USA

DEADLY FORMULA*

AN INTERNATIONAL PERSPECTIVE ON THE 40TH ANNIVERSARY OF *FURMAN v. GEORGIA*

(DEMOCRACY + DEFERENCE + DOMESTIC STANDARDS = 1,300 EXECUTIONS & COUNTING)*

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INTERNATIONAL

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FURMAN V. GEORGIA: A JUDICIAL RED RAG TO A LEGISLATIVE BULL

In recognizing the humanity of our fellow human beings, we pay ourselves the highest tribute. We achieve a major milestone in the long road up from barbarism and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment

Justice Thurgood Marshall, US Supreme Court, *Furman v. Georgia*, 29 June 1972

For a moment, 40 years ago, it looked like the USA might join the nascent global trend against the death penalty. On 29 June 1972, the US Supreme Court issued a 5-4 ruling, *Furman v. Georgia*, which had the effect of nullifying the country's capital laws and overturning nearly 600 death sentences.[1] But the moment proved fleeting. Only two of the Justices had found capital punishment per se unconstitutional, while the other three in the majority decided that it was only its then arbitrary or discriminatory application that rendered it unlawful. This left legislators room for manoeuvre. The states showed little hesitation in setting about revising their capital statutes, and four years after *Furman*, in *Gregg v. Georgia*, the Supreme Court gave them the go-ahead to resume executions under such laws.

Four decades after the *Furman* ruling held out its brief promise of a United States of America without judicial killing, the USA has fallen far behind the international curve on this fundamental human rights issue. By 1972, 13 countries were abolitionist in law for all crimes, and during that very same year, another two, Finland and Sweden, joined this group. Forty years later, 97 countries are abolitionist for all crimes, 141 are abolitionist in law or practice, and only 57 retain the death penalty, a small percentage of which account for the bulk of the world's executions each year.[2] One of these leading death penalty countries, the USA, has executed 1,300 men and women since the US Supreme Court lifted the *Furman* moratorium in 1976, and today more than 3,000 others wait on death row, a wait which one of the Justices in the *Furman* majority noted "exacts a frightful toll" in terms of mental suffering.[3] Four months earlier, the California Supreme Court had written that "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture".[4]

The wait for the USA to break its attachment to the death penalty continues. Forty years after *Furman*, it could be said that the USA's judges are waiting for legislators to act and legislators are waiting for the public to act, while most members of the public are daily confronted by issues in their lives they perhaps consider more pressing than the death penalty. According to Justice Thurgood Marshall, who wrote the longest of the *Furman* concurring opinions, a problem with this waiting game was evidence that "American citizens know almost nothing about capital punishment". And with "easily forgotten members of society" (the "poor, the ignorant, and the underprivileged") bearing the brunt of the death penalty, he argued, "legislators are content to maintain the status quo" – "ignorance is perpetuated and apathy soon becomes its mate."

Justice Marshall, who with Justice William Brennan decided that the death penalty was in and of itself unconstitutional, celebrated the global abolitionist trend and the prospect of the USA joining it. Chief Justice Warren Burger, on the other hand, leading the four-Justice dissent,[5] argued that this world trend "hardly points the way to a judicial solution in this country under a written Constitution". He and the three other dissenters had all been nominated by President Richard Nixon after his successful 1968 electoral campaign in which he had promised to appoint to the Court "strict constructionists" who would not engage in so-called "judicial activism" (as opposed to "judicial restraint"), an accusation levelled from certain quarters against judges perceived by their detractors to be acting according to their personal policy preferences rather than enforcing the law as passed by the elected branches of government.[6]

In *Furman*, President Nixon's four nominees could be said to have acted as he would have wished, and in so doing sowed the seeds for the *Gregg* decision four years later. In his August 1968 speech accepting his own nomination as the Republican Party's presidential candidate, Nixon had asserted that "some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country and we must act to restore that balance."[7] In the *Furman* dissent, the first of his nominees, Chief Justice Burger, argued that "in a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." The second, Justice Harry Blackmun, suggested that the majority had fallen to the "almost irresistible" temptation to allow their personal views on the "wisdom of legislative and congressional action" to guide their decision. The third, Justice Lewis Powell, wrote that the majority had gone "beyond the limits of judicial power" in a ruling that amounted to an unprecedented subordination of "national and local democratic processes". And the fourth, Justice William Rehnquist, asserted that the opinion "impose[d] upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best."

If the country's legislatures came "to doubt the efficacy of capital punishment," Chief Justice Burger concluded, "they can abolish it". It rapidly became clear after the *Furman* ruling that most legislators harboured no such doubts, or if they did, that they were willing to abandon their qualms to the "tough on crime" politics of the death penalty. Their re-enactment of capital statutes, as the *Furman* dissenters would have it and four years later the *Gregg* ruling did have it, reflected the "popular will".[8] This democracy-in-action justification remains to this day the common response of US authorities to international critics of the USA's death penalty, as discussed further below.

