocent lives.

Few sensible people doubt that the more severe the penalty, the more deterrent value it has. A great deal of our criminal justice system is built upon this fact. There is only one place where this commonsense proposition is routinely discounted -- the death penalty debate. For years, abolitionists have maintained that not only does the death penalty fail to deter murder, it *stimulates* murder by its "brutalizing effect" and by showing that "society approves of killing."

The abolitionist argument has never stacked up well against experience. Now several recent, independent studies ratify the commonsense conclusion that the death penalty does indeed deter murder. What this means is that it is the imposition of the death penalty, not its abolition, that will save innocent life.

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That the prospect of getting executed deters at least some would-be killers should hardly come as a surprise. As Senator Dianne Feinstein explained to the California District Attorneys Association, "I remember well in the 1960's when I was sentencing a woman convicted of robbery in the first degree and I remember looking at her commitment sheet and I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: 'Why was your gun unloaded?' She said to me: 'So I would not panic, kill somebody, and get the death penalty.' That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent."

Senator Feinstein is not alone in this observation. New York Law School Professor Robert Blecker found something similar in a recorded interview he had with a convicted murderer. The convict had robbed and killed drug dealers in Washington, DC, where he knew there was no death penalty. He specifically did not murder a drug dealer in Virginia because, and only because, he envisioned himself strapped in Virginia's electric chair, which he had seen while imprisoned in that state.

The deterrent effect of the death penalty is supported by a great deal more than these and similar anecdotes. The historical relationship between the death penalty and the murder rate is stark, and it can be stated briefly: When the number of executions goes up, the number of murders goes down. When the number of executions goes down, the number of murders goes up.

Our citizens sometimes forget that we have already had what amounted to a death penalty moratorium. In the 15 years from the end of 1965 through 1980, there were only six executions in this country -- a virtual suspension of capital punishment. At the beginning of that period, the murder rate was 5.1 murder victims for every 100,000 people. At the end, it was 10.2 victims -- an exact doubling. In other words, the murder rate doubled during our death penalty "moratorium." But in the 15 years from the end of 1990 through 2005, when there were hundreds of executions (891, to be exact), the murder rate fell from 9.8 to 5.5, a decline of 44%. Moreover, the correlation between an increasing number of executions over that period and a decreasing murder rate is impressive. By far most of the executions during that time were in its second half, and it was during that time that the murder rate dropped to levels that had not been seen since the 1950's (another era in which executions were carried out rather than halted).

It is undoubtedly true that the increase in executions over the last 15 years is not *alone* responsible for the decreasing murder rate. But the idea that it played no role is at best undocumented and at worst preposterous. To repeat: For 40 years, in good times and bad, when we have had more executions we have had less murder, and when we have had fewer executions we have had more murder. There are inevitably attempts to explain away this fact, but a fact it is nonetheless.

Now, several independent studies confirm what history illustrates, namely, that the death penalty saves innocent life. A little more than two weeks ago, on June 11, 2007, MSNBC.com reported an Associated Press story detailing the evidence. I repeat verbatim several relevant portions of that story:

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The steady drumbeat of DNA exonerations - pointing out flaws in the justice system - has weighed against capital punishment. The moral opposition is loud, too, echoed in Europe and the rest of the industrialized world, where all but a few countries banned executions years ago.

What gets little notice, however, is a series of academic studies over the last half-dozen years that claim to settle a once hotly debated argument - whether the death penalty acts as a deterrent to murder. The analyses say yes. They count between three and 18 lives that would be saved by the execution of each convicted killer.

The reports have horrified death penalty opponents and several scientists, who vigorously question the data and its implications.

So far, the studies have had little impact on public policy. New Jersey's commission on the death penalty this year dismissed the body of knowledge on deterrence as "inconclusive."

But the ferocious argument in academic circles could eventually spread to a wider audience, as it has in the past.

"Science does really draw a conclusion. It did. There is no question about it," said Naci Mocan, an economics professor at the University of Colorado at Denver. "The conclusion is there is a deterrent effect." (emphasis added).

'The results are robust'

A 2003 study he co-authored, and a 2006 study that re-examined the data, found that each execution results in five fewer homicides, and commuting a death sentence means five more homicides. "The results are robust, they don't really go away," he said. ***"I oppose the death penalty. But my results show that the death penalty (deters) - what am I going to do, hide them?"*** (emphasis added).

Statistical studies like his are among a dozen papers since 2001 that suggest capital punishment has deterrent effects. They all explore the same basic theory - if the cost of something (be it the purchase of an apple or the act of killing someone) becomes too high, people will change their behavior (forgo apples or shy from murder).

To explore the question, they look at executions and homicides, by year and by state or county, trying to tease out the impact of the death penalty on homicides by accounting for other factors, such as unemployment data and per capita income, the probabilities of arrest and conviction, and more.

Among the conclusions:

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- Each execution deters an average of 18 murders, according to a 2003 nationwide study by professors at Emory University. (Other studies have estimated the deterred murders per execution at three, five and 14).
- The Illinois moratorium on executions in 2000 led to 150 additional homicides over four years following, according to a 2006 study by professors at the University of Houston.
- Speeding up executions would strengthen the deterrent effect. For every 2.75 years cut from time spent on death row, one murder would be prevented, according to a 2004 study by an Emory University professor.

In 2005, there were 16,692 cases of murder and non-negligent manslaughter nationally. There were 60 executions.

The studies' conclusions drew a philosophical response from a well-known liberal law professor, University of Chicago's Cass Sunstein. A critic of the death penalty, in 2005 he co-authored a paper titled "Is capital punishment morally required?"

"If it's the case that executing murderers prevents the execution of innocents by murderers, then the moral evaluation is not simple," he told The Associated Press. *"Abolitionists or others, like me, who are skeptical about the death penalty haven't given adequate consideration to the possibility that innocent life is saved by the death penalty."* (emphasis added).

Sunstein said that moral questions aside, the data needs more study.

Critics of the findings have been vociferous.

Some claim that the pro-deterrent studies made profound mistakes in their methodology, so their results are untrustworthy. Another critic argues that the studies wrongly count all homicides, rather than just those homicides where a conviction could bring the death penalty. And several argue that there are simply too few executions each year in the United States to make a judgment.

'Flimsy' studies?

"We just don't have enough data to say anything," said Justin Wolfers, an economist at the Wharton School of Business who last year co-authored a sweeping critique of several studies, and said they were "flimsy" and appeared in "second-tier journals."

"This isn't left vs. right. This is a nerdy statistician saying it's too hard to tell," Wolfers said. "Within the advocacy community and legal scholars who are not as statistically adept, they will tell you it's still an open question...."

Several authors of the pro-deterrent reports said they welcome criticism in the interests of science, but said their work is being attacked by opponents of capital punishment for their findings, not their flaws.

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"Instead of people sitting down and saying 'let's see what the data shows,' it's people sitting down and saying 'let's show this is wrong,'" said Paul Rubin, an economist and co-author of an Emory University study. "Some scientists are out seeking the truth, and some of them have a position they would like to defend."

Myth: The death penalty is losing public support.

Fact: "According to Gallup's 2007 Values and Beliefs survey, conducted May 10-13, the death penalty ranks as one of the most widely agreed upon issues on the roster of moral issues facing the country. Nearly two-thirds of Americans say it is morally acceptable (66%), while less than half that number (27%) consider it morally wrong. Support for the death penalty is fairly uniform across different age groups, political parties, and between men and women." (Gallup organization news release, June 3, 2007)

It has been a staple of the abolitionist movement that the death penalty is losing support among Americans. And it is true that approval of capital punishment for persons convicted of murder has dropped from 77% in May 1995 (in the immediate aftermath the mass murder of 168 people in the Murrah Building in Oklahoma City on April 19, 1995) to 67% in October 2006 (the most recent date the question was asked by Gallup). But 67% is two-thirds -- a remarkable showing for an issue sparking so much emotion -- and the overall story is one of strong and steady support for the death penalty.

This is true in both the long and short runs. Over the long run, support for the death penalty has surged. In May 1966, about 40 years ago, only 42% approved of the death penalty, while 47% disapproved. By October 2006, 67% approved and 28% disapproved -- making it, as noted, "one of the most widely agreed upon issues on the roster of moral issues facing the country." And since the beginning of the 21st Century, support for the death penalty has held steady in a range between 65 and 72 percent, according to Gallup. (The Washington Post/ABC poll has slightly lower figures, showing that the approval range from 2000 forward has been between 63 and 66 percent). Meanwhile, opposition to the death penalty has yet to reach 33% in either the Gallup, ABC/Washington Post or Pew Center polls. (Source: http://www.pollingreport.com/crime.htm).

