

Testimony of
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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 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 an "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.ca-defnet.org, to assist federal defenders and court-appointed private counsel in death penalty cases;

responding to Congressional inquiries addressed to the federal defender system concerning proposed capital punishment legislation, and 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 the 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 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 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 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 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 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 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 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.

Moreover, 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 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 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 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 lopsided 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 data⁴ 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 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 Justice⁵ 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.

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 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 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.

U.S. Department of Justice, Survey of the Federal Death Penalty System (1988-2000) (September 12, 2000).

3Although 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.

4Stephen P. Klein, Richard A. Berk, and Laura J. Hickman, "Race and the Decision to Seek the Death Penalty in Federal Cases" (2006).

5Phyllis 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).