> "Nearly a quarter of a century ago the US Supreme Court decided the watershed case of *Furman v Georgia*. In the course of a compendiously researched opinion, [Justice Thurgood] Marshall reviewed virtually every scrap of Anglo-American evidence for and against capital punishment. In the course of his 'long and tedious journey' (his own description) he made the crucial finding that 200 years of research had established "that capital punishment serves no purpose that life imprisonment could not serve equally well."
>
> Constitutional Court of South Africa, 1995, finding death penalty unconstitutional[9]

The *Furman* dissenters were not all dyed in the wool supporters of executions, and state legislators would have benefited from reflecting on this before, "from Florida to Wyoming, elected officials scrambled to restore the death penalty".[10] Chief Justice Burger wrote that if he and his colleagues were "possessed of legislative power", he might have voted to outlaw the death penalty. Justice Harry Blackmun went further. He said that he "yield[ed] to no-one" in his "distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds". He said that his personal opposition was "buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated", but that such questions were for the political branches of government, not the courts. It would take another two decades before Justice Blackmun finally overcame his "judicial restraint" and announced in 1994 that he was "morally and intellectually obligated simply to concede that the death penalty experiment has failed". He said that he would no longer "coddle the Court's delusion that the desired level of fairness has been achieved", and expressed the hope that the Court would come to realize that the effort to eradicate arbitrariness was "so plainly doomed to failure" that the death penalty should be abolished.[11] Fourteen years later, in May 2008, the then longest serving Justice on the Court, John Paul Stevens, who like Justice Blackmun had also voted with the majority in 1976 to lift the *Furman* moratorium, reached much the same conclusion (as described below).

In his dissent from the *Furman v. Georgia* ruling, Chief Justice Burger had alighted upon the

"less than self-defining" nature of the constitutional prohibition of "cruel and unusual punishments" when accusing the *Furman* majority of acting as if they were members of an elected branch of government. The hazy scope of this Eighth Amendment ban, he said, rendered it essential that judges not "seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law". Two decades later, in the year that the US annual execution toll went above 30 for the first time since *Furman*, a total that would more than triple by 1999,[12] the USA ratified the International Covenant on Civil and Political Rights (ICCPR). This treaty places restrictions on the use of the death penalty and its language points to an expectation that governments will work towards abolition. A reason given by the USA for the unprecedented "reservation" it attached to the prohibition of cruel, inhuman or degrading treatment or punishment under article 7 of the ICCPR and the identical reservation it lodged with article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment two years later was that the international language on this prohibition was vague, and could hold the USA to a higher standard than its Constitution required.

More specifically, the USA, conditioned its ratification of the ICCPR on reservations that sought to allow the only constraint on the USA's death penalty system to be the US Constitution. Since then, however, the reservations have contributed to the flawed legal justifications for torture and other ill-treatment of detainees in US custody in the counter-terrorism context. With this in mind, this report considers the question of whether the USA's pursuit of the death penalty in the last three decades of the 20th century may have contributed to these human rights violations in the first decade of the 21st, and whether treaty reservations ostensibly aimed at protecting the executioner have since become a part of protecting the torturer.

Whatever the answer to this question, from the perspective of anyone familiar with the USA's death penalty record prior to 11 September 2001 – or at least those considering capital punishment to be cruel, inhuman or degrading – its resort to torture and other human rights violations against terrorism suspects after that date was perhaps less surprising than to some others. If nothing else, a country that regularly kills prisoners in its execution chambers and holds thousands under that threat can hardly be said to be a stranger to the cruel treatment of those deprived of their liberty. In the first decade of judicial killing in the USA after the *Furman* moratorium ended (1977-1998), 104 prisoners were put to death. This almost quadrupled to 396 in the second decade (1989-1998), and then rose to 636 in the third decade (1999-2008). Today, the USA is executing around 40 to 50 prisoners a year.

Three months before the attacks of 11 September 2001, the US Government had carried out the first federal execution in the USA since the *Furman* ruling, and the first since 1963.[13] The prisoner had been convicted of the 1995 bombing of a federal government building in Oklahoma City in which 168 people were killed and more than 500 injured. Not only did he become the first federal prisoner to be executed in nearly 40 years, but the appalling crime of which he was convicted hastened the enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA). The AEDPA was designed to speed up executions by placing unprecedented restrictions on the review of state criminal convictions by federal courts. The final section of this report considers the question of deference (federal to state, judiciary to legislature, legislature to executive, executive to judiciary) as another ingredient of a lethal formula, combining with perceived popular will and the promotion of domestic standards as the exclusive yardstick, that has resulted in 1,300 executions since the US Supreme Court lifted the *Furman* moratorium in 1976. The report concludes that it does not have to be like this.

If the *Furman* decision had called a permanent halt to the death penalty rather than seeding the brevity of its own shelf-life through its split majority opinion and a dissent that practically

invited legislatures to revive executions, the USA would have been closer to respecting the human rights principles it claims to uphold. Instead the USA's pursuit of judicial killing has institutionalized a cruel ritual that extends the suffering of families of murder victims to those of the condemned for no constructive societal benefit and carries with it the inescapable risk of irrevocable error and inequity. This pursuit, in the face of international standards and jurisprudence that increasingly frown upon the retentionist state and view the death penalty as incompatible with human rights and an obstacle to international cooperation on law enforcement,[14] has helped to cement a US reluctance to apply international human rights law to its own conduct and a tendency to view domestic constitutional standards as the be all and end all.

