

TESTIMONY OF ANDREW G. MCBRIDE

**BEFORE THE SENATE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CONSTITUTION, FEDERALISM
AND PROPERTY RIGHTS**

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RACE AND THE FEDERAL DEATH PENALTY

I. Introduction

Chairman Feingold, Senator Thurmond, distinguished Members of the Subcommittee, and learned colleagues. I am honored to appear before the Subcommittee today on the important subject of the fair and even-handed enforcement of the federal death penalty. By way of background, I am a former law clerk to Justice Sandra Day O'Connor. I served as an Associate Deputy Attorney General in the first Bush Administration, where I helped draft then-President Bush's crime control bill. I have testified several times before Congress regarding the federal death penalty and habeas corpus reform. I also served as a federal prosecutor for almost seven years in the United States Attorney's Office for the Eastern District of Virginia. As a prosecutor, I appeared twice before the Attorney General's capital case review committee, and I tried a four-defendant capital case in federal district court in Richmond, Virginia in 1997.

I believe that the death penalty serves an important role in the spectrum of penalties that the federal criminal justice system has available. Recent studies indicate the death penalty does in fact play a role in the general deterrence of capital crimes. *See, e.g.,* Dezhbacksh, Rubin & Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data*, Department of Economics, Emory

University (January 2001). We know the death penalty accomplishes specific deterrence, for it eliminates the possibility that a known-killer will kill again in prison or upon eventual release. The death penalty offers an additional measure of protection for our federal law enforcement officers who are often faced with the prospect of arresting violent felons who are already facing life imprisonment. Most importantly, the death penalty sends a message of society's outrage and resolve to defend itself against the most heinous of crimes. As we have seen most recently in the McVeigh case, it gives survivors a sense of justice and closure that even life imprisonment without parole cannot accord.

As a former prosecutor who has tried capital cases, and as a citizen, I share the concern of the Chairman and the entire Subcommittee that the death penalty be enforced in a fair, even-handed, and race-neutral manner. At the same time, I am wary of the misuse of race and racial statistics as a stalking horse for those who are opposed to the death penalty in all circumstances. Honest opposition to capital punishment on moral grounds is one thing, throwing charges of racism at federal law enforcement officers and federal prosecutors in order to block enforcement of a penalty the Congress has authorized and the American people clearly support, is another. I fear that some of my fellow panelists today have let vehement opposition to all capital punishment blind them to some simple facts about enforcement of the federal death penalty.

II. There is no Credible Statistical Evidence of Racial Bias in the Enforcement of the Federal Death Penalty.

The dangers of statistical analyses are perhaps best captured in the old saying figures never lie but liars often figure. The Subcommittee should be very wary of the

results of regression analysis or other statistical devices applied to capital punishment. No two capital defendants are the same. No two capital crimes are the same. Federal law and the Eighth Amendment require that juries be allowed to consider every aspect of the crime, the background and competence of the defendant, and even impact evidence regarding the victim, in arriving at the correct punishment. Regression analysis posits that each factor relevant to the imposition of the death penalty can be identified and then given an assigned weight, such that very different cases can be meaningfully compared. This premise is simply false. There are literally millions of legitimate variables that a prosecutor or jury could consider in seeking or imposing capital punishment. If we truly believed that they could all be identified and weighted, we would allow computers to deliberate and impose penalty. Instead, we quite properly rely upon human judgment, the judgment of the prosecutor, the death penalty committee in the Department of Justice, the Attorney General, the district court judge, and a fairly-selected jury from the venue where the crime occurred. In my opinion, and in my experience for seven years as a federal prosecutor, I saw no evidence that the race of defendants or victims had any overt or covert influence on this process. I believe the charge is fabricated by those who wish to block enforcement of the federal death penalty for other reasons.

I would ask the Subcommittee to keep four points in mind as it evaluates these very serious, but, in my opinion, wholly unsupported charges. *First*, pointing to statistical disparities between racial percentages of capital defendants and racial percentages in the population at large is utterly specious. The population at large does

not commit violent felonies B only a small percentage of both the white and non-white communities are ever involved in violent crime. The sad fact is that non-whites are statistically much more likely to commit certain crimes of violence that might lead to death penalty prosecutions. African Americans make up approximately 13 percent of the nation's population. Yet, according to the FBI's 1999 uniform crime reports, there were 14,112 murder offenders in the United States in 1999, and of those offenders for whom race was known, 50 percent were black. Given that most murders are intra-racial, it is not surprising that of the 12,658 murder victims in 1999, 47 percent were black.