The abolitionist movement maintains that there is growing support for a "moratorium" on the death penalty. A centerpiece of this argument is a recent poll commissioned by the Death Penalty Information Center (DPIC) which purports to find that 58% of the public would support a moratorium. What that finding neglects to mention is that the DPIC is not simply, or even primarily, a mere source of death penalty "information." It is one of the leading, if not the leading, abolitionist organization in the country. That by itself would not debunk the results of its poll. What does, however, is the fact that the interview questions did not constitute a "poll" as ordinarily understood. Instead, it was a classic "push poll" -- that is, one in which a series of leading questions is asked beforehand, intending (and in this instance succeeding) in producing a pre-determined outcome. This was made clear by Gallup's unusually blunt commentary on the DPIC poll (Source: http://blogs.usatoday.com/gallup/):

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"A survey commissioned by the Death Penalty Information Center in Washington showed, according to its report, that "...58% of the American population believes it is time for a moratorium on the death penalty..." Actually, what the study shows is that 58% of Americans can be persuaded by the use of data and evidence and one-sided arguments to support a death-penalty moratorium. But the survey doesn't tell us where the public stands if asked neutrally about a moratorium, and it doesn't tell us how far the public could be pushed to oppose a moratorium if presented with arguments against it....

"The moratorium question itself was number 13 within the survey. It was phrased as follows: 'Would you support a national halt to all death penalty executions while the problems that lead to wrongful convictions and wrongful death sentences are thoroughly investigated by a blue-ribbon commission?'

"Study this question wording carefully. Note that the writers of the question reminded respondents as the question was being asked that there have been wrongful convictions and wrongful death sentences. In courtrooms, this is called 'leading the witness'. What if the respondent had been led the other way, with a question phrased like this: 'Would you support a national halt to all death penalty executions even if this meant that convicted murderers of women and children who have had their sentences upheld by numerous courts through years of appeals would sit in jail at taxpayer expense and not have the wishes of juries and the court carried out?....'

"Furthermore, and this is the more serious issue with the DFIC survey, [Question] 13 on the moratorium was asked only after the respondents had been subjected to 12 previous questions. And a number of those questions – in essence – presented arguments in favor of a moratorium. There were virtually no arguments or reasons presented in the first 12 questions about why a moratorium might not be a good idea." ###

In fact, there is substantial evidence that our citizens would not favor a moratorium -- much less abolition -- if the issue were framed neutrally. First, when a asked straightforwardly whether the death penalty was imposed too often, about the right amount, or not often enough, a majority -- 51% -- said "not often enough." (May 2006 Gallup poll; a poll one year earlier had found the "not often enough" view to be slightly higher, at 53%). Of course it can scarcely be the case both that a majority wants a halt to death sentences and believes that death sentences are not imposed often enough.

Second, the roughly two-thirds support for the death penalty persists notwithstanding the fact that a majority believes (incorrectly, as Justice Scalia has shown in the Kansas v. Marsh concurrence) that an innocent person has been executed in the past five years. When support for capital punishment remains that strong in the face of such a belief, it is difficult to conceive that a *moratorium* is what the public demands.

Third, although a very few states -- notably Illinois, under (now-incarcerated) Governor George Ryan -- adopted moratoriums, many more have declined to do so, most recently Maryland, where a proposed moratorium bill died in the state legislature. And in Wisconsin, a state with a strong progressive tradition and which has not had capital punishment for

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more than 150 years, voters just eight months ago approved a proposal advising the legislature to enact the death penalty for first degree murder where the conviction was supported by DNA evidence.

Indeed, authentic legislative action suggests that a moratorium is the *opposite* of what voters want -- and this is especially true at the federal level. It was a Democratic Congress that adopted the Omnibus Crime Bill in the 1990's, which not only declined to impose a moratorium on the federal death penalty but vastly expanded the number of offenses for which it could be imposed. That bill was signed by President Clinton, who had overseen executions as Governor of Arkansas. More recently, in 2004, one of the country's leading liberals, Senator Barbara Boxer, joined Senator Feinstein in calling upon the Justice Department to to prosecute the killer of a San Francisco police officer under the very death penalty provision today's proposed legislation would abolish. As David Sandretti, Senator Boxer's spokesman, put it to the San Francisco Chronicle (http://sfgate.com, May 5, 2004), "Sen. Boxer is contacting the U.S. Attorney this afternoon...She believes the vicious murder of Officer Espinoza is a heinous crime and...when a police officer is murdered, those responsible should be punished to the fullest extent of the law....Her position on the death penalty has been clear for her entire career in the Senate."

Thus, abolitionists to the contrary, the truth is that public support for the death penalty is, and for many years has been, steady and consistent, and today is as strong or stronger than for virtually any contentious issue in public life.

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U. S. DEPARTMENT OF JUSTICE

STATEMENT

OF

BARRY SABIN
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"OVERSIGHT OF THE FEDERAL DEATH PENALTY"

PRESENTED ON
JUNE 27, 2007

Statement of Barry Sabin
Deputy Assistant Attorney General, Criminal Division
Before the Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
June 27, 2007

Thank you Mr. Chairman and Members of the Committee. I am pleased to appear before you today to testify about the Department of Justice's implementation of the Federal death penalty statutes. The Justice Department relies upon rigorous procedural safeguards and highly experienced personnel to ensure a uniform decision-making structure that is respectful to victims and defendants.

In connection with my testimony today, I will emphasize the paramount importance the Department attaches to the review of capital cases and key elements that define this review process. These elements are: (1) the capital case review process is centralized and the decision in every case is ultimately made by the Attorney General of the United States; (2) the review of a capital matter is designed to respect the Federal law; (3) the review of a capital matter treats each defendant as an individual, even as it evaluates the case within a national framework; (4) discrimination and bias play no role in the capital review process; and (5) each review of a capital matter respects victims' and defendants' rights.

I. Background

Pursuant to the Federal Death Penalty Act of 1994, as codified in Title 18, United States Code, Section 3591 *et seq.*, and as most recently updated on March 6, 2006 pursuant to the USA PATRIOT Improvement and Reauthorization Act of 2005, Congress has authorized the Department of Justice to seek the death penalty for more than 50 Federal offenses including murder within federal jurisdiction, treason or major violent drug trafficking activities. Consistent with Congressional intent, the Department of Justice treats capital cases as matters of paramount importance. The Justice Department strives to enforce Federal capital sentencing laws fairly and even-handedly, uninfluenced by the locations of prosecutions or the races or ethnicities of defendants and victims.

With the goal of fair and consistent application in mind, in June 2001, the Justice Department implemented a revised protocol (hereinafter protocol), which further harmonized the capital review process. This protocol for Federal death penalty case review appears in Title 9-10.000 of the United States Attorneys' Manual. Under this United States Attorney Manual provision, the Department instituted policies and procedures to ensure that the government fairly and consistently seeks the death penalty in cases with appropriate factual support for potential death verdicts.

Recently, the Department has focused on expediting the review of certain categories of offenses for which a decision to seek the death penalty is highly unlikely and on facilitating and encouraging timely submissions through centralized monitoring of potential capital cases. These

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revisions to the protocol will further ensure fairness and address the concerns expressed by the Federal judiciary about the cost of providing counsel with capital expertise during the review process. In addition, by encouraging timely submission of cases for review, the revisions reduce the need to delay judicial proceedings to accommodate the review. The proposed revisions will clarify existing procedures, create mechanisms to more closely manage cases, and expedite decision-making for certain categories of cases in which the Justice Department will not likely seek the death penalty.

II. Capital Case Review: Personnel and Process

A. The Review Process Is Conducted By Experienced Prosecutors

The Department relies upon a core group of prosecutors experienced in capital litigation to effectuate the Department's protocol. These veteran prosecutors are located in the Criminal Division's Capital Case Unit and the Attorney General's Review Committee on Capital Cases (the "Committee"). These two independent entities are integral in ensuring the proper review of potential death penalty cases.