The USA needs urgently to re-assess its relationship to international law and standards. It should recognize that its continuing resort to the death penalty places it squarely at odds not only with the global abolitionist trend, but also with fundamental human rights principles. It should recognize that while international law may not yet prohibit the death penalty, regional and international human rights law and standards view abolition as fully consistent with progress on human rights and respect for human dignity. The USA should withdraw its reservations and other limiting conditions lodged with its ratification of international treaties, including in relation to provisions on the death penalty. It should join the global movement against judicial killing, and work to ensure that its treatment of detainees and prisoners meets international, not just constitutional, standards.

DOMESTIC STANDARDS PROMOTED AS THE BE ALL AND END ALL

The scope of the conduct subject to the death penalty in the United States is not a matter relevant to the obligations of the United States under the Covenant
USA to UN Human Rights Committee, July 2006

The 40th anniversary of the *Furman* ruling comes shortly after the 20th anniversary of the USA's ratification of the International Covenant on Civil and Political Rights (ICCPR).[15] The year 2012 is therefore an opportune moment to reflect upon how the US government conditioned its ratification of the ICCPR so as not to cramp the USA's post-*Furman* death penalty activities beyond domestic constraints; how it proceeded to lodge the same conditionality with its ratification two years later of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); and how such conditionality may have contributed to human rights violations in areas other than the death penalty, particularly over the past decade.

The ICCPR opened for signature on 19 December 1966. By the time of the *Furman* ruling, five and a half years later, there were 13 states party to the treaty. Today there are 167, including the USA. While the ICCPR recognizes the death penalty, this acknowledgment that some countries may retain it should not be invoked "to delay or to prevent the abolition of capital punishment", in the words of its article 6.6. The UN Human Rights Committee, the expert body established under the ICCPR to oversee implementation of the treaty has said that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life". Seven years after the Human Rights Committee issued this General Comment in 1982, the Second Optional Protocol to the ICCPR, aimed at abolition of the death penalty, opened for signature. Today there are 74 countries party to the Protocol, each committing itself not to execute anyone and to enact abolition in the interest of "enhancement of human dignity and progressive development of human rights", and each expressly recognizing the abolitionist spirit of article 6 of the ICCPR.[16]

Nearly 1,200 men and women have been put to death across the USA in the two decades that these 74 countries have bound themselves to the Second Optional Protocol. Clearly, officials in the USA are failing to do all they can to bring nationwide abolition closer in any reasonable timeframe. As a result, the USA has found itself the subject of multiple calls from other countries for it to join the abolitionist movement, most recently when the US human rights record came up for scrutiny under the Universal Periodic Review process at the UN Human Rights Council in 2010. The administration batted away such calls:

> "While we respect those who make these recommendations, we note that they reflect continuing policy differences, not a genuine difference about what international human rights law requires."[17]

This nod of deference to international law should not be allowed to disguise the fact that the USA continues to maintain that it is bound only by domestic constitutional standards in relation to the death penalty, including who it subjects to this punishment,[18] whether its application is arbitrary, what qualify as the "most serious crimes" for which the death penalty should be reserved if used at all,[19] how US executioners end the lives of the condemned, and how long and under what conditions the USA keeps condemned inmates on death row before killing them.[20] The US government considers that the USA has no obligations under the ICCPR in this regard.

When the USA ratified the ICCPR it filed a number of "reservations, declarations and understandings". Two of these conditions stemmed at least in part from the USA's intent to avoid any constraints on the country's use of capital punishment beyond that imposed by its Supreme Court as final arbiter of constitutional standards. Like a capital jury in the USA is "death-qualified" – removing from sitting on it those who have serious doubts about the death penalty[21] – the USA's ratification of the ICCPR could be said to have been "death-qualified" too, removing international legal "opposition" to the death penalty. According to this approach, nothing but US domestic standards and decisions would stay the hand of the country's capital prosecutors and its executioners.

With article 6 of the ICCPR on the right to life, then, the USA lodged the following reservation:

> "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

The stated main purpose of the USA's reservation to article 6 – which has been described as "far and away the most extensive reservations to the capital punishment provisions of any international human rights treaty"[22] – was to allow states in the USA to continue to use the death penalty against individuals for crimes committed when they were under 18 years old, despite the unequivocal ban on such executions contained in article 6.5 of the ICCPR (and other instruments and customary international law). Three years before the USA ratified the ICCPR, the US Supreme Court had upheld the constitutionality of executing people sentenced to death for crimes committed when they were 16 or 17.[23] A number of the USA's states pursued this internationally unlawful practice until the Supreme Court ruled it unconstitutional in 2005 on the grounds that "standards of decency" in the USA had evolved to a point at which there was a national consensus against such executions.[24] This ruling has not led to withdrawal of the reservation to article 6, however. In 2006, reporting to the Human Rights Committee on US compliance with the ICCPR, the administration of President George W. Bush emphasised the USA's reservation and its breadth, rather than the previous

emphasis on the narrow issue of the death penalty against children:

> "…the United States took a reservation to the Covenant, permitting it to impose capital punishment within its own constitutional limits.[25] Accordingly, the scope of the conduct subject to the death penalty in the United States is not a matter relevant to the obligations of the United States under the Covenant."[26]

The Bush administration told the Human Rights Committee that the reservation "remains in effect, and the United States has no current intention of withdrawing it."[27] That remains the case six years later under a new administration. At the UPR session on the USA at the UN Human Rights Council in November 2010, a number of governments called on the USA to withdraw this reservation and other conditions attached to the ICCPR and other treaties. In its formal response in March 2011, the USA rejected such calls. Even if the original immediate motivation for the reservation had been to facilitate the execution of offenders for crimes committed when they were children, the USA apparently intends to continue to seek to avoid any international law curtailment of its judicial killing. The death penalty system only needs to pass constitutional muster, but as the past 35 years have shown, what is considered constitutional in the USA would not necessarily pass the international law test.[28]

