

It's Not About Federalism #10: The Death Penalty

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The conservative *Economist* magazine recently complained that John Ashcroft's "reverence for central government is beginning to seem downright Democratic, if not Gallic." Chastising the former states' rights champion, the *Economist* said his "conversion into a centralizer is both hypocritical and short-sighted."

Puerto Rico's people seem to have reached the same conclusion, judging from their almost universal outrage at a federal death penalty trial currently proceeding there. Puerto Rico outlawed the death penalty in 1929, and its constitution states: "The right to life, liberty, and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist...." Nonetheless, the Justice Department is going forward with the prosecution.

Puerto Rico's experience is not unusual. Attorney General Ashcroft has overruled local U.S. Attorneys' recommendations against seeking the death penalty at least 31 times, often imposing his will on the 12 states with no death penalty or others that have instituted a death penalty moratorium.

This would seem to be in some tension with "federalist" principles. In striking down a federal statute designed to aid rape victims, the states' right bloc on the Supreme Court said: "We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." But under Ashcroft, the federal government is *more* likely to seek the death penalty in states that have abolished it. Many crimes can be prosecuted under either state or federal law, and generally the feds will leave the job to the states unless the federal interest in the case is "more substantial" than the local interest. A Department of Justice death penalty guideline used to say that a particular state's lack of a death penalty did not by itself justify federal prosecution. Ashcroft deleted the guideline.

Back to Puerto Rico, where citizens are seething. Governor Sila M. Calderón says she is "totally and absolutely against the death penalty because of moral and ethical reasons." Anabelle Rodriguez, Puerto Rico's Secretary of Justice (equivalent to a state attorney general) "wholeheartedly" supports the ban on the death penalty, saying "[i]t is reflective of our collective consciousness." In fact, the Puerto Rican government filed a friend-of-the-court brief supporting the accused murderers when they unsuccessfully appealed to the U.S. Supreme Court. Meanwhile, the former Vice President of the Puerto Rican Bar Association made a presentation about the case to the U.N. Decolonization Committee, saying: "It's not only a question of human rights, it's a question of self-determination." Territorial Senator Fernando Martín concurred, noting that Puerto Ricans cannot vote for Congress or the President: "It's not right for the U.S. to impose a law that Puerto Ricans had no hand in crafting."

The final insult to local feeling is the exclusion of most Puerto Ricans from the jury.

Although proceedings in Puerto Rico's own court system are in Spanish, federal court jurors must be fluent in English, barring more than two-thirds of the population from service. Further, as in capital trials throughout the United States, the prosecution can exclude any juror who has moral objections to imposing the death penalty, a requirement that disqualifies most of the remaining one-third, particularly those who (like most Puerto Ricans) are Roman Catholic and who follow the Church's teaching that capital punishment is immoral. The jury is thus drawn from a pool that is wildly unrepresentative of the local population, a circumstance that in most other contexts would violate the Sixth Amendment.

It's not about federalism; it's about putting people to death.

On the Internet:

The *Economist* article: http://www.economist.com/displaystory.cfm?story_id=1748616

The First Circuit's opinion finding (contrary to the Puerto Rico federal trial court) that the federal death penalty applies in Puerto Rico:
<http://www.ca1.uscourts.gov/pdf/opinions/00-2088-01A.pdf>

From the *New York Times*: <http://www.commondreams.org/headlines03/0717-09.htm> and
<http://www.nytimes.com/2003/07/20/weekinreview/20LIPT.html>

From the *Washington Post*: <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A5450-2002Jun30¬Found=true>

From the *Milwaukee Journal Sentinel*:
<http://www.jsonline.com/news/Metro/may03/143613.asp>

From the *National Law Journal*: <http://www.law.com/jsp/article.jsp?id=1058416409520>