The Capital Case Unit is comprised of seven career attorneys (who have been led by the same career Chief since the Unit was formed in 1998). The Capital Case Unit provides the legal and factual analysis underlying the protocol review of death penalty eligible offenses. The Capital Case Unit (1) facilitates thorough review of death penalty eligible offenses for which the Attorney General must decide whether to seek the death penalty; and (2) provides informed expert assistance to the United States Attorneys' Offices prosecuting capital cases to the extent allowed by existing resources. It also provides training to individual districts and at the National Advocacy Center on the prosecution of death penalty cases. In that context, its instructors discuss the demands associated with capital litigation (for example, investigation relevant to the punishment phase). The Capital Case Unit also provides guidance on a case-by-case basis. At the request of individual districts, and as time and resources allow, Capital Case Unit attorneys assist U.S. Attorneys by providing or drafting documents or participating at trial or in post-conviction litigation.

The Committee is drawn from the United States Attorneys' Offices, the Criminal Division, and the Office of the Deputy Attorney General. Committee members are selected based on their experience, abilities to synthesize facts and to fairly and uniformly evaluate arguments regarding the application of the Federal death penalty statutes. The Committee has no policy-setting function and only gathers information as required to fully consider individual cases.

The relatively small size of the Committee helps ensure fairness and consistency in the application of Federal death penalty laws. The Committee has two standing members, a Deputy Assistant Attorney General or other senior attorney experienced in capital litigation from the Criminal Division and the career Chief of the Capital Case Unit. Additional Committee members are assigned on a rotating basis from two pools. The first pool includes selected

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attorneys in the Office of the Deputy Attorney General; the second pool includes Assistant United States Attorneys with capital trial experience from approximately half a dozen United States Attorneys' Offices around the country. One representative from each pool is named to the Committee for every case.

The Committee meets to consider every case for which the U.S. Attorney requests authorization to seek the death penalty and every case in which, based on the U.S. Attorney's protocol submission and an analysis prepared by an attorney in the Capital Case Unit, an assigned Committee member requests a conference. Under the United States Attorney's Manual provision, United States Attorneys' Offices submit all potential death penalty cases for review by the Committee. The Committee's central role and national perspective further the Department's goal of fairly and uniformly administering the Federal death penalty.

B. The Justice Department Review Procedures For Capital Cases Are Transparent, Thorough, and Uniform

1. Procedural Safeguards

The Department designed its death penalty review process to ensure the fair and consistent application of the nation's capital sentencing statutes. The Department strictly adheres to this protocol because of the unparalleled degree of transparency it affords to the reviewing attorneys and the attorneys litigating for both the government and the defense. Such openness optimizes the quantity and quality of information available to the officials who recommend or decide whether the government will seek the death penalty in any given case. In every potential capital case, the Committee recommends to the Deputy Attorney General and the Attorney General whether to seek the death penalty, but the final determination rests solely with the Attorney General.

2. The Review Process is Race and Ethnicity Neutral

The Attorney General, the Committee, and the other Department personnel involved in reviewing protocol submissions are not advised of the race or ethnicity of defendants or victims. Protocol submissions from U.S. Attorneys are forwarded to the Capital Case Unit through the office of the Assistant Attorney General for the Criminal Division. The Capital Case Unit's clerical staff sanitizes the submissions of any references to the races of victims or defendants before the cases are assigned to a unit attorney. Though staff separately collects demographic data, the Department's attorneys are not provided with that information unless defense counsel chooses to submit race-identifying information about their clients. The result is a review process that is blind to the race and ethnicity of victims and defendants.

The Department of Justice September 2000 Statistical Survey noted that there was no evidence that any U.S. Attorney's office had engaged in discrimination or bias in charging decisions. Following this statistical study, the Justice Department contracted the RAND Corporation to undertake further analysis of the Justice Department's capital case statistics. In 2006, the RAND Corporation published a Technical Report that concluded that decisions to seek

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the Federal death penalty through 2001, "were driven by heinousness of crimes rather than race."

Despite an absence of discrimination or bias as of 2001, the Department adopted additional procedural safeguards to forestall the possibility that biases might develop. U.S. Attorneys' Offices are required to seek review of all cases in which the facts alleged in the indictment could support a death-eligible charge, rather than just those cases in which a death-eligible offense is charged. The protocol also requires U.S. Attorneys to submit requests not to seek the death penalty for cases in which they propose to enter plea agreements with capital-eligible defendants.

3. The Committee's Decision-Making Process and Defense Counsel's Participation

When the Committee convenes a conference, its recommendation is determined by majority vote. The recommendation and the supporting rationales are set forth in a memorandum prepared by the Capital Case Unit and circulated to the Committee for approval and revisions. Dissenting Committee members have discretion to include the minority viewpoint in the memorandum, which, in all events, summarizes the defense position and any Committee responses. The Committee memorandum, the U.S. Attorney's submission, all defense submissions, and any other pertinent documents are forwarded to the Deputy Attorney General and the Attorney General. The review is based on all the available pertinent documents.

There are multiple opportunities for defense counsel to provide information favorable to their client and argue against the Government seeking the death penalty. The protocol requires any U.S. Attorney, or his or her representative, considering whether to seek the death penalty, to meet with defense counsel. Any written submission made by defense counsel to the U.S. Attorney is forwarded to the Department to be considered by the Committee and all subsequent reviewers. Defense counsel may make additional written submissions to the Committee and a decision to seek the death penalty is never made without affording defense counsel the opportunity to personally appear before the Committee. If at the time of the Committee conference defense counsel expect to obtain, but are not yet in possession of additional relevant information, the Committee will allow additional time for submission of that information if possible under the Court's schedule. In addition, the Committee always informs defense counsel that the Committee will consider, additional information favorable to the defendant, even if the Attorney General has already made a decision adverse to their client's interests. The additional information may provide a basis for the Committee to recommend reconsideration of the decision to seek the death penalty. Further, it must be emphasized that the Committee considers the case of each death penalty eligible defendant and the mitigating circumstances apparent from the record or identified by defense counsel. Review of death penalty submissions remains thoughtful and substantive, even after the Committee has made a recommendation.

The death penalty protocol also advises the United States Attorney to consult with the family of the victim concerning the decision whether to seek the death penalty and to include the views of the victim's family concerning the death penalty in any submission made to the Department. The victim's family is notified by the U.S. Attorney of all final decisions regarding the death penalty.

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4. Participation of the Deputy Attorney General and Attorney General

As previously noted, the Committee's recommendation memorandum, the U.S. Attorney's submission, any defense submission, and any other pertinent documents are forwarded to the Deputy Attorney General and the Attorney General. The documents (such as the United States Attorney memorandum, the Committee memorandum, indictment, defense submissions, death penalty evaluation forms) are organized in an indexed "AG Notebook." The notebook is initially received by the Office of the Deputy Attorney General, where it is assigned to a staff member who did not serve on the Committee for the case. The staff member prepares a brief analysis and recommendation, which along with the AG notebook is forwarded to the Deputy Attorney General's Chief of Staff, who makes a separate recommendation to the Deputy Attorney General. The Deputy Attorney General's recommendation is also conveyed to the Attorney General in the AG Notebook. In the Attorney General's office, a staff member reviews the recommendations of the U.S. Attorney, the Committee and the Deputy Attorney General, and presents the case to the Attorney General. The Attorney General's decision is memorialized in a letter addressed to the prosecuting U.S. Attorney. The letter states whether the Attorney General has authorized the U.S. Attorney to seek the death penalty.

In an effort to secure fair and appropriate decisions in every case, the review process permits and encourages communication between the U.S. Attorney's Office and the reviewing officials within the Department. The Committee's recommendations are communicated to the prosecution team. Certain recommendations may prompt further discussion between the Committee and the prosecutors, who have a continuing right to supply the Committee with supplementary documents and information in support of their position. The process also permits a request for reconsideration of a recommendation to seek the death penalty at any time throughout the pre-trial and trial litigation. The U.S. Attorney's Office typically has multiple opportunities to present its position to the Deputy Attorney General and various members of his staff.

C. Capital Case Review Provides Each Defendant With Individualized Consideration, Even as it Permits Each Case To Be Assessed Within a National Framework

The Justice Department's review of capital cases is not aimed at maximizing or minimizing capital cases; it aims to apply the most faithful reading of Federal law to cases. Current Federal law authorizes capital punishment for a number of crimes and, pursuant to statute, Congress has limited the discretion of the Department and juries to seek or impose the death penalty. Unless specified intent factors and aggravating circumstances can be found beyond a reasonable doubt, the death penalty is not authorized. The Attorney General will not authorize seeking the death penalty unless these statutory requirements are met. If they are met, the Department must follow the law and consider the death penalty as a possible sanction for these crimes. By definition, Federal law does not vary from State to State. As a result, national consistency would be impossible if decisions about whether to seek the death penalty turned on

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State or local approaches to the death penalty. The Federal government has an obligation to evenhandedly enforce Federal law, and the Department of Justice's capital case review process ensures this outcome.

