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## UNITED STATES OF AMERICA

# Blind faith

**An appeal to President George W. Bush to admit that the USA's 30-year experiment with the death penalty has failed**

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*Ideology is the curse of public affairs because it converts politics into a branch of theology and sacrifices human beings on the altar of abstractions.*

Arthur Schlesinger, Jr., US historian<sup>1</sup>

Historian Arthur Schlesinger Jr. wrote: “No paradox is more persistent than the historic tension in the American soul between an addiction to experiment and a susceptibility to ideology”. On the one hand, Schlesinger suggested, “Americans are famous for being a practical people, preferring fact to theory, finding the meaning of propositions in results, regarding trial and error, not deductive logic, as the path to truth”. On the other hand, “they also show a recurrent vulnerability to spacious generalities”.<sup>2</sup>

The USA's attachment to the death penalty carries echoes of Schlesinger's paradox. The facts on the ground say abolish, but an idealised notion of capital punishment says continue. Thus, 30 years after *Gregg v. Georgia*, the Supreme Court decision of 2 July 1976 which approved new capital laws and allowed executions to resume after almost a decade without them, the USA's reluctance to let go of judicial killing sets it apart from a clear majority of countries.<sup>3</sup> Yet surely, in Justice Harry Blackmun's words, the USA's “death penalty experiment has failed”. In his 1994 dissent, Justice Blackmun vowed that after two decades of struggling to fashion a capital justice system that would be consistent, fair and error-free, he would no longer “tinker with the machinery of death”. No combination of rules or regulations, he wrote, could ever save capital punishment from its inherent flaws. However, a dozen years later, even those current Justices who seem the most troubled by the

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<sup>1</sup> Arthur Schlesinger, Jr. *Foreign policy and the American character*. Foreign Affairs, Volume 62, No. 1, 1983.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976)

death penalty suggest that, despite “decades of back-and-forth between legislative experiment and judicial review” and the growing “evidence of the hazards of capital prosecution”, it is “far too soon for any generalization about the soundness of capital sentencing across the country”.<sup>4</sup> Thus the USA continues with its dead-end experiment, refusing to give up what Justice Blackmun suggested was the delusional idea that the death penalty can be made to work.<sup>5</sup>

Delusional is perhaps the appropriate word, for the death penalty could be said to make assumptions about a world that does not exist. It assumes the absolute perfection of the criminal justice system, and the absolute imperfection of the people it condemns to death. It assumes that human beings can decide – free from error or inequity – which of their fellow human beings convicted of crimes should live and which should die. It assumes that even if discrimination has not yet been eradicated in society, it can be overcome in the course of capital justice. Even if government is traditionally the focus of public distrust in a country founded in revolution against tyranny or the authorities are specifically known to have erred (to have been “dead wrong”, perhaps, on the intelligence used to go to war), the state is still somehow assumed to be imbued with incorruptibility and infallibility when it turns its hand to executions.<sup>6</sup>

If these assumptions are *not* made, and the imperfection of the justice system and the fallibility of the government are thereby accepted, then those advocating the death penalty must also accept the inevitability of executing the wrongfully convicted or the unfairly sentenced. One cannot have it both ways.

President George W. Bush, for one, continues to display a faith in judicial killing that appears to border on the ideological. Asked in 2001 whether he was having any “second thoughts” about the death penalty, he responded “Not as far as I’m concerned – so long as the system provides fairness.”<sup>7</sup> Fairness is not a characteristic of the capital justice system, however. The Supreme Court recognized this in 1972, in *Furman v. Georgia*, when a majority of its Justices found that the death penalty was unconstitutional as then applied.<sup>8</sup> The words used by the Justices to describe its use included “arbitrary”, “capricious”, “discriminatory” and “freakish”. The same words could be used now because the experiment authorized by the

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<sup>4</sup> *Kansas v. Marsh*, 26 June 2006, Justice Souter dissenting (joined by Justices Stevens, Ginsburg and Breyer).

<sup>5</sup> “Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed”. *Callins v. James* (1994), Justice Blackmun dissenting.

<sup>6</sup> “We conclude that the Intelligence Community was dead wrong in almost all of its pre-war judgments about Iraq’s weapons of mass destruction. This was a major intelligence failure”. Letter to President George W. Bush from the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, transmitting the Commission’s final report. 31 March 2005.

<sup>7</sup> Press conference of the President, White House, 11 May 2001, available at: <http://www.whitehouse.gov/news/releases/2001/05/20010511-3.html>.

<sup>8</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

Supreme Court in *Gregg v. Georgia* has failed, inevitably, to produce a system that passes the test of fairness.

There have been approximately 500,000 murders in the USA since 1977. In the same period about 7,000 people have been sentenced to death, just over 1,000 of whom have been executed and about 3,300 of whom remain on death row. In the *Furman v. Georgia* ruling in 1972, Justice William Brennan wrote:

“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in ‘extreme’ cases.”