Meanwhile, with article 7 of the ICCPR on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the USA also filed a reservation:

> "the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

This was the first and, until 2000, only reservation to article 7 of the ICCPR made by any country.[29] The USA's motivation for the reservation for article 7, as stated in communications between the administration and the Senate Foreign Relations Committee, was also related to the death penalty. The administration of President George H.W. Bush had recommended that the Senate adopt this reservation because the European Court of Human Rights had taken the position that prolonged incarceration on death row could amount to cruel, inhuman or degrading treatment (so-called "death row phenomenon").[30]

In the USA's initial 1994 report under the ICCPR to the Human Rights Committee, the administration of President Bill Clinton pointed again to international jurisprudence and opinion indicating that prolonged imprisonment on death row could violate article 7, and that the USA had therefore adopted the reservation. The administration cited *Furman v. Georgia* when it stated that under the Eighth Amendment to the US Constitution, "cruel and unusual punishments include uncivilized and inhuman punishments, punishments that fail to comport with human dignity, and punishments that include physical suffering" were prohibited. The Clinton administration added that "because the scope of the constitutional protections differs from the provisions of article 7, the US conditioned its ratification upon a reservation".[31]

The Clinton administration also noted that in addition to the question of death row phenomenon, the Human Rights Committee had "indicated … that the prohibition may extend to such other practices as corporal punishment and solitary confinement", and noted that the USA had lodged an identical reservation to its 1994 ratification of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). In addition, the USA lodged the following "understanding" to its UNCAT ratification, making clear its view that the death penalty was a purely domestic matter:

> "the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

In November 1994, the Human Rights Committee issued General Comment 24 to address the question of reservations lodged by countries when ratifying the ICCPR. The Committee noted that under international law, specifically the Vienna Convention on the Law of Treaties, a state may not make a reservation that is incompatible with the object and purpose of the treaty. Provisions of the ICCPR which constituted customary international law or peremptory norms, the Committee said, "may not be the subject of reservations". Such provisions included article 7's prohibition of torture or other cruel, inhuman or degrading treatment or punishment and the prohibition on arbitrary deprivation of life or the execution of juvenile offenders under article 6. The Committee stated that

> "Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted."

The Clinton administration raised its concerns about General Comment 24 prior to the Human Rights Committee issuing its concluding observations in April 1995 on the USA's initial report to it on US compliance with the ICCPR. In these conclusions, the Human Rights Committee nevertheless expressed its regret at the extent of the USA's reservations, declarations and understandings to the treaty and stated its belief that:

> "taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant."

In other words, the reservations were unlawful and should be withdrawn. Two decades after they were filed, the USA has yet to withdraw them.[32]

The Senate took offence at General Comment 24. In the version of the Foreign Relations Revitalization Act it passed in December 1995, the Human Rights Committee was accused (in direct contradiction of its legitimate role) of "claiming for itself the power to judge the validity under international law of reservations to the Covenant, and in the purported exercise of this power asserted that reservations of the type included in the Senate resolution of ratification are invalid". The Senate asserted that "the purpose and effect of General Comment No. 24 is to seek to nullify as a matter of international law the reservations, understandings, declarations, and proviso contained in the Senate resolution of ratification, thereby purporting to impose legal obligations on the United States never accepted by the United States." Furthermore, the Act continued:

> "General Comment No. 24 threatens not only the Supremacy Clause of the United States Constitution and the constitutional authority of the Senate with respect to the approval of treaties, but also the… United States constitutional rights and practices protected by the reservations, understandings, declarations, and proviso contained in the Senate resolution of ratification."

The bill stated that "the sense of the Senate" was that the Human Rights Committee should revoke General Comment 24. In General Comment 31 issued in 2004 on the "general nature of the legal obligation imposed on States Parties to the Covenant", the Committee re-endorsed General Comment 24 by reference.

Meanwhile, the USA has kept its reservations. Indeed the current US administration is standing by them. In its latest (fourth) periodic report to the Human Rights Committee, dated December 2011, which the Committee has yet to review, the Obama administration merely stated that "the United States has provided the text and explanations for reservations, understandings and declarations it undertook at the time it became a State Party to the Covenant in its prior reports. For purposes of brevity those descriptions and explanations will not be repeated in this report".[33]

The same has been the case in relation to UNCAT. In 2000, after considering the USA's initial report to it, the UN Committee Against Torture urged the USA to withdraw its reservations, understandings and declarations to UNCAT. However, the USA has not done so, and at the time of its second periodic report to the Committee, reiterated that it "considers the issue of capital punishment to be outside the scope of its reporting obligations under the Torture Convention".

