COMMONWEALTH OF PUERTO RICO
Department of Justice

ROBERTO J. SÁNCHEZ RAMOS
SECRETARY

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

CONCERNING

“OVERSIGHT OF THE FEDERAL DEATH PENALTY”

PRESENTED ON
JUNE 27, 2007

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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

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.

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

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

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.

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.

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.

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.

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.