The majority in the *Gregg* decision four years later said that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.” There are many cases to illustrate how misplaced was the Supreme Court’s confidence expressed in *Gregg*.<sup>9</sup> What happened to Johnny Joe Martinez, executed in Texas on 22 May 2002, almost exactly 30 years after the *Furman* ruling, is a case in point.

Johnny Martinez was sentenced to death for a murder committed in 1993 when he was 20 years old. He had no history of violence, no prior convictions, was remorseful immediately after the crime, handed himself in to the police, and assisted them in finding the murder weapon. Despite the fact that in the USA’s death penalty experiment “capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution”, a Texas jury found that Johnny Martinez should be executed.<sup>10</sup> He lost his appeal to the Texas Court of Criminal Appeals (TCCA) by five votes to four. One of the dissenting judges wrote:

“We have the duty of ensuring death sentences are imposed in an evenhanded, rational and consistent manner... Today, the majority shirks that responsibility and issues an opinion that insulates jury verdicts from meaningful appellate review... In light of the majority opinion, there is no longer any assurance that the death penalty will not be wantonly or freakishly imposed”.

The TCCA then appointed a lawyer to represent Johnny Martinez for his further *habeas corpus* appeals. This lawyer had never handled such an appeal, and asked the court on several occasions for permission to withdraw from the case. In 1997, the lawyer filed an appeal, without having once spoken to or visited his client, having refused to accept telephone calls from him, and having sent him only one brief letter. The appeal was five and a half pages long. Two of the four claims raised comprised 17 lines of text with three inches of

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<sup>9</sup> For example, see *USA: Arbitrary, discriminatory, and cruel: an aide-mémoire to 25 years of judicial killing*, [http://web.amnesty.org/library/pdf/AMR510032002ENGLISH/\\$File/AMR5100302.pdf](http://web.amnesty.org/library/pdf/AMR510032002ENGLISH/$File/AMR5100302.pdf).

<sup>10</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005) quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

margin, with no cases cited. *Habeas corpus* applications filed by adequately funded, experienced lawyers routinely run to more than 150 pages because of the number of issues raised and the complexity of the law. The appeal did not challenge the adequacy of Johnny Martinez's trial representation, even though his trial lawyer had done little investigation or preparation for the sentencing phase.

The TCCA dismissed the appeal. One of the judges dissented, citing the brevity and lack of quality of the appeal. He wrote that the merits of the appeal should not be assessed, but that the adequacy of the appeal lawyer's performance should be examined. The lawyer himself agreed with the dissent, again asking to withdraw from the case because of his inexperience.

New lawyers later appointed for Johnny Martinez's federal appeals discovered substantial mitigating factors that had not been presented to the trial jury, including evidence that Johnny Martinez had been subjected to sexual and physical abuse as a child, and of his dysfunctional family background, including his mother's selling and use of heroin. Given Johnny Martinez's youth, intoxication, remorse, cooperation with the police, and non-violent history, such mitigation evidence, the federal appeal lawyers argued, might have affected the sentence. However, the federal courts ruled that the claim of inadequate trial counsel was procedurally barred from being evaluated because the claim had not been raised in the state courts. The federal district court expressed concern at this "harsh" outcome – given that the issue was lost to judicial review because of the incompetence of the state *habeas* lawyer – but considered itself bound by precedent.

Johnny Martinez's final chance lay with executive clemency. He lost his appeal to the state clemency board by eight votes to nine, despite an appeal for mercy from the murder victim's mother. The governor of Texas refused to intervene, just as President Bush had failed to intervene in 152 executions that were carried out in Texas during his five-year tenure as governor there.

At a press conference in March 2005, President Bush was again asked about whether his support for executions had changed at all since leaving the Texas governorship. The President replied: "No. I still support the death penalty, and I think it's a deterrent to crime."<sup>11</sup> He did not say what evidence he was drawing on for this assertion, leaving the impression that he was relying on an idea rather than empirical data. As Justice Marshall said in *Furman v. Georgia*, there is "clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society", adding that "in light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect." At the same time, there have been individual cases in which the death penalty appears to have served as a counter-deterrent – that is, to have caused the crime rather than prevented it.<sup>12</sup>

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<sup>11</sup> President's press conference, 16 March 2005, available at <http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html>.

<sup>12</sup> For example, see cases of Daniel Colwell and Robert Smith, page 8-9 of *USA: The illusion of control*, April 2001, <http://web.amnesty.org/library/index/engamr510532001>.