Capital crimes also are more likely to occur in urban areas that are more densely populated and tend to have higher minority populations. According to the FBI data, 43 percent of murders in 1999 were recorded in the South, the most heavily populated area of the country. The same data shows that the Nation's metropolitan areas reported a 1999 murder rate of 6 victims per 100,000 inhabitants, compared to rates of 4 per 100,000 for rural counties and cities outside metropolitan areas.

One cannot simply ignore these facts in evaluating the performance of our criminal justice system. Indeed, if the numbers of federal capital defendants of each race precisely mirrored their representation in society as a whole, that would be truly a cause for alarm. It would suggest real racial profiling in the death penalty.

Second, the federal government does not have general jurisdiction over all violent crimes committed within its jurisdiction. From 1988 to 1994, the only federal death available was for murder in relation to certain drug-trafficking crimes. *See* 26 U.S.C. '

848(e). This period coincided with the worst drug epidemic in our Nation's history B the spread of crack cocaine from New York and Los Angeles to all our major urban centers. Most of the participants in the drug organizations that distributed crack cocaine were black, and most of the homicides connected with this drug trade were black-on-black homicides. Approximately half of the defendants presently on federal death row were convicted of a drug-related homicide.

The Department of Justice study released last week indicates that the Eastern District of Virginia is a prime example of an area where the type of crime at issue and the needs of state and federal law enforcement have shaped the statistics. I was a prosecutor in that district for a period of seven years, and I can assure the Subcommittee that I never saw any racial bias in the investigation or charging stages by federal agents or prosecutors during my tenure there. Drug-related homicide was a major problem in the urban areas of Richmond, Norfolk, and Virginia Beach. Many of these homicides were unsolved and had in fact been committed by interstate drug gangs with roots as far away as New York, Los Angeles, and even Jamaica. Joint task forces, composed of federal agents, state police, and local detectives investigated these cases under the supervision of federal prosecutors. Local leaders and politicians, including leaders of the African American community, *welcomed* this effort to focus federal resources on inner-city crimes and the unsolved murders of African-American citizens. These prosecutions were a classic example of the federal government lending support where support was needed and requested and the crimes had a significant interstate element. The results of aggressive federal prosecutions

have included cutting the murder rate in Richmond, Virginia in half from its high in the early 1990's.

Third, the available statistical evidence indicates that whites who enter the federal capital system (both pre- and post-1994) are significantly more likely to face the death penalty than minority defendants. Thus, even opponents of the federal death penalty seem to concede that there is no racial bias in the Department of Justice procedures for determining whether or not to seek the death penalty. Instead, they posit racial bias in the decision to take a case federal in the first place. It is obvious that these critics have never served as a state or federal prosecutor. The same federal prosecutors who make the initial intake decision regarding state or federal prosecution also make the initial decision on the death penalty and prepare the recommendation memorandum to the Attorney General's standing committee. The proposition that they are severely racially biased in the former (the intake decision when capital status is unsure) but are not biased in the latter (when the decision to seek the death penalty is actually made) is absurd. Intake decisions are made by supervisors in the United States Attorney's Offices, who often have fixed protocols with their state counterparts regarding certain crimes. The fact that a group of bank robbers is multi-jurisdictional, or that an organization's trafficking level of cocaine has gone above 10 kilograms of crack are factors likely to result in federal prosecution. Race is never a factor and the notion that federal law enforcement agents are making racist intake decisions (by themselves) is a baseless charge that displays a

shocking lack of knowledge of how our federal/state criminal justice system actually works.

Fourth, the Subcommittee should not place any stock in statistical patterns or comparisons. A pool of approximately 700 federal capital cases is too small a cohort for any serious statistician to produce any reliable conclusions. Moreover, all such studies suffer from the flaw noted above B they assume that all the factors that influence capital punishment can be quantified. It is clear that they cannot be. Rather than focus on largely meaningless statistical games, we should focus on continuing and improving the procedures in place at the Department of Justice to ensure that every capital eligible crime is submitted and reviewed, and that every decision to seek the death penalty is fully justified by the facts and circumstances of the case.

CONCLUSION

In my opinion as a former federal prosecutor, there is no racial bias in the federal capital system. The decision to seek federal prosecution itself is made by federal prosecutors based on largely fixed criteria regarding the interstate nature of the crime or other objective, non-racial factors. The decision to actually seek the death penalty for a capital eligible crime has several layers of review and includes a standing committee that ensures fairness and continuity. Statistical evidence is of little or no probative value in this area and is, in my opinion, being manipulated by those who simply oppose the federal death penalty for any crime. The American people overwhelmingly support capital punishment and Congress has made it available for a limited set of federal crimes.

I believe that the Department of Justice has enforced these laws in an unbiased manner to date and that it will continue to do so under the leadership of Attorney General Ashcroft.

I will be happy to answer any questions that the Members of the Subcommittee might have.

Respectfully Submitted,

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