The review allows each potential capital case to be viewed in context of all other such cases, protecting against arbitrary decision-making. The review also ensures that individual characteristics are highlighted during this review; the Attorney General's decision turns on what the defendant has done and the relevant aggravating and mitigating circumstances. Factors that are arbitrary, such as race, ethnicity, gender, or religion, are not considered. In this way, the Justice Department is able to effectuate Congress's intent that the death penalty be sought against the worst offenders, while simultaneously respecting statutory and constitutional principles that all defendants must be given individualized consideration. In short, the Attorney General will not authorize seeking the death penalty against a defendant unless he believes that such a sentence is both authorized under Federal statute, and is consistent with constitutional principles.

III. Conclusion

The Department has established rigorous safeguards to ensure that capital cases are reviewed in a fair, transparent and uniform manner. We have dedicated tremendous efforts and resources to ensure fairness in Federal capital litigation. I appreciate the opportunity to testify today and I look forward to your questions.

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TESTIMONY

ANÍBAL ACEVEDO VILÁ
GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO

TO BE PRESENTED BY ROBERTO J. SÁNCHEZ RAMOS
SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

June 27, 2007

Mr. Chairman and members of the Subcommittee, I am Roberto J. Sánchez Ramos, Secretary of Justice of the Commonwealth of Puerto Rico (Commonwealth). I appear on behalf of our Governor, Hon. Aníbal Acevedo Vilá, to present the Commonwealth's position on the federal government's application of the death penalty to jurisdictions, such as Puerto Rico, whose legal systems do not contemplate capital punishment. In our view, Congress should abandon the death penalty as punishment for federal offenses or, at the very least, establish a rule of deference barring the imposition of this penalty within jurisdictions, such as Puerto Rico, that do not allow it locally.

I. INTRODUCTION

In the United States, state and federal jurisdictions intermingle in the legal life of their residents. But we need to remember that life is led, and legal life is predominately constituted, at the local level. The imposition of the death penalty by the federal government raises fundamental questions about the cultures of law in jurisdictions without capital punishment at the local level. These questions are amplified in the case of Puerto Rico, where our special relationship with the United States of America (United States), our constitutional prohibition of capital punishment, and the lack of local consent to the federal law authorizing the imposition of such most extreme

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of penalties for certain federal crimes, raises profound questions as to the legitimacy and wisdom of seeking such punishment in our jurisdiction.

The people of Puerto Rico have a longstanding, unwavering and broadly accepted commitment against the death penalty for moral, social, political, economic, cultural and religious reasons. The Constitution of the Commonwealth of Puerto Rico, enacted in 1952 and officially approved by the United States Congress, which gives expression to the culture and values of our citizens, provides in Article II, Section 7, that "the death penalty shall not exist" in Puerto Rico.

More recently, considerable attention has been directed toward the consistent efforts of federal prosecutors in Puerto Rico to seek the death penalty in numerous cases.[1] This federal policy is not in accord with our local culture and promotes jurisdictional tensions that require the immediate attention of policy-makers to establish rules generous and reasonable enough to accommodate the different qualities and diverse cultures that interrelate in the American legal system. In this sense, comity is a value that must not be disregarded if diverse peoples are to work and progress as one.

More than fifty years ago, the people of Puerto Rico came together and with one single voice declared that they would no longer "tinker with the machinery of death". Callins v. Collins, 510 U.S. 1141, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting). And their will was so strong and unequivocal that they were not content to simply establish it as a general declaration of public policy, nor as a part of their Penal Code. The people of Puerto Rico deemed their

[1] By 2000, there were 64 requests to the United States Attorney General's Office in Washington, D.C. for the imposition of the death penalty in Puerto Rico. United States Department of Justice, The Federal Death Penalty System: A Statistical Survey 1988-2000.

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purpose so fundamental that they were of one mind to elevate their prohibition against this irrevocable punishment to the level of a constitutional right. Alongside the most fundamental of rights to freedom of expression, freedom from unreasonable searches and seizures, equal protection of the law, universal suffrage, etcetera, the Puerto Rican people also chose to install the freedom of its citizens from the penalty of death.

Be it due to the deeply spiritual nature of our people, the religious convictions of the majority of Puerto Ricans, their strict adherence to the guarantee of the equal protection of the law, the grounding of our legal system on the principles of a continental European model which has moved away from the death penalty, or simply because of a very particular understanding of the powers that may be safely, wisely, legitimately and justly ascribed to the State, the Puerto Rican people strongly disagree with the use of death as a form of punishment. Under these circumstances, it is not only understandable, but it was also foreseeable, that the application of the Federal Death Penalty Act in Puerto Rico has, is, and will continue to inspire great opposition from, and unrest in, the Puerto Rican people[2].

It is, then, as an emissary of my people that I reach out to you today and request your understanding regarding the very particular nature of the issue of the imposition of the death penalty on Puerto Rican soil. For all the reasons I will now spell out, I believe that Congress, in the exercise of its broad powers under the Constitution of the United States of America, should, if not abandon the death penalty altogether, at least legislate an absolute, or at least severe, statutory limit on the imposition of the death penalty in federal cases in Puerto Rico, as well as in

[2] In 2003, as Resident Commissioner, I co-sponsored H.R. 2574 to establish the "Federal Death Penalty Abolition Act of 2003". Similar legislation, S. 122, was introduced by Senator Russ Feingold in January, 2005.

those other United States jurisdictions that vehemently reject it. We must all recognize, today more than ever, that the true wisdom of a people lies not in the prudence of their points of view, but in their ability to respect and honor those of others.

II. DISCUSSION

A. The Commonwealth favors the elimination of death as a form of punishment by the federal government.

At the outset, we would like to express our institutional rejection of the death penalty as a form of punishment for criminal activity. As a democratic and developed society, we should aspire to have laws and a criminal justice system premised on higher principles that demonstrate an absolute respect for human life, even for the life of a murderer. I believe that an overwhelming majority of Americans would strongly disapprove – and would most likely not even consider seriously debating the possibility of – implementing the state-sanctioned torture of a torturer or rape of a rapist as forms of punishment. I see no reason why the moral calculus should vary when considering the state-sanctioned killing of a killer. Taking the life of a murderer is a similarly disproportionate punishment.

In addition, the uniqueness of death as punishment, in that it is irrevocable, should give any government pause. Because no human system can be free of error, that system must provide reasonable reparation for the victims of mistakes. However, because of the irrevocability of death, victims of wrongful executions cannot obtain such reparation. Simply put, once an inmate is executed, nothing can be done to make amends if a mistake has been made.

Moreover, the possibility of mistakes in the application of the death penalty is not theoretical; in fact, the evidence suggests it is not even remote. There is considerable evidence

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that an alarming number of persons have been incorrectly sentenced to death by various jurisdictions within the United States. For example, a study conducted at the Columbia University School of Law found that the overall national rate of prejudicial error in capital cases was 68%. When the cases were retried, over 82% of the defendants were not sentenced to death and 7% were completely acquitted. See James S. Liebman et al., A Broken System: Error Rates in Capital Cases 1973-1995, available at www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

DNA testing has also served to exonerate death row inmates. At least fourteen inmates exonerated by DNA testing were at one time sentenced to death or served time on death row. See Innocence Project, Benjamin N. Cardozo School of Law, Facts on Post Conviction DNA Exonerations. Here, too, the justice system had concluded that these defendants were guilty and deserving of the death penalty. DNA testing became available only in the early 1990s, due to advancements in science. If this testing had not been discovered until ten years later, many of these inmates would have been executed. And if DNA testing had been applied to earlier cases where inmates were executed in the 1970s and 1980s, the odds are high that it would have proven that some of them were innocent as well.