In the *Gregg* ruling four years later, Justice Potter Stewart wrote that the evidence about the deterrence effect of the death penalty was “inconclusive”, and passed this “complex factual issue” to legislatures to resolve. The opinion suggested that the legislative branch was the best placed to “evaluate the results of statistical studies”. Therefore legislators should be considering, for example, a 1996 survey of the views of some of the USA’s top criminologists which found a wide consensus within this expert community about the empirical research on deterrence. The consensus was that “the death penalty does, and can do, little to reduce rates of criminal violence”. Thus, as the study put it, “these leading criminologists do not concur with one of the most important public justifications for the death penalty in modern society”.<sup>13</sup> A more recent review of the statistical evidence on the deterrent effect of the death penalty has concluded that “the existing evidence for deterrence is surprisingly fragile”. The principal insight of the study published in the *Stanford Law Review* in 2005 was that “the death penalty – at least as it has been implemented in the United States since *Gregg* ended the moratorium on executions – is applied so rarely that the number of homicides it can plausibly have caused or deterred cannot be reliably disentangled from the large year-to-year changes in the homicide rate caused by other factors. Our estimates suggest not just ‘reasonable doubt’ about whether there is any deterrent effect of the death penalty, but profound uncertainty”.<sup>14</sup>

Profound uncertainty is surely no basis on which to justify this irrevocable punishment. Yet President Bush and other elected officials continue to respond with a degree of certainty about the death penalty that is not warranted by the evidence. According to the White House spokesman in December 2005, “the President strongly supports the death penalty, because he believes, ultimately, it helps save innocent lives. When it’s administered fairly and swiftly and surely, it serves as a deterrent and it saves innocent lives. And that’s why the President has been a strong supporter of it”.<sup>15</sup> President Bush himself has said that his support for the death penalty is conditional upon making sure that those who are subject to it are “truly guilty”.<sup>16</sup>

The cases of Ricky McGinn and Henry Lee Lucas were the only Texas or federal cases of impending execution in which Governor – and then President – George W. Bush has intervened, despite many others that cried out for executive intervention. This record suggests that the phrase “truly guilty” represents the narrowest of funnels through which his quality of mercy is strained.<sup>17</sup> In the context of US death penalty law, the concept of “truly guilty” must

<sup>13</sup> *Deterrence and the death penalty: The view of the experts*. Michael L. Radelet and Ronald L. Akers, in the *Journal of Criminal Law & Criminology*, Volume 87, No. 1.

<sup>14</sup> John D. Donohue and Justin Wolfers, *Uses and abuses of empirical evidence in the death penalty debate*, 58 *Stanford Law Review* 791 (2005).

<sup>15</sup> White House Press Briefing, 2 December 2005, available at <http://www.whitehouse.gov/news/releases/2005/12/20051202-2.html>.

<sup>16</sup> “No, I still support the death penalty, and I think it’s a deterrent to crime. But I want to make sure, obviously, that those subject to the death penalty are truly guilty.” President’s press conference, 16 March 2005, available at <http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html>.

<sup>17</sup> On the case of Henry Lee Lucas and others see page 42 of *USA: Failing the future – Death penalty developments, March 1998 - March 2000*, <http://web.amnesty.org/library/index/engamr510032000>. On Ricky McGinn’s case, see for example, *Bush’s death penalty dodge*, by Alan Berlow, 12 June 2000

mean that not only is the defendant guilty of the capital crime as charged, but that he or she also falls into the category of the “worst of the worst” for sentencing purposes.<sup>18</sup> As noted above, the case of Johnny Martinez shows that this principle has existed on paper only. So too, for example, does the fact that among the approximately 1,000 men and women executed since 1976 were at least 100 people with histories of serious mental illness, and at least another 50 who had mental retardation or were children at the time of their crimes.<sup>19</sup>

Another sign of the rhetoric about fairness being punctured by reality is the consistent finding in numerous studies over the years that race, particularly the race of the murder victim, is a factor in who is sentenced to death.<sup>20</sup> Eighty per cent of those executed in the USA since 1977 had been convicted of crimes involving white victims. Yet blacks and whites are the victims of murder in approximately equal numbers in the USA. At least one in six of the 350 African Americans executed in the USA since 1977 were tried in front of all-white juries. Given the racist history of the USA (and elsewhere) any racial influence in capital cases alone should shame US politicians into ending the death penalty, not defending it. Three Supreme Court Justices concurring in the *Gregg* decision acknowledged that in the death penalty experiment they were initiating, “mistakes will be made and discriminations will occur”. Nevertheless, they refused to rule against a resumption of executions “on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner”.<sup>21</sup> Their predictions about errors and prejudice were right. Their refusal to provide the only possible remedy – abolition – was wrong.

In April 2002 in Illinois, the 14-member Commission appointed by the governor to examine the state’s capital justice system in view of the number of wrongful convictions in capital cases, reported that it was “unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death”. In contrast, US Supreme Court Justice Antonin Scalia recently displayed what could be described as over-confidence in the reliability of the USA’s capital justice system. Referring to the Illinois experience, but ignoring the case of Anthony Porter, who only survived execution in Illinois after 17 years on death row because some students happened to investigate his case and prove his innocence, Justice Scalia perpetuated the myth that exonerations of condemned inmates demonstrate “not the failure of the system but its success”. Justice Scalia also said:

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available at <http://archive.salon.com/politics/feature/2000/06/12/death/> and *The hanging governor*, by Alan Berlow, 11 May 2000, <http://archive.salon.com/politics/feature/2000/05/11/bush/index.html>.