In 2006, the Bush administration told the Committee Against Torture that the USA had entered the reservation to article 7

> "because of concern over the uncertain meaning of the phrase 'cruel, inhuman or degrading treatment or punishment'…The reasons underlying the decision by the United States to file its reservation to Article 7 have not changed, as the underlying vagueness of this provision remains. Because of the concern that certain practices that are constitutional in the United States might be considered impermissible under possible interpretations of the vaguely-worded standard in Article 7, the United States does not currently intend to withdraw that reservation."[35]

> "The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") under article 16, paragraph 1, [of UNCAT] are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture… In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure…
>
> Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations."
>
> UN Committee Against Torture, 2008[34]

The Bush administration's concern about what it said was vagueness in the international legal ban on the ill-treatment of prisoners was used to justify the President's decision in February 2002 not to apply article 3 common to the four Geneva Conventions in the context of what the Bush administration dubbed the "war on terror", including in Afghanistan. He had been advised by White House Counsel Alberto Gonzales that the prohibition of "outrages upon personal dignity" and "inhuman treatment" under common Article 3 was "undefined".

Gonzales advised that a "positive" consequence of not applying Geneva Convention protections to detainees held in this "new kind of war" which "places a high premium" on "the ability to quickly obtain information from captured terrorists and their sponsors", would be the substantial reduction in the threat that US agents would be liable for criminal prosecution under the USA's War Crimes Act, which criminalized as war crimes under US law conduct prohibited under common Article 3, including torture, cruel treatment, and "outrages upon personal dignity, in particular, humiliating and degrading treatment".[36] In September 2006, confirming for the first time that the USA had for years been operating secret detention facilities around the world, President Bush again referred to these "vague and undefined" provisions of international law, and the "unacceptable" risk that US personnel could be prosecuted for war crimes following the US Supreme Court's decision (*Hamdan v. Rumsfeld*, 2006) that common article 3 did apply to the treatment of detainees.[37]

The USA's reservation to the prohibition of cruel, inhuman or degrading treatment or punishment, originally formulated at least in part as an execution facilitator has since been a part of the USA's flawed legal justification given for the abuse of detainees in US custody. By the time that the USA made the above statement to the Committee Against Torture in 2006, its Central Intelligence Agency (CIA) had been operating secret detention facilities around the world in which detainees, held in solitary confinement and incommunicado for years, were subjected to torture and enforced disappearance authorized at the highest levels of government.

In a number of then secret memorandums issued from 2002 to 2007 giving legal approval for interrogation techniques and detention conditions that violated the international prohibition of torture or other ill-treatment against detainees held in CIA or military custody, government lawyers repeatedly cited the reservations the USA attached to article 16 of UNCAT and article 7 of the ICCPR. This was no longer about the death penalty against convicted prisoners, but about torture and other ill-treatment of detainees held indefinitely without charge or trial for interrogation, including at undisclosed locations:

> "An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws"
>
> Thomas Paine, A Dissertation on the First Principles of Government (1795)[38]

- ☒ In a memorandum dated 1 August 2002, the Office of Legal Counsel (OLC) at the US Department of Justice argued that the prohibition of torture covered "only extreme acts". It also pointed to the Senate and Bush administration's agreement to ratify UNCAT with a reservation to article 16, thereby "establishing the Constitution as the baseline for determining whether conduct amounted to cruel, inhuman or degrading treatment or punishment" and preventing the USA from being held to a higher standard under international law. The memorandum concluded that "because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture" and would therefore not violate the US Constitution.[39] In an accompanying memo, the OLC provided the legal green light for the CIA to use 10 "enhanced interrogation techniques" against detainees held in secret CIA custody outside the USA, including physical assaults, cramped confinement, stress positions, sleep deprivation, exploitation of a detainee's fear of insects, and "water-boarding".[40]

- ☒ At a meeting between government lawyers and military personnel at the US Naval Base at Guantánamo on 2 October 2002 to discuss "counter-resistance" interrogation techniques against detainees held at Guantánamo, the chief legal

counsel to the CIA's Counterterrorism Center advised that the Department of Justice had "provided much guidance" on this issue, and said that the USA "did not sign up to" the international prohibition of cruel, inhuman or degrading treatment, giving it "more license to use more controversial techniques".[41] One of the participants at the meeting, a US military lawyer, finalized a legal memorandum the following month endorsing a range of interrogation techniques by the US military, including death threats, stress positions, exploitation of detainee phobias, exposure to cold temperatures, waterboarding, stripping, hooding, prolonged isolation, sensory deprivation and sleep deprivation. Among other things, she pointed to the USA's reservations to article 7 of the ICCPR and to article 6 of UNCAT which she said meant that the USA was only bound by constitutional standards on detainee treatment.[42]

☒ In March 2003, the OLC provided a memorandum to the Pentagon addressing military interrogations. The memo again pointed to the reservations to article 7 of the ICCPR and article 16 of UNCAT, asserting that the reservations meant that the USA was only bound by its own constitutional constraints. Among other things, the memo cited the opinion of a US Supreme Court Justice arguing that there were no grounds to hold that many years of incarceration on death row violated the US Constitution, even if there were international court opinions finding that this phenomenon was cruel, inhuman or degrading.[43] The OLC memo asserted that the USA "is within its international law obligations even if it uses interrogation methods that might constitute cruel, inhuman or degrading treatment or punishment".[44]

☒ In May 2005, approving the "enhanced" interrogation of detainees held in secret CIA detention, the OLC again cited the reservation to article 16 of UNCAT and that this bound the USA only to its own constitutional constraints. The OLC said that this reservation is "legally binding and defines the scope of United States obligations under Article 16 of the CAT." The constitutional test, the OLC said, was whether the conduct in question "shocks the conscience". If it did, the conduct would be unlawful. The OLC asserted that the CIA interrogation techniques in question, including water-boarding and sleep deprivation used against detainees held incommunicado in isolation in secret detention at undisclosed locations did not shock the (domestic) conscience and were therefore constitutional and therefore did not violate article 16.[45]