In our view, whatever deterrent effect imposition of the death penalty might have is outweighed by moral considerations, the risk of wrongful executions and inequitable application of the penalty, and the additional cost involved. Moreover, the fact is that the value of the death penalty in decreasing criminal activity is highly questionable. In fact, some criminologists, such as William Bowers of Northeastern University, maintain that the death penalty has the opposite

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effect: that is, society is brutalized by the use of the death penalty, and this increases the likelihood of more murders. States within the union that do not employ the death penalty generally have lower murder rates than states that do. The same is true when the United States is compared to countries similar to it. The United States, with the death penalty, has a higher murder rate than Canada and the various European countries of Europe that have outlawed the death penalty.[3] In our experience, the death penalty, in itself, is probably not an effective deterrent because most people who commit crimes (including those punishable by death) simply do not expect to get caught. The most effective deterrent, then, is to increase the perceived likelihood of being caught by increasing the government's effectiveness in apprehending and prosecuting criminals.

Finally, we have to consider that capital cases are notoriously protracted and expensive, and they constitute a significant drain on the resources of a prosecutor's office. At the trial level, death penalty cases are estimated to generate roughly $470,000 in additional costs to the prosecution and defense over the cost of trying the same case as an aggravated murder without the death penalty, as well as added costs of $47,000 to $70,000 for the courts. See http://www.deathpenaltyinfo.org (last visited June 18, 2007); see also Katherine Baicker, National Bureau of Economic Research, The Budgetary Repercussions of Capital Convictions, available at www.nber.org/papers/w8382. Elimination of this type of penalty would liberate a

[3] I do not intend to blindly follow the sometimes fallacious precept: *post hoc ergo propter hoc*. I am well aware that correlation does not always entail causation. However, we must be mindful of these interesting correlations and should give them due consideration when analyzing an issue as important as capital punishment. Simply disregarding them would be naïve and possibly irresponsible.

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good part of our limited law-enforcement resources which could then be used to assure some form of punishment for more criminals who might otherwise escape justice altogether.

For all these reasons, I believe it is time to end capital punishment as part of the federal criminal justice system. Given the fact that the death penalty constitutes such a moral and economic burden on our legal system, I believe that we should all feel compelled to eliminate it.

B. In this context, the quest for public policy uniformity at the federal level is outweighed by significant political, social and cultural differences, as well as by the problems and risks associated with the pursuit of death in jurisdictions that are opposed to that form of punishment.

The American legal system contains multiple levels of jurisdictions that have different social and political qualities, and that ultimately respond to different cultures. In particular, the contest for supremacy over capital punishment between state and federal government calls attention to jurisdictional tensions that are at the core of national politics in America. In recent years, there has been an increase in the cases in which the United States pursues the death penalty. Some people argue in favor of implementing a national uniform policy regarding this issue. However, we have to ask ourselves if it is really possible to achieve a reasonable level of uniformity in such a sensitive area of discretionary law enforcement. Furthermore, we need to ask if such uniformity is even desirable.

As a matter of fact, there are various reasons why there always have been, and likely always will be, significant differences around the country, and even within particular districts, in the way similar offenders are punished. At the end of the day, this is part and parcel of the federal system of government; a system precisely premised on the notion that local sovereigns,

as representatives of the people, are the ones with the primary responsibility of defining, prosecuting and punishing antisocial criminal behavior.

First, prosecutors have never been obligated to treat similar cases in exactly the same way in all circumstances. Differences in the exercise of prosecutorial discretion affect not only whether similarly situated defendants get prosecuted, but to what extent and how severe their punishments will be. It has been documented that many variations are the direct result of prosecutors' policies. See John Gleeson, Supervising Federal Capital Punishment: Why the Attorney General Should Defer when U.S. Attorneys Recommend Against the Death Penalty, 89 Va. L. Rev. 1697 (2003). From 1988, when the death penalty resurfaced as an option in federal prosecutions, until 2003, federal prosecutors in 40 federal districts in 32 states (as well as the federal districts in Guam, the United States Virgin Islands, and the Northern Mariana Islands) had never asked for permission to seek the death penalty. Id. at 1715. Thirteen of the federal districts in which the death penalty had not been sought were in jurisdictions that had no death penalty under local law. Id. at 1716.

It was reported that, in 2000, a United States Justice Department study showed that only 9 of the 94 federal districts accounted for 43% of all cases in which the death penalty was sought. Death Penalty Doubts, N.Y. Times, December 12, 2000, at A32. See also John Brigham, Unusual Punishment: The Federal Death Penalty in the United States, 16 Wash. U. J. L. & Pol'y 195, 214 (2005). Furthermore, by September 2004, the rate of approval for requests by United States Attorneys interested in seeking the death penalty in states that had outlawed

capital punishment at the local level was 21% percent, while it was 30% in states with some form of local capital punishment. See http://deathpenaltyinfo.org.[4]

It is also very difficult to validate a uniform process for all capital punishment cases. Procedurally, federal protections at trial for death penalty cases are extensive. The accused is entitled to two lawyers, one of whom must be experienced in death penalty cases. The trial is bifurcated, with one stage determining guilt or innocence, and a second stage determining the punishment based on considerations of special and mitigating circumstances. In 1995, the Justice Department took over review of all federal death penalty cases. In order for a federal prosecutor to seek the death penalty, he or she must gain approval from the United States Department of Justice Capital Case Review Committee in Washington, D.C. The system is designed to protect against bias, and it certainly serves to bring the ultimate decision back to the nation's capital. However, as I have previously mentioned, several factors influence the volume of cases the Committee receives for approval from jurisdictions that have outlawed the death

[4] In Puerto Rico, by 2000, 16 out of 64 cases presented to the Attorney General's Capital Case Review Committee were approved for capital prosecution. This is more than in any other jurisdiction except the Eastern District of Virginia. United States Department of Justice, The Federal Death Penalty System: A Statistical Survey 1988-2000. As a result, the Puerto Rico United States Attorney's Office has submitted the largest number of potential death penalty cases of any of the 94 federal districts since the Capital Case Review protocol was issued in 1995. Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 Fordham Urb. L. J. 347, 357 (1999).

It is worth noting that the United States Attorney General and the United States Attorneys implementing such policy in Puerto Rico are not elected, so they are not politically accountable for their vigorous enforcement of the death penalty. It must also be noted that the President, who appoints the United States Attorney General and the United States Attorney for the District of Puerto Rico, and the Senators, who confirm the President's nominees, are not politically accountable to the people of Puerto Rico, either. This might well explain the significant departure in our jurisdiction from the general experience that shows that the death penalty is rarely pursued by federal authorities in jurisdictions that have no death penalty under local law.

penalty at the local level. And even the rulings of the Committee itself show an inferior rate of approval for those jurisdictions.

As I mentioned above, the accused in a capital case is entitled to two lawyers, one of whom must be experienced in death penalty cases. However, unquestionably, defendants in jurisdictions without local capital punishment confront a greater challenge in obtaining proper legal representation by experienced lawyers. It goes without saying that the implications of a murder case in which the penalty of death is not being sought are less significant than a prosecution where execution is an option. And even when some experienced lawyers venture to other states to represent those accused of capital murder in a federal case, it is doubtful that the client will be in the same position as another represented by a member of the local legal community. In Puerto Rico, this matter is aggravated by the fact that most of the population does not speak English fluently, which could affect the quality of communication between the accused and its learned counsel from another jurisdiction.

Another problematic aspect of conducting a death penalty prosecution in a state that does not have capital punishment at the local level is the extraordinary attention such a trial receives. This is part of the same phenomenon that makes the selection of a jury capable of objectively applying the law regarding a death sentence so problematic. Murder prosecutions get an abundant amount of attention in any case, but they get even more attention when the death penalty is an option, and even more still in a situation where capital punishment is not a locally-sanctioned penalty.

Unlike noncapital cases, in which federal juries are isolated from the issue of punishment, juries play the central role in the imposition of the death penalty. As I have emphasized, there will always be regional differences in how we, as a society, perceive and react to crime. In many ways, jurors personify the values of those communities. Thus, since jurors play a central role in death penalty cases, it is impossible to isolate the procedure from the way society, at the local level, perceives the imposition of such penalty. This issue has many dimensions, including the likelihood of obtaining a truly representative jury of peers and the probability of obtaining a conviction based exclusively on the amount and quality of the evidence. Thus, the failure to impose the death penalty is not the only ill effect that could flow from the decision to seek death. Some prosecutors who try capital cases believe that jurors in such cases "hold the prosecution to a higher standard than proof beyond a reasonable doubt". Gleeson, supra, at 1719. Seeking the death penalty in those jurisdictions that strongly oppose capital punishment may jeopardize the ability of authorities to even get a conviction. As an example, in United States v. Acosta Martínez, Crim. No. 99-044 (SEC), a highly publicized case in Puerto Rico, the defendants were ultimately acquitted by the jury.[5] Hence, when the federal government seeks death in jurisdictions such as Puerto Rico, it disregards the possibility of jury nullification at its own risk ... and at the risk of future potential victims of crime.