<sup>18</sup> “Within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst’.” *Kansas v. Marsh*, *op. cit.* Justice Souter dissenting.

<sup>19</sup> See Appendix 1 of USA: *The execution of mentally ill offenders*, January 2006 available at: <http://web.amnesty.org/library/Index/ENGAMR510032006>. Tables 3 and 4 of USA: *Indecent and internationally illegal – the death penalty against child offenders*, September 2002 available at, <http://web.amnesty.org/library/Index/ENGAMR511432002>.

<sup>20</sup> USA: *Death by discrimination - the continuing role of race in capital cases*, April 2003, available at: <http://web.amnesty.org/library/Index/ENGAMR510462003>.

<sup>21</sup> *Gregg v. Georgia*, Justice White, joined by the Chief Justice and Justice Rehnquist, concurring in the judgment.

“Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to...”<sup>22</sup>

It is shocking that a Justice of the United States Supreme Court should consider as “insignificant” the risk of wrongful convictions in capital cases, given the number of such cases – more than 100 – that have been uncovered since the *Gregg* ruling.<sup>23</sup> Amnesty International, which makes no apologies for being ideologically opposed to the death penalty, has little doubt that sooner or later it will be shown that since the *Gregg* decision, the USA has executed at least one person for a crime he or she did not commit. Such cases are, of course, hard to prove, especially before abolition. The state will resist attempts to uncover the execution of an innocent person, and in any event, once a person has been executed, the scarce resources of the legal and abolitionist communities will generally be directed toward trying to stop future executions. In the United Kingdom, for example, it took nearly half a century to clear Mahmood Mattan’s name. This 28-year-old Somali sailor had been hanged in the UK in 1952. After a long campaign by relatives and others to prove his innocence, his murder conviction was overturned by an appeal court in 1998.

Nevertheless, a number of investigations have unearthed evidence pointing to the post-*Gregg* execution of wrongfully convicted individuals in the USA. Journalists at the *Chicago Tribune*, for example, have raised compelling evidence that Carlos DeLuna, executed in Texas in 1989 for a murder committed six years earlier, was innocent of the crime for which he was put to death.<sup>24</sup> Three other investigations in the past two years have pointed to the execution of possibly innocent men – Cameron Todd Willingham and Ruben Cantu, executed in Texas in 1993 and 2004 respectively, and Larry Griffin executed in Missouri in 1995.<sup>25</sup> There are numerous other cases of individuals who went to their deaths despite doubts about their guilt.

Irrevocability is, of course, only one of the fundamental flaws of capital punishment. As Justice Potter Stewart said in *Furman v. Georgia*, the death penalty “is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.” Justice Brennan added, in Justice Scalia’s recent parlance, “a truism, not a revelation”:

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<sup>22</sup> *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

<sup>23</sup> See <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6>.

<sup>24</sup> See 3-part series by Steve Mills and Maurice Possley, *Chicago Tribune*: ‘I didn’t do it. But I know who did’ (25 June 2006). *A phantom, or the killer?* (26 June). *The secret that wasn’t* (27 June). [http://www.chicagotribune.com/news/specials/broadband/chi-tx-htmlstory\\_0\\_7935000.htmlstory](http://www.chicagotribune.com/news/specials/broadband/chi-tx-htmlstory_0_7935000.htmlstory).

<sup>25</sup> See <http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#executed>.

“We know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”

Justice Byron White wrote in *Furman* that “the imposition and execution of the death penalty are obviously cruel in the dictionary sense”. Yet executions continue in the USA while one by one other countries have dropped off the list of those prepared to kill a selection of their citizens in this most calculated of ways. Clearly, the Eighth Amendment of the US Constitution, prohibiting the infliction of “cruel and unusual punishments”, has not instilled within government in the USA a progressive approach to this fundamental human rights issue, and many if not most elected officials evidently still do not consider the death penalty to be ‘unusual’, cruel, inhuman or degrading. They include President Bush who has repeatedly asserted his administration’s commitment to the “non-negotiable demands of human dignity” while at the same time being a leading proponent of judicial killing. Yet the Supreme Court has said that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>26</sup>

In this 1958 ruling, the Court clarified that the words of the Eighth Amendment “are not precise” and “their scope is not static.” Rather, “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” It was this criterion which the Court recently applied to the question of the execution of juvenile offenders and people with mental retardation when it concluded – later than most of the rest of the world – that both categories of offender should be exempted from the death penalty.<sup>27</sup> While Amnesty International welcomed these decisions, it considers that their regrettable belatedness in relation to other countries and international law illustrated how the “evolving standards of decency” yardstick can conspire against progressive change in the USA.