☒ In August 2006, the OLC instructed the CIA that the conditions of confinement in its secret detention facilities were lawful, even under the Detainee Treatment Act of 2005 (DTA) which prohibited the "cruel, inhuman or degrading treatment or punishment" of anyone in US custody, regardless of nationality or location. In these facilities, detainees were being subjected to years of incommunicado solitary confinement, enforced disappearance (a crime under international law), white noise, 24-hour lighting, and shackling whenever they were moved. The OLC's position was based on the fact that the DTA had expressly incorporated the US reservation to article 16 of UNCAT and the USA was therefore only bound by constitutional constraints, and thereby the "shocks the conscience" test. The domestic contemporary conscience, it concluded, was not shocked by such treatment, even in the case of a detainee who "is isolated from most human contact, confined to his cell for much of each day, under constant surveillance, and is never permitted a moment to rest in the darkness and privacy that most people seek during sleep"; even though these conditions were "unrelenting and, in some cases, have been in place for several years"; and even though "these

conditions, taken together and extended over an indefinite period, may exact a significant psychological toll". These conditions, the OLC said, "considered both individually and collectively, are consistent with the DTA". The OLC noted that the UN Committee Against Torture had told the USA in May 2006 that secret detention per se violated UNCAT, but the OLC summarily dismissed this conclusion as "neither authoritative nor correct".[46]

- ☒ In July 2007, the OLC provided the CIA with legal advice on the application of "conditioning techniques" and "corrective techniques" for use against detainees held in secret custody, including dietary manipulation, various forms of physical assault, extended sleep deprivation, and the use of diapering.[47] The CIA had told the OLC that the agency particularly favours the use of sleep deprivation, as it was used to bring the detainee to a "baseline state". The OLC concluded that this and the other techniques, singly or in combination, were lawful. In so concluding it pointed, among other things, to the US reservation to article 16 of UNCAT. [48]

It bears noting when considering the various aspects of the USA's human rights record down the years and their interrelatedness, that since leaving the White House, George W. Bush has confirmed, among other things, that he personally authorized the use of a torture technique – "water-boarding" – whereby detainees held in secret detention were strapped down and subjected to mock execution by interrupted drowning.[49] Before taking the presidential election in 2000, his almost six years as Governor of Texas had seen more than 150 actual executions – of prisoners strapped down and injected with lethal drugs. This cutting of the future President's teeth as chief executive of the country's leading death penalty state[50] included the execution of a number of prisoners in violation of clear provisions of international law after the governor's power of reprieve was not exercised. They included, for example, the case of Glen McGinnis, executed in January 2000 for a crime committed when he was 17 years old.[51] In addition to the hundreds of appeals from Amnesty International members around the world, a letter from the organization's Secretary General was faxed to the governor/presidential contender on the eve of the execution urging him to stop it:

> "On behalf of more than one million Amnesty International members across some 100 countries, I am writing to you in your capacity not only as a Governor who took office on a promise to make Texas a "beacon" state, but also as a presidential contender in a country which claims to be a shining light for human rights in the world. There is indeed no doubt that in the next few hours, a spotlight of an international nature will be focussed on the USA – specifically on your office, and the power invested in you to reprieve those condemned to death in Texas. After those hours have passed, citizens and governments across the world will be able to make their own assessment of the respect for global human rights standards held, not only by the highest executive officer of an individual US state, but also by a potential future leader on the world stage."[52]

> "Former Attorney General Ramsey Clark has said, 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' One searches our chronicles in vain for the execution of any member of the affluent strata of this society."
>
> Justice William Douglas, *Furman v. Georgia*, 29 June 1972, concurring in the judgment

Whether President Bush would have taken a different approach to international law on detainees after 11 September 2001 if he had heeded such appeals to respect US legal obligations on the death penalty during his time as Texas governor is of course unknowable. In any event what is pressing today is that, 40 years after *Furman*, not only is the USA continuing to use the death penalty but that the administration of President Barack Obama is continuing the move, begun under President Bush, towards a new chapter in the USA's ugly history of judicial killing. Detainees subjected to torture and enforced disappearance at the hands of US officials, crimes under international

law for which those responsible continue to enjoy impunity, are facing the possibility of the death penalty after unfair trials by military commission at the US naval base at Guantánamo Bay in Cuba. Any execution following such trials would violate the right to life under international human rights law.[53]

Torture and enforced disappearance are of course always unlawful under international law, whereas the death penalty is not yet. Yet the USA's pursuit of the death penalty in an increasingly abolitionist world, and its resort to these crimes under international law coupled with its continuing failure to end the impunity of those responsible, are not unrelated. On each issue, the US government has built on a long-held reluctance to apply international standards to its own conduct, holding up domestic constitutional standards as the requisite yardstick, to the exclusion of international human rights principles.

DEMOCRACY: GIVING THE PEOPLE WHAT THEY WANT?

