

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Opening Statement of U.S. Senator Russ Feingold
Senate Judiciary Subcommittee on the Constitution Hearing
On "Oversight of the Federal Death Penalty"

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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 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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