Thirty years ago, the same yardstick allowed the Supreme Court to duck abolition as well as the antagonism that the *Furman* ruling had caused among state legislators. In *Gregg v. Georgia*, a majority of Justices found that legislative developments in the four years since *Furman* had “undercut substantially” the notion that standards of decency had evolved to the point where the death penalty was unconstitutional. In other words, because some 35 US states had responded to *Furman* by enacting new death penalty statutes, it was “now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction”. With that conclusion, the Court opened the doors to the country’s death chambers.

In 1995, in contrast, the Constitutional Court of South Africa found that the death penalty violated that country’s new constitution. One of the Judges, building on the USA’s “evolving standards of decency” notion, recalled Justice Scalia’s opinion that “the risk of

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<sup>26</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>27</sup> *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005), *op.cit.*

assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views".<sup>28</sup> Judge Ackermann continued:

"This is a pertinent warning which I have, I hope, kept in mind. I believe, nonetheless, that there is ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies. Most democratic countries have abandoned the death penalty for murder... [I]n general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading, not only to those subjected to it but also to the society which inflicts it."<sup>29</sup>

Justice Antonin Scalia is one of President Bush's favourite judges.<sup>30</sup> Justice Scalia has written that the death penalty is morally acceptable and that the "modern aversion to the death penalty" is the predictable but erroneous response to "modern, democratic self-government" in which, he says, private morality is equated with governmental morality. Few people, he wrote, "doubted the morality of the death penalty in the age that believed in the divine right of kings."<sup>31</sup> Notably, criticisms of the US administration's record under President Bush, who came to office as a strong advocate of the death penalty, have included the accusation that as President he has assumed quasi-monarchical powers impacting on wider human rights issues.<sup>32</sup> This includes in relation to the military commissions he has attempted to set up to try "war on terror" detainees, with the power to hand out death sentences.<sup>33</sup>

<sup>28</sup> *Thompson v. Oklahoma* (1988), Justice Scalia dissenting (against the Court's decision which stopped the execution of anyone who was 15 years old or younger at the time of the crime).

<sup>29</sup> *The State v. T. Makwanyane and M Mchunu*, Constitutional Court of South Africa, 6 June 1995, Ackermann J., concurring.

<sup>30</sup> On NBC's *Meet the Press* on 21 November 1999, presidential candidate George W. Bush was asked to name the Supreme Court justice he most respected. He replied, "Well, that's – Antonin Scalia is one. . . . There's a lot of reasons why I like Judge Scalia."

<sup>31</sup> Antonin Scalia. *God's justice and ours*. First Things, Volume 123, pages 17-21 (May 2002).

<sup>32</sup> For example, Professor Michael Glennon has suggested that Berkeley law professor and former Justice Department lawyer, John Yoo, "concludes that for all intents and purposes we have an elected king". John Yoo was author of a number of controversial government memorandums relating to detentions, treatment of detainees, and executive power in the "war on terror". *Conservative legal scholar John Yoo, whose memos helped shape White House policy, says the framers gave the president all the war powers of a king*. Boston Globe, 23 October 2005. See also statements by Senator Russ Feingold, <http://feingold.senate.gov/~feingold/statement/05/11/2005C17B45.html> and <http://feingold.senate.gov/~feingold/statements/06/03/2006331.html>. Faced with the suggestion that his "war on terror" presidency has been one of "unchecked power", President Bush has said that the latter label "basically is ascribing some kind of dictatorial position to the President, which I strongly reject". <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>. Amnesty International has been concerned about the apparent pursuit of unfettered executive power in the 'war on terror'. See, for example, *USA: Guantánamo and beyond: the continuing pursuit of unchecked executive power*, May 2005, [http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/\\$File/AMR5106305.pdf](http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/$File/AMR5106305.pdf).

<sup>33</sup> In a brief filed in the Supreme Court in 2004, US military lawyers described President Bush's proposed trials by military commission as a "monarchical regime", [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/RasuilMilDefCounselSCamicus.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/RasuilMilDefCounselSCamicus.pdf). On 29 June 2006, the US

In any event, in a distinctly US angle on the relationship between democracy and the death penalty, US officials tend to defend their country's resort to judicial killing by characterizing it as democracy in action rather than the use or abuse of state power. Thus the USA's recent report to the UN Committee Against Torture justified the death penalty on the grounds that "a majority of the people in a majority of the states, and of the country as a whole, have chosen through their democratically elected representatives to provide the possibility of capital punishment for the most serious of crimes".<sup>34</sup> In one of his most recent opinions, Justice Scalia expressed the flipside of this US position, namely that leaders who abolish the death penalty despite apparent public support for it are undemocratic:

"There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently – and indeed, many of them would still have it if the democratic will prevailed)."<sup>35</sup>

Sixty years ago, the US Supreme Court wrote that the purpose of the Bill of Rights, the first 10 Amendments to the US Constitution adopted in 1791, was "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials... [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections".<sup>36</sup> Amnesty International agrees: respect for fundamental human rights should not be dependent on opinion polls or other indicators of public sentiment, including the vote. Just because a democratically elected legislature passes a law allowing a human rights abuse does not make it right. Even Justice Scalia has acknowledged that there are limits to democratically approved abuse:

"What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offences? ... I doubt whether any federal judge... would sustain them against an eighth amendment challenge... I am confident that public flogging and hand-branding would not be sustained by our courts."<sup>37</sup>

Nevertheless, when it comes to the state killing people convicted of certain criminal offences, Justice Scalia displays a double standard. He maintains that if "the American people have determined that the good to be derived from capital punishment... outweighs the risk of error", then it is "no proper part of the business of this Court, or of its Justices, to second-

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Supreme Court ruled that President Bush had overstepped his authority in relation to the military commissions (*Hamdan v. Rumsfeld*). Justices Scalia, Thomas and Alito dissented against the majority's conclusion. See AI news release, <http://web.amnesty.org/library/Index/ENGAMR511022006>.

<sup>34</sup> Second Periodic Report of the United States of America to the Committee Against Torture, 6 May 2005, available at <http://www.state.gov/g/drl/rls/45738.htm#article16>.

<sup>35</sup> *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

<sup>36</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>37</sup> *Originalism: the lesser evil*. Antonin Scalia, University of Cincinnati Law Review, Volume 57, pages 849 to 865. 1989.

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guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.”<sup>38</sup>

The executive, legislative and judicial branches of government all have roles to play in promoting and protecting progressive standards of decency and adherence to human rights norms. The history of the progress towards worldwide abolition reveals, as Justice Scalia’s comment about the countries of “finger-waggers” suggests, that governments have not waited for perceived public opinion to turn against the death penalty. In some cases, it has been the judiciary that has led the way, such as in South Africa in 1995. This has occurred on occasion in the USA, albeit with only temporary effect. The *Furman* decision was one from which the Supreme Court backed away four years later in *Gregg*. Also in 1972, the Chief Justice of the California Supreme Court wrote in an opinion finding the state’s death penalty unconstitutional: “Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants”.<sup>39</sup> At some point, judges bring their own judgment to an issue.

Not that this will necessarily lead to progress against the death penalty in the absence of principled human rights leadership from the other branches of government. Federal judges in the USA are appointed by the President with the advice and consent of the Senate. The political support for the death penalty in the White House and Congress over recent decades has unsurprisingly meant the appointment of few federal judges who were ideologically opposed to judicial killing. The main distinction between judges in relation to the death penalty has thus tended to be one of their greater or lesser support for regulation of the capital process, rather than opposition to executions *per se*.

As the late Chief Justice of the US Supreme Court, William H. Rehnquist, wrote: “There is obviously wide room for honest difference of opinion over the meaning of general phrases in the Constitution: any particular Justice’s decision when a question arises under one of these general phrases will depend to some extent on his own philosophy of constitutional law.”<sup>40</sup> A seminal article in 1992 examining the various notions of ‘political’ used to describe the US Supreme Court noted that:

“It is not necessarily the case that a justice’s vote flows from his policy preferences and precedes a process of legal rationalization. That does, of course, happen on occasions. But different philosophical principles will inevitably dictate different results, so that different policy consequences will follow ineluctably from justices’ different jurisprudences. For example, those who see the fundamental role of the Court as the protector of the individual, particularly the unpopular individual, against the power of the state, will necessarily incline towards activism (defined here as a

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<sup>38</sup> *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

<sup>39</sup> *People v Anderson*, California Supreme Court, 6 Cal. 3d 628 (1972).

<sup>40</sup> *The notion of a living Constitution*. William H. Rehnquist, Texas Law Review, Volume 54, No. 4, May 1976. This article was written when the author was an Associate Justice on the Supreme Court.

willingness to find unconstitutional the laws and actions of duly elected officials); those who defer to elected officials except where the most egregious breakings of the Constitution have taken place will naturally seem self-restrained”.<sup>41</sup>

On death penalty cases, the end result of the “conservative/liberal” divide can be what appears to be ideological decision-making by federal judges, and heightens the need for progressive action by the other two branches of government, the executive and the legislature. A recent illustration of this occurred in the case of Levar Walton, a seriously mentally ill prisoner convicted of three murders committed in 1996 and sent to Virginia’s death row where he remains.

There is compelling evidence that Levar Walton was already suffering from mental illness at the time of the murders and that he was incompetent to stand trial. Once on death row his mental illness worsened – prison records have described an inmate who is “floridly psychotic” with little apparent concern about his impending execution. The principal question in his case thus became one of whether he was legally insane and therefore “incompetent” for execution. The execution of an insane prisoner violates the US Constitution under the 1986 Supreme Court ruling, *Ford v. Wainwright*. However, *Ford* protections have proved minimal. At a bare minimum, it requires that a prisoner be found to make a connection between his crime and punishment. However, what if the connection is highly tenuous or takes place in an inner world that is delusional and the product of severe mental illness? Precisely what the *Ford* decision means continues to cause disagreements in the lower courts.