A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off

Gregg v. Georgia, lifting the *Furman* moratorium, US Supreme Court, 2 July 1976

On his second full day in office, the newly inaugurated President Barack Obama committed his administration to closing the Guantánamo detention facility "promptly" and at the latest by 22 January 2010. The US electorate, he said, had called for a new approach, "one that recognized the imperative of closing the prison at Guantánamo Bay."[54] If so, the electorate has not got what it called for. Today there are more than 150 detainees still at Guantánamo, some of whom are now facing the prospect of death sentences after trials by military commission that do not meet international fair trial standards, including as provided in the ICCPR.

Accountability for human rights violations has also been portrayed as an electoral issue, rather than also an obligation under international law. After the torture and other ill-treatment of detainees held in US custody in Abu Ghraib prison in Iraq came to light in 2004, various officials suggested that accountability in the case of senior officials was up to the electorate. In 2005, for example, a Pentagon spokesperson said that "the American people had the full weight of everything that happened in the past four years and decided to rehire the President for this job. That's not bad when it comes to whether or not somebody at the very top was accountable". A senior lawyer at the US Department of Justice – who had written legal memorandums giving the green light to interrogation techniques constituting torture and other cruel, inhuman or degrading treatment against detainees in military and secret CIA custody, was quoted as saying that President George W. Bush's re-election in late 2004 and Alberto Gonzales's promotion from a White House Counsel immersed in the interrogation issue to US Attorney General was "proof that the debate is over… The public has had its referendum".[55] Another presidential election later, and with yet another looming, accountability for human rights violations, including the crimes under international law of torture and enforced disappearance, remains notable by its absence in relation to the CIA's former secret detention programme. Thus the USA remains on the wrong side of its international obligations, whatever the US electorate may or may not think about that.

Clearly, democracy cannot guarantee respect for a country's human rights obligations without the political will to meet such obligations on the part of that country's government officials. Too often political will has fallen prey to electoral politics. The death penalty – an issue that implicates fundamental international human rights and yet is seen largely as a domestic question to be determined by the popular will within constitutional constraints – is

particularly vulnerable to such politics.[56]

In a report in 2006 on the USA's use of the death penalty against individuals with serious mental illness, Amnesty International wrote the following about a death row inmate whose case came to be associated with electoral expediency:

> *"Ricky Rector had shot himself in the head prior to his arrest. The bullet wound and subsequent surgery resulted in the loss of a large section of the front of his brain. As his execution approached, the death watch log maintained by prison personnel at the Cummins Unit in Varner revealed an inmate displaying clear signs that he was seriously mentally disabled. The log's entry for 21 January 1992, for example, described Ricky Rector as "dancing in his cell.... Howling and barking while sitting on his bunk.... Walking back and forth in the Quiet Cell snapping his fingers on his right hand and began noises with his voice like a dog." Whether or not to proceed with his execution, a journalist later wrote, "became a test in Arkansas of the lengths to which a society would pursue the old urge to expiate one killing by performing another – and a test of the state's highest temporal authority, the governor, who alone could stop it.*
>
> *The Arkansas governor, who at the time was seeking the highest office in the country, chose not to stop it. Breaking off from presidential campaigning, Governor Bill Clinton flew back from New Hampshire for Ricky Ray Rector's execution. This calculated killing, when it came on 24 January 1992, had a final outrage in store. The execution team had to search for 50 minutes to find a suitable vein in which to insert the lethal injection needle. Rector, apparently not comprehending what was happening to him, helped them in their macabre task. Earlier, as was his daily habit, he had left the slice of pecan pie from his final meal "for later". And shortly before that, catching a glimpse of Governor Clinton on the television news, Ricky Rector told one of his lawyers, 'I'm gonna vote for him for President'"*[57]

From the dissent in *Furman*, through the *Gregg* ruling in 1976, to today, the USA's pursuit of judicial killing is promoted as 'democracy in action' to the exclusion of recognition that it constitutes an affront to human rights principles. The people – or rather a majority of the electorate – are getting what they want – a selection of convicted murderers killed in their name. If the people wanted abolition, so the argument goes, they would elect like-minded legislators or lobby incumbents to repeal the country's death penalty laws. This presupposes an electorate fully informed about the reality of the death penalty and willing to act upon such information, a level of voter knowledge and activism that Justice Marshall for one, in his concurring opinion in the 1972 *Furman* ruling, suggested was absent.[58]

From another US perspective, however, it is countries that have stopped executing that should be criticized for acting undemocratically. Such a view has been articulated by, among others, Justice Antonin Scalia, the US Supreme Court's currently longest-serving judge, nominated to the Court by President Ronald Reagan in 1986.[59] Two decades – and nearly 1,000 US executions – after he joined the Court, Justice Scalia wrote:

> "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."[60]

It is not just from the judiciary that the justification for the death penalty as reflecting the will of the people is heard, and those promoting this line have been US administration officials across the years. Ronald Reagan, for example, "a staple, if not dominant part" of whose 1966 successful campaign to become governor of California had been the death penalty, as President (1981-1989) "believe[d] in the people's right to impose capital punishment for most serious murder offences".[61] Then, after the administration of President

George H.W. Bush had ratified the ICCPR with its reservations seeking to preserve the US death penalty system from international constraints, the administration of President Bill Clinton, reporting on US compliance with the ICCPR, told the UN Human Rights Committee in 1994 that:

> "The majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country."[62]

During review of the US report, a member of the Human Rights Committee specifically raised his concern with the US delegation about this paragraph, stating that it was difficult to accept this "subjective affirmation" of the death penalty, and asking whether even if accurate "should such a sensitive issue be decided by majority rule?"[63] Clearly, the USA continues to answer this question with, 'yes it should'. At the same time as giving this response, however, politicians have all too often not only failed to acknowledge the human rights implications of their response, but also to ensure that the electorate to whom they defer are operating in the fullest possible knowledge about the realities of the death penalty. The question of deterrence is a case in point.