[5] In this case, the local United States Attorney sought the death penalty in the prosecution of two defendants accused of kidnapping and brutally murdering a grocery store owner after they were not paid a million-dollar ransom. The decision to pursue the death penalty evoked strong protests from the local community, and the trial judge initially assigned to the case rejected the death penalty prosecution entirely, holding that the federal death penalty could not be applied in Puerto Rico. United States v. Acosta Martínez, 106 F. Supp. 2d 311 (D.P.R. 2000). The United States Court of Appeals for the First Circuit reversed, United States v. Acosta Martínez, 252 F.3d 13 (1st Cir. 2001), and the death penalty prosecution went forward under continued protest before a different district judge. In August 2003, the jury acquitted the defendants on all counts, including charges of extortion and obstruction of justice.

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In conclusion, even now, it is a fallacy to state that capital punishment is uniformly implemented across the United States and that present policy is evenly enforced. Multiple factors, including social, cultural, political and administrative considerations, interrelate and influence the disposition of federal authorities to seek capital punishment in different jurisdictions across the country. As far as those jurisdictions present different characteristics and backgrounds, the outcome of capital punishment processing will vary from jurisdiction to jurisdiction, resulting in some degree of disparity. As I will discuss next, the degree of disparity is amplified in the case of Puerto Rico. Therefore, Congress should seriously contemplate the desirability of establishing a statutory rule of deference barring the imposition of such penalty through federal prosecutions in those jurisdictions which have outlawed it at the local level. At the very least, Congress should require that strict statutorily imposed conditions be met as a pre-requisite to seeking the death penalty in those jurisdictions.

C. The application of the federal death penalty in Puerto Rico raises unique and substantial concerns, and thus Congress should consider exempting the Commonwealth from the application of the federal death penalty.

The majority of Puerto Rico's population firmly opposes the death penalty on social, political, economic, cultural and religious grounds. No execution has taken place in Puerto Rico since 1927, and the Constitution of the Commonwealth of Puerto Rico, ratified by the U.S. Congress in 1952 as part of the process through which the current government of the Commonwealth was constituted, specifically prohibits capital punishment.

Notwithstanding the special characteristics of Puerto Rico and the strong opposition of the community to capital punishment, in United States v. Acosta Martínez, Crim. No. 99-044

(SEC), the United States Attorney for the District of Puerto Rico pursued the death penalty against defendants charged for a murder in retaliation for providing law enforcement officials with information related to the possible commission of a federal offense. The United States District Court for the District of Puerto Rico held that the Constitution of the Commonwealth of Puerto Rico precluded the federal government from imposing the death penalty in the Commonwealth. United States v. Acosta Martínez, 106 F. Supp. 2d 311 (D.P.R. 2000). The district judge, Hon. Salvador E. Casellas, argued that Puerto Rico was not specifically mentioned in the legislation establishing the federal death penalty and that implementing the death penalty would violate the Federal Relations Act of 1950 because Puerto Rico's Constitution prohibits capital punishment. He relied, *inter alia*, on the work of Rory K. Little, former member of the United States Department of Justice Capital Case Review Committee, who opined that the imposition of the death penalty in Puerto Rico raises unresolved sovereignty issues and is characterized by conflicting federal law. However, the United States Court of Appeals for the First Circuit, in its opinion in United States v. Acosta Martínez, 252 F.3d 13 (1st Cir. 2001), held that the federal death penalty, as applied under the Federal Death Penalty Act of 1994, could be administered legally in Puerto Rico. The decision resulted in widespread opposition across the island.

Nonetheless, questions about the application of the federal death penalty are still highly relevant because the United States Attorney for the District of Puerto Rico has in the recent past submitted the greatest number of applications for the imposition of the federal death penalty of all 94 federal districts, and currently has the highest number of pending death penalty cases in

the United States federal system. The pursuit of the federal death penalty in Puerto Rico stands against the highest social, cultural, political, moral and religious values of the members of our community, and violates the balance of power and comity that the people of Puerto Rico envision as transcendental to their relationship with the United States.

It must be noted that, in the special case of Puerto Rico, this is not simply a matter of the technical interpretation of the law. This situation generates questions and controversies that lie at the very core of the special political relationship between the United States and the Commonwealth.

1. The imposition of the federal death penalty in Puerto Rico is not supported by our special and extraordinary political relationship with the United States.

A year after Spain recognized the United States' authority over Puerto Rico in 1899, Congress passed legislation establishing a framework to govern the relations between the people of Puerto Rico and the federal government. In the Foraker Act of 1900, Congress established the principle that federal law generally applies to Puerto Rico, but it did so with an important caveat: federal laws that were "locally inapplicable" did not automatically go into effect within Puerto Rico. 31 Stat. 77 (1900). This limitation preserved local autonomy and was carried forward in the organic law, known as the Jones Act, establishing a government for Puerto Rico.[6] In recognition of the wishes of the people of Puerto Rico, on July 3, 1950, Congress enacted Public

[6] Specifically, Section 9 of the Puerto Rican Federal Relations Act reads: "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States...". This clause has been the basis for much of the litigation on the question of whether specific federal laws are applicable to the island. Unsurprisingly, Puerto Rico's unique position in the federal system has given rise to numerous issues of interpretation when Congress has not clearly specified the application of particular federal statutes to Puerto Rico.

Law 600, which gave the United States' official approval of the people of Puerto Rico's establishment of a constitution. Pub. L. No. 81-600, 64 Stat. 319 (1950). Pursuant to its own terms, Public Law 600 was to be submitted to the voters of Puerto Rico for acceptance or rejection.

An overwhelming majority of qualified Puerto Ricans voted in favor of Public Law 600. The constitutional convention that followed produced a proposed constitution for Puerto Rico, which was then approved by an overwhelming majority of Puerto Rico's voters. The Constitution prohibited the imposition of capital punishment and thereby raised to constitutional level a longstanding local statute to the same effect.[7] The Commonwealth Constitution's categorical rejection of the death penalty reflected the people of Puerto Rico's will that such most extreme of punishments never be imposed on Puerto Rican soil. See also 2 Diario de Sesiones de la Asamblea Constituyente 1510-1524 (Equity Publishing Corp. 1961). Congress gave the United States' official approval to the Commonwealth Constitution through the enactment of Public Law 447, 82nd Cong., 66 Stat. 327 (1952). Congress, however, conditioned its approval on, among other things, the addition of the following language to Article VII: "Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-First Congress, adopted in the nature of a compact". The Puerto Rican Constitutional Convention approved the Constitution with Congress's suggested additions and,

[7] In 1929, Act No. 42 of April 26, 1929, abolished by statute the death penalty in Puerto Rico.

on July 25, 1952, the Governor of Puerto Rico announced the establishment of the Commonwealth of Puerto Rico.

At the founding of the Commonwealth, the United States explicitly recognized that Puerto Rico would be autonomous with regard to issues that were rooted in Puerto Rican culture and society. The United States acknowledged this political principle in its memorandum advising the United Nations that it would no longer report on Puerto Rico as a "non self-government". See Memorandum by the Government of the United States of America concerning the Cessation of Transmission of Information under Article 73 (c) of the Charter with Regard to the Commonwealth of Puerto Rico. Section 9 of the Federal Relations Act contains the operative provision of federal law that reflects the deference owed to the laws of the Commonwealth. It provides, in pertinent part, "the statutory laws of the United States not locally inapplicable ... shall have the same force and effect in Puerto Rico as in the United States". 48 U.S.C. § 734.

As for the application of the Federal Death Penalty Act to Puerto Rico, it is undisputed that the aforementioned statute stands, at the very least, in serious tension with the constitutional prohibition forbidding the application of the death penalty in Puerto Rico, as adopted by the people of Puerto Rico and officially approved by Congress. It goes without saying that said prohibition is deeply rooted in Puerto Ricans' socio-cultural values and traditions. The United States Court of Appeals for the First Circuit's decision in Martínez Acosta, in its technically legal resolution of a particular litigation dispute, did not need to engage in the important discussion of comity and politics that other non-judicial fora must enable and stimulate if the delicate balance between United States and Commonwealth authorities is to flourish.

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The provision of the Commonwealth Constitution which prohibits the death penalty reflects the deeply-held convictions of the people of Puerto Rico. To disregard this political reality, independently of strictly-legal considerations, carries the risk of inviting the erosion of the important and mutually-beneficial relationship between the people of the United States and the people of Puerto Rico. It is the responsibility of Congress to intervene, in agreement with the Commonwealth authorities who represent the people of Puerto Rico, to restore the balance of power and the important comity that the people of Puerto Rico envisioned as a fundamental part of their relationship with the United States.

2. Due to its special relationship with the United States, the people of Puerto Rico have not consented to the imposition of the federal death penalty.

It is also interesting to note that, in defending its policy on capital punishment before the United Nations, the United States has relied on an argument based on the political representation that the people subject to such penalty have in Congress. In response to the 2000 United Nations Sixth Quinquennial Survey, the United States declared:

> The sanction of capital punishment continues to be the subject of strongly-held and publicly debated views in the United States. There are and have been, from time to time, legislative, policy, and other initiatives to limit and or [sic] abolish the death penalty. However, a majority of citizens have chosen through their freely elected state and federal officials to provide for the possibility of the death penalty for the most serious and aggravated crimes, under state law in a majority of the states ... and under federal law.... [W]e believe that in democratic societies the criminal justice system--including the punishment prescribed for the most serious and aggravated crimes--should reflect the will of the people freely expressed and appropriately implemented through their elected representatives.

However, due to our special relationship with the United States, Puerto Rico has an extremely limited participation in the federal decision-making process. Therefore, the idea that our

democracy has a self-correcting ability – that general dissatisfaction with federal legislation will be channeled through the ballot box – does not apply to Puerto Rico. The application of a federal law that violates the will of the Puerto Rican people, as specifically expressed in the Commonwealth Constitution, is, therefore, fundamentally different from the application of federal law despite state opposition. This factor becomes even more significant when the federal law in question concerns a subject matter as controversial, at every level of government, as capital punishment.

3. The unique cultural and social particularities of the Puerto Rican people adversely affect the fairness of capital punishment proceedings.

The unique cultural and social particularities of Puerto Rico (within the federal system) present significant obstacles for the fair imposition of the death penalty in our jurisdiction.

First, English is the required language for conducting trials in all federal district courts, even Puerto Rico. This factor was of importance in the Acosta Martínez proceedings, where the defendant requested the services of a translator whose translation the judge was forced to correct in various occasions to protect the fairness of the trial.[8] Furthermore, as I mentioned before, this particularity of the Puerto Rican situation could be a factor that negatively affects the quality of the legal representation available to the accused. Capital punishment cases are not common practice for members of the local legal communities, and defendants in such proceedings have been forced to rely on the services of learned counsel from other jurisdictions, who might not be

[8] During the Acosta Martínez trial, the importance of this factor was noted by the judge, who corrected the translator on more than one occasion during the testimony of the prosecution's key witness, admonishing the translator: "This is an important and sensitive case". See Elizabeth Vicens, Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard, 80 N.Y.U. L. Rev. 350, 378 (2005).

proficient in Spanish and might have problems communicating with their Puerto Rican clients, as lead counsel.

Second, in the context of the federal death penalty, the importance of the jury cannot be overestimated. Given that jury members in capital cases bear the responsibility of determining whether the death penalty will be imposed, it is critically important to ensure that they constitute a fair and representative cross-section of the defendants' peers. However, it has been noted that widespread opposition to the death penalty for religious and cultural reasons resulted in a protracted jury selection process during the Acosta Martínez trial. Elizabeth Vicens, Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard, 80 N.Y.U. L. Rev. 350, 376 (2005).

In addition, language is another factor that significantly limits the jury selection process. The data provided by the United States Census Bureau for the year 2000 illustrates that, in Puerto Rico, 85.4% of the population speaks Spanish at home. Of those, 71.9% said that they speak English "less than very well". It has been stated that, while almost the entire Puerto Rican population speaks Spanish, one half of the population speaks no English at all, and approximately another 20% have only a limited ability to speak and understand it. Id. at 377. Rural and poorly-educated Puerto Ricans are less likely to speak English fluently, a fact that becomes significant in terms of being able to obtain a representative jury of peers.

The federal government has recognized these language concerns and conducts almost all of its proceedings in Spanish in those agencies that interact with the public at large in Puerto Rico, such as, for example, the Postal Service, the Department of Labor and the Social Security

Administration. However, trials in the federal district court are still conducted in English. Hence, because English proficiency is currently a requirement for federal district court jury service, persons who lack this proficiency must be disqualified from such service. As a result, an estimated 75% of the Puerto Rican population is automatically disqualified from serving as jurors on a federal capital case. Id. at 378. This amounts to a systematic exclusion of a vast amount of Puerto Rican residents (particularly those with lower incomes and education levels) from the federal juries of "peers".

When the situation regarding language described above is combined with the fact that many of the remaining potential jurors may be disqualified on account of their moral opposition to the death penalty, the jury selection process for federal capital cases in Puerto Rico can hardly result in the selection of a true cross-section of the defendants' peers. Such practical reality may well be interpreted as a violation of the defendants' Sixth Amendment rights. However, the United States Court of Appeals for the First Circuit has characterized Puerto Rico a special case under the Sixth Amendment. See U.S. v. Flores Rivera, 56 F.3d 319 (1st Cir. 1995); U.S. v. Aponte Suárez, 905 F.2d 483 (1st Cir. 1990); U.S. v. Benmuhar, 658 F.2d 14 (1st Cir. 1981). However, the United States Department of Justice's insistence on pursuing the death penalty in a jurisdiction, like Puerto Rico, where the jury selection process does not result in the selection of a cross-section of the defendants' peers certainly raises compelling issues of constitutional law and basic fairness in light of the traditional principles of our legal system.

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III. CONCLUSION

Given Puerto Rico's unique relationship with the United States, basic principles of democracy and representative government demand that the political will of Puerto Ricans be particularly heeded by the federal authorities when imposing the most severe of punishments to Puerto Rican citizens. The singular position that Puerto Rico occupies within the federal system is based on the respect and comity that the United States and Puerto Rico have long extended to each other's cultural and legal autonomy.

Puerto Rico respectfully demands that this Congress intervene, in coordination with the Commonwealth authorities, to restore the balance, mutual respect, and comity that the people of Puerto Rico envision as a fundamental part of their relationship with the United States. Puerto Rico's longstanding prohibition of the death penalty, which is deeply rooted in its social, political, economic, moral, cultural and religious values and traditions, and the extraordinary political process from which it evolved, is entitled to such consideration. As a democratically elected representative of the people of Puerto Rico, I urge you to consider and pass legislation which would definitively eliminate the possibility of the ultimate penalty of death being imposed in Puerto Rico. At the very least, I believe that the people of Puerto Rico deserve the measure of respect which would drive this Congress to impose severe statutory limitations on the exercise of discretion by federal authorities when determining whether or not to seek the death penalty in Puerto Rico.

Finally, I wish to extend the people of Puerto Rico's gratitude for allowing me to testify before you today regarding an issue of such import and consequence.

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STATEMENT OF MR. HILARY O. SHELTON

DIRECTOR

NAACP WASHINGTON BUREAU

ON THE FEDERAL DEATH PENALTY

BEFORE THE SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

June 27, 2007

Good morning. My name is Hilary Shelton and I am the Director of the Washington Bureau of the NAACP, our Nation's oldest, largest and most widely-recognized grassroots civil rights organization in the United States. The Washington Bureau is the legislative and public policy arm of the NAACP; we currently have more than 2,200 membership units in every state across the country.

The NAACP remains resolutely opposed to the death penalty, and as such I would like to offer our sincere thanks to the Chairman, Senator Feingold, for his unflinching efforts to end this practice at the federal level. You are indeed our champion and an inspiration for all on this issue. Thank you.

From the days of slavery, through years of lynchings and Jim Crow laws, and even today capital punishment has always been deeply affected by race. This is true among the states as well as at the federal level. Despite the fact that African Americans make up only 13% of our Nation's population[1], almost 50% of those who currently sit on the federal death row are African American[2].

Furthermore, across the Nation about 80% of the victims in the underlying murder in death penalty cases are white, while less than 50% of murder victims overall are white[3]. This statistic implies that white lives are valued more than those of racial or ethnic minorities in our criminal justice system.

Finally, the NAACP is very concerned about the number of people who have been exonerated since being placed on death row. Since 1973, over 120 people

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[1] US Census Bureau, State & County Quick Facts, 2007
[2] Death Penalty Information Center, *Facts About the Death Penalty*, June 19, 2007
[3] *Ibid*

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have been released from death row with evidence of their innocence[4]. The death penalty is the ultimate punishment, one that is impossible to reverse in light of new evidence.

The American criminal justice system has been historically, and remains today, deeply and disparately impacted by race. It is difficult for African Americans to have confidence in or be willing to work with an institution that is fraught with racism. And the fact that African Americans are so overrepresented on death row is alarming and disturbing, and certainly a critical element that leads to the distrust that exists in the African American community of our Nation's criminal justice system.

It bears repeating that 49% of all the people, or almost half of all those currently sitting on the federal death row, are African American. Perhaps more disturbing is the fact that nobody at the Department of Justice can conclusively say that race is not a factor in determining which defendants are to be tried in federal death penalty cases.

According to the DoJ's own figures, 48% of the defendants in federal cases in which the death penalty was sought between 2001 and 2006 were African Americans[5].

What we don't know, unfortunately, is whether or not this number is representative of the number of criminal defendants who are accused of crimes in which the death penalty may be sought. And, since there are several layers that must be examined to even begin to assess this number, including whether a crime is tried at the local or federal level, it is not an easy number to attain.

What is clear, though, is that at several different points in the process of determining who is tried in a federal death penalty case and who is not, a judgment is made by human beings in a process in which not everyone has similar views. And in a world in which 98% of the chief district attorneys in death penalty states are white and only 1% are black[6], it is this differential that gives us the most problem.

In addition to the factor of the race of the defendants, the NAACP is also deeply troubled by the role played in the race of the victim. Although at the federal level the weight of the victim's race appears to have changed over the last few years[7], at the state level the race of the victim still appears to play a big role. According to the Death Penalty Information Center, 79% of the murder victims in cases resulting in an execution were white, even though nationally only 50% of murder

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[4] *Ibid*
[5] U.S. Department of Justice, *Responses to oversight questions from Senator Feingold*, June, 2007
[6] Death Penalty Information Center, *Facts About the Death Penalty*, June 19, 2007
[7] U.S. Department of Justice, *Responses to oversight questions from Senator Feingold*, June, 2007

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victims overall were white[8]. A recent study in California found that those who killed whites were over 3 times more likely to be sentenced to death than those who killed African Americans and more than 4 times more likely than those who killed Latinos[9]. Another study in North Carolina found that the odds of receiving a death sentence rose by 3.5 times among defendants whose victims were white[10].

These studies, along with the fluctuations we see in all death penalty jurisdictions including the federal government, speak again to the varying factors involved in determining who is eligible for the death penalty and who is not. The overwhelming evidence that a defendant is more likely to be executed if the victim is white is also incredibly problematic; it sends a message that in our criminal justice system, white lives are more valuable than those of racial or ethnic minorities.

Obviously with race being so problematic and such an overwhelming factor in the application of the death penalty, the NAACP is also concerned that there be no room for error. Yet errors do occur, even today. Nationally, more than 120 people have been exonerated and freed from death row before they could be executed[11]. Given the finality of the death sentence under which these people where living, they may in fact be considered the "lucky ones". Furthermore, considering the disparities in the number of African Americans on death row, it is likely that more African Americans are falsely executed, a fact that once again contributes to the mistrust that is endemic among the African American community of the American criminal justice system.

There are several other very valid arguments against the death penalty that I will mention but shall not elaborate on here. The death penalty is not a cost effective punishment; a 2005 study showed that in California, taxpayers paid $114 million per year beyond the costs of keeping convicts locked up for life; taxpayers have paid more than $250 million for each of the state's executions[12].

The death penalty is not a deterrent; according to the 2004 FBI Uniform Crime Report the southern United States had the highest murder rate, despite the fact that 80% of all executions are in the South.

Yet to the NAACP, the biggest argument against the death penalty is that it is handed out in a biased, racially disparate manner. Race matters, whether it be the race of the defendant or the race of the victim. And until it can be proven that race is not a factor in determining who is executed, Americans' faith in the

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[8] Death Penalty Information Center, *Facts About the Death Penalty*, June 19, 2007
[9] Pierce & Radelet, *Santa Clara Law Review*, 2005
[10] Prof. Jack Boger and Dr. Isaac Unah, University of Nrth Carolina, 2001
[11] Death Penalty Information Center, *Facts About the Death Penalty*, June 19, 2007
[12] Los Angeles Times, March 6, 2005

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criminal justice system, especially the confidence among African American communities, will continue to be dismal.

This mistrust is detrimental to not only our communities, but to our Nation as a whole: Law enforcement executives and the rank and file officers agree that crimes cannot be prevented or solved without a basic community trust of the police.

And so let me end where I began, by thanking Senator Feingold for all you have done to enact a moratorium on the death penalty. The NAACP both supports and appreciates your efforts, and we look forward to working with you to see that someday we are successful.

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UNIVERSITY OF CALIFORNIA AT BERKELEY
BOALT HALL SCHOOL OF LAW

October 9, 2006

James A. Thompson
President and Chief Executive Officer
RAND Corporation
1776 Main Street, P.O. Box 2138
Santa Monica, CA 90407-2138

Dear Dr. Thompson:

We were five of the six "expert consultants" recruited to work with RAND on the federal death penalty study released July 17, 2006. We write now to express our concern about both the process that produced the final report and the conclusions about that final report communicated in RAND's press release.

The process problem concerns RAND's insistence on keeping the experts you hired from communicating with each other. As academic experts with experience in the field, we were asked first to write analyses of the study design and then to write critiques of a draft final report. None of the experts saw any of the materials prepared by any of the other experts. When two experts requested that their comments about the report be circulated to the other experts, Laura Hickman and Stephen Klein rejected this as potentially inhibiting the independent judgment of those other experts. When those two experts then asked that their comments be circulated *after* the other experts had submitted their reports, this was refused as forbidden by the funder's conditions. This is both a highly unusual policy in the scientific study of the criminal justice system – or of any other subject – and very bad science policy. At minimum, we hope that the RAND Corporation will explicitly reject this model of using consultants for any future unclassified social science research.

Unfortunately these procedural problems are not our only concern. The RAND press release that accompanied the release of the study claims much more than an objective analysis of the data would permit. The headline on the press release announced:

> "RAND study finds no evidence of racial bias in federal prosecutors' decisions to seek death penalty from 1995-2000." (July 17, 2006)

That sound bite accurately reflects the claims made by the release.

The study does suggest that the Attorney General's office did not have a pattern of racially problematic decision making on capital charging from 1995 to 2000. But the study examined less than 10% of the data it would need to reach <u>any</u> defensible judgment about the behavior of U.S. attorneys. Why the contrast? The study examined <u>every</u> case in which the Attorney General made a decision whether to seek or to decline to seek a death penalty – just

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over 600 cases involving about 400 killings. But the study only examined those cases in which U.S. attorneys decided to charge defendants with capital crimes in federal court, and that was a tiny fraction of all cases where a federal death penalty could have been sought.

For example, consider two major categories of eligible cases: The FBI's *Supplementary Homicide Report* homicide data suggest that somewhere between 6,000 to 9,000 gun robbery killings and drug killings from 1995 through 2000 were legally eligible for federal capital prosecution. The RAND study examined no data that bear on how the U.S. attorneys decided to reject perhaps 90% of potentially death-eligible cases in these two categories. As a consequence, the study cannot tell us whether the victim's race, the defendant's race, or both made a difference in federal capital charging. The most important step in that process is the initial intake decision, which is made by the U.S. attorneys. With respect to that decision, this study is the equivalent to "studying" the effects of income and religion on acceptance to Harvard by looking only at the 10% of applicants who were accepted.

Obviously it is impossible to use this study as the basis for a scientific conclusion that race did or did not influence federal capital charging. This fundamental point is not made clear by the press release or the report itself. The data do reveal regional differences that the RAND report is not concerned about, but which generate racial differences that are not linked to any variation in offense seriousness. But this is a small matter next to the huge data gap that the press release ignores and the study itself does not adequately acknowledge.

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