In May 2003, a District Court issued a stay of execution in order to assess whether Levar Walton was competent for execution under *Ford*. After holding hearings, at which he heard conflicting professional opinions on Walton’s competence for execution, the judge ruled him competent under a narrow interpretation of the *Ford* ruling. Walton’s lawyers appealed to a three-judge panel of the US Court of Appeals for the Fourth Circuit, arguing that the *Ford* decision requires not only that the condemned inmate understands that he is to be executed and why, but also that this understanding is such that the prisoner is able to prepare for his death.<sup>42</sup> Two of the judges agreed. Noting that the *Ford* decision “presents challenges” because it had neither defined insanity nor mandated the procedures for making competency determinations, the panel’s 2005 opinion stated that, as in Walton’s case, “a person who can only acknowledge, amidst a barrage of incoherent responses, the bare facts that he will be executed and that his crime is the reason why does not meet the standard for competence” under *Ford*.

The state successfully appealed for a rehearing in front of the full Fourth Circuit court of 13 judges. In March 2006 a majority of seven judges concluded that the District Court had

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<sup>41</sup> *Six definitions of ‘political’ and the United States Supreme Court*. Richard Hodder-Williams, British Journal of Political Science, Volume 22, No. 1 (1992).

<sup>42</sup> The only dispute for the Fourth Circuit court was how to establish whether Levar Walton was competent for execution under the *Ford* decision. As the earlier Fourth Circuit panel opinion had noted, “undoubtedly, determining whether a person is competent to be executed is not an exact science.” In other words there will inevitably be errors and inconsistencies – reaffirming that abolition is the only solution.

applied the correct legal standard. All seven judges had been appointed by Republican Presidents, including two appointed by President George W. Bush and three by President George H.W. Bush.<sup>43</sup> The other six dissented, noting the “substantial evidence that Percy Levar Walton does not understand that his execution will mean his death, defined as the end of his physical life”. They noted that “there is no dispute that since his sentencing, Walton has fallen deeper and deeper into mental illness”. Five of these six judges had been appointed by President Bill Clinton, a Democratic president.<sup>44</sup> Clearly these six judges took a more “liberal” view than their seven colleagues.<sup>45</sup>

This phenomenon is apparent in other areas of the death penalty. For example, in September 2000, the US Court of Appeals for the Sixth Circuit split seven votes to seven on whether to grant Tennessee death row inmate Philip Workman a hearing on new evidence supporting his claim of innocence (the 7-7 tie meant that he lost). The seven judges voting for a new hearing had all been appointed by Democratic presidents.<sup>46</sup> The seven voting against had all been appointed by Republican presidents.<sup>47</sup> In a more recent Sixth Circuit decision involving the case of Abu-Ali Abdur’Rahman, another Tennessee death row case with many troubling aspects of race, mental health, inadequate legal representation and prosecutorial misconduct, nine of the 10 judges who voted for the state’s position were appointed by Republican presidents, including six appointed by President George W. Bush.<sup>48</sup> The five judges who dissented had been appointed by Democratic presidents.

Amnesty International is not suggesting either that federal judges lack independence or that the system of appointing them is undemocratic. Voters, for example, would or could have known that President George W. Bush would likely appoint conservative judges if elected as President.<sup>49</sup> The point is simply that, not only should democratic principles not be

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<sup>43</sup> The other two were appointed by President Reagan and President Nixon.

<sup>44</sup> The sixth was the exception (who proved the rule?). Judge Wilkins was appointed by President Reagan.

<sup>45</sup> Shortly before Levar Walton was due to be executed in early June 2006, Governor Timothy Kaine (Democrat) issued a six-month stay of execution in order that the question of Walton’s mental competence could be assessed. His decision drew fierce criticisms from political opponents, including former state Attorney General Jerry Kilgore (Republican) who was Kaine’s defeated opponent in the 2005 Virginia gubernatorial election. Kilgore, whose campaigning had included advertisements questioning Kaine’s commitment to the death penalty, accused Kaine of “defeat[ing] the entire judicial process” by not allowing Walton to be killed as scheduled. *Kaine delays execution of inmate for 6 months*. Washington Post, 9 June 2006.

<sup>46</sup> Five were appointed by President Clinton, two by President Carter. The decision is *Workman v. Bell*, (5 September 2000)

<sup>47</sup> Four had been appointed by President Reagan, three by President George H.W. Bush.

<sup>48</sup> Of the three others, two were appointed by President George H.W. Bush and one by President Reagan (the 10<sup>th</sup> judge was a Clinton appointee). Of the five dissenters, four had been appointed by President Clinton, and one by President Carter. *Abdur’Rahman v. Bell* (7 October 2005). For more on this case, see *USA: Not in the jury’s name: the imminent execution of Abu-Ali Abdur’Rahman*, June 2003, <http://web.amnesty.org/library/Index/ENGAMR510752003>.