In his concurrence with the *Furman* ruling, Justice Brennan noted the less than scientific approach to the question of deterrence promoted by the states in their arguments to be allowed to keep the death penalty:

> "The States argue, however, that they are entitled to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the argument runs, the threat of death must be the greatest deterrent."

Meanwhile, in his *Furman* concurrence, Justice Marshall described the absence of scientific proof of the deterrent effect of the death penalty:

> "Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject."[64]

In his dissent against *Furman*, Chief Justice Burger took the view that the question of deterrence was "beyond the pale of judicial inquiry", and was a question for the political branches of government. The legislatures, he said, "can and should make an assessment of the deterrent influence of capital punishment". Again, this held sway four years later when the Court lifted the *Furman* moratorium in 1976 in *Gregg v. Georgia*:

> "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

In 2008, one of the Justices who had voted in the *Gregg* ruling to lift the *Furman* moratorium, Justice John Paul Stevens, returned to the question of deterrence after 33 years on the Court:

> "Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment."[65]

To which Justice Scalia responded that it was not the judiciary's "place to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather than commonsense predictions about human behavior."

In 2012, the Committee on Deterrence and the Death Penalty at the National Research Council issued its conclusion of a review into research on deterrence and judicial killing in the USA conducted in the years of judicial killing since the *Furman* moratorium was lifted:

> "The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment".[66]

Politicians should take heed, rather than simply deferring to the perceived popular support for the death penalty.

The "democratic" justification for the death penalty has been heard at state level too. In July 1997, for example, in a letter to an Amnesty International member in Austria concerned about executions in Arkansas, then Senator Mike Everett of Arkansas wrote that "77% of Arkansas people favour it [the death penalty]. That is enough said. If 77% of Arkansas people want it, they will have it." In his letter, Senator Everett, who died in 2004, suggested that:

> "what is moral and what is legal is often a matter of perspective. Nations, like humans, evolve. America is not so far removed from the frontier as Austria. Your country is much older… further from its history of uncivilization, than ours… Our attitude toward the death penalty will change when our attitudes towards gun control, racial differences, religion, poverty, and other fundamental values, change".[67]

Fifteen years later, on 15 June 2012, the US Embassy in Austria wrote to an Amnesty International activist in response to his concern about a death penalty case in Mississippi:

> "At present, 33 of 50 states in the United States, representing a majority of our nation, have chosen to retain the option of imposing the death penalty for the most serious crimes…The foundations of America's democracy depend on the assurance of fairness in our legal system, and we have a solemn obligation to ensure that cases involving the death penalty have been handled in full accordance with all the guarantees of our Constitution… The issue of the imposition of the death penalty continues to be the subject of vigorous and open discussion both among the American people and on an international basis."[68]

The prisoner in question had been executed three days earlier. Too poor to afford his own trial lawyer, Mississippi capital defendant Michael Brawner had been appointed one by the judge, who also appointed as an assistant a law school graduate who had failed his state bar exam. It was this "law clerk", not the lawyer, who handled most of the pre-trial defence work, including advising the defendant about how to plead and whether to accept a plea bargain. He was also delegated to prepare mitigation for sentencing, but failed to do so. At the trial, the defendant said that he did not want mitigation presented on his behalf, but his decision was surely not an informed one given that those representing him were unaware of what mitigation evidence was available and so could not advise Brawner of his options. Evidence that could have been introduced included details of a childhood of severe abuse, parental alcohol and drug abuse, and a diagnosis of post-traumatic stress disorder.[69]

Such cases of indigent capital defendants failed by their appointed lawyers are anything but rare. If the "foundations of America's democracy" depend on fairness in its legal system,

those foundations have been routinely undermined as the state pursues executions.

To take three cases – the 13th, 130th, and 1300th executions – since the *Furman* moratorium ended in 1977.

- **13th** – John Taylor was executed in Louisiana's electric chair on 29 February 1984. At his sentencing, his lawyer introduced no new evidence. He only sought to argue that the unreliability of the evidence against Taylor was a reason for the jury to vote for life. The judge forbade this line of argument on the grounds that it was relevant to the guilt phase rather than sentencing. The lawyer made no other argument on behalf of his client. John Taylor was an African American man convicted and sentenced to death by an all-white jury for the murder of a white man four years earlier. By 2003 at least one in five of the nearly 300 African Americans executed in the USA since 1977 had been tried in front of all-white juries. Around 90 per cent of these more than 55 individuals had, like John Taylor, been convicted of killing a white person.[70]

- **130th** – On 18 June 1990, John Swindler became the first person to be put to death in Arkansas since 1976. He had been convicted of murdering a police officer in Fort Smith, but his conviction was overturned by the Arkansas Supreme Court in 1978 because of the trial judge's failure to grant a change of venue from the county where the crime occurred and had received substantial local media coverage prejudicial to the defendant. He was subsequently retried in an adjacent rural county in a courthouse that was only 45 miles from the original trial venue. During jury selection for the retrial, a majority of the would