



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

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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.

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 States. 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 States 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 where 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.