<sup>49</sup> See, for example, comments of Senator John Kerry, second 2004 presidential debate: “A few years ago, when he came to office, the President said – these are his words – ‘What we need are some good

used to justify human rights violations, democracy alone will not rid a society of such abuses. It requires informed public debate and principled human rights leadership at all levels of government.

In the US system of government, the federal authorities have had a tendency to hide behind the concept of “federalism” or “states’ rights” when accused of failing to live up to international obligations in relation to the country’s use of the death penalty. In international law, however, the USA is a single state. The federal government, as the authority which signs and ratifies treaties, is under an obligation to ensure that the whole country complies with any treaty ratified. The federal structure of government does not absolve it of this obligation.<sup>50</sup>

Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992, recognizes that some countries are still retentionist. However, the Human Rights Committee, the expert body established by the ICCPR to oversee implementation of that treaty, has emphasised in its authoritative interpretation of Article 6 that the article is abolitionist in outlook, and therefore “all measures of abolition should be considered as progress in the enjoyment of the right to life”. Writing in 1982, the Committee expressed its concern at the inadequate progress towards abolition or limitation of the death penalty among member states.<sup>51</sup> Since then, some 60 more countries have abolished the death penalty. In the same period, the USA has executed more than 1,000 men and women for capital murder.

There are many reasons to oppose capital punishment, including ideological or practical reasons. New Jersey’s Attorney General Zulima Farber, for example, recently voiced her support for the moratorium in force in her state, and said of the death penalty: “I don’t think it’s a deterrent. And I understand revenge. I think some people deserve it. But I don’t think it’s a necessary tool... I don’t have a philosophical or religious opposition to the death penalty; I have a practical opposition to the death penalty.”<sup>52</sup>

To oppose capital punishment is not to excuse or minimize the consequences of violent crime. If it were, then a majority of countries are currently apologists for violent crime, clearly a nonsensical suggestion. Instead, to end the death penalty is to recognize that it is a destructive, diversionary and divisive public policy that is not consistent with widely held values. It not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in social and psychological terms. It has not been shown to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim’s family, and extends that suffering to the loved

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conservative judges on the courts.’ And he said also that his two favourite justices are Justice Scalia and Justice Thomas. So you get a pretty good sense of where he’s heading if he were to appoint somebody”. Available at <http://www.whitehouse.gov/news/releases/2004/10/20041009-2.html>.

<sup>50</sup> Article 27 of the Vienna Convention on the Law of Treaties (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

<sup>51</sup> Human Rights Committee, General Comment No. 6 (1982).

<sup>52</sup> *Attorney general tells of death-penalty doubts*. Associated Press, 17 March 2006.

ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity. It should be abolished.

Human rights violations come in many forms. Amnesty International considers that the death penalty is the ultimate form of cruel, inhuman or degrading treatment or punishment. Particularly in the context of the “war on terror”, US officials have authorized and condoned interrogation techniques and detention conditions that violate the international prohibition on torture and other cruel, inhuman or degrading treatment. Yet, in statements that echo the official attitude towards the death penalty, officials have at the same time claimed to be committed to treating detainees humanely. Amnesty International has urged the US administration to ensure that when officials speak of the USA’s commitment to humane treatment, what they mean at least meets international law and standards.<sup>53</sup> This is a problem that is familiar to those working against the death penalty in the USA. The “culture of life” and the “non-negotiable demands of human dignity” to which President Bush has repeatedly committed his administration clearly do not include the question of the death penalty, even as much of the rest of the world turns against this state-sanctioned killing.

Amnesty International now urges President Bush, in addition to reconsideration of his administration’s approach to the treatment of detainees in US custody at home and abroad, to reconsider his support for the death penalty. The organization urges him to reflect upon what his administration told the United Nations Committee Against Torture in Geneva on 8 May 2006: “All governments are imperfect because they are made up of human beings who are, by nature, imperfect. One of the great strengths of our nation is its ability to recognize its failures, deal with them, and act to make things better.”<sup>54</sup>

Once one accepts the fallibility of governments and human beings more generally, one must reject the death penalty, realizing that no amount of tinkering with the machinery of death can free this outdated punishment from its inescapable flaws.

### **Write to President Bush**

Please send an appeal to President Bush urging him to recognize that the 30-year death penalty experiment in the USA has failed; to declare a moratorium on federal executions; to speak out publicly against the death penalty; and to do everything in his power and influence to lead the USA away from capital punishment.

#### **Appeals to:**

President George W. Bush, The White House, 1600 Pennsylvania Avenue NW, Washington, DC 20500, USA. Fax: +1 202-456-2461. Email: [president@whitehouse.gov](mailto:president@whitehouse.gov)

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<sup>53</sup> See, for example, *Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo*, 23 June 2006, <http://web.amnesty.org/library/Index/ENGAMR510932006>.

<sup>54</sup> Statement available at <http://www.state.gov/g/drl/rls/rm/2006/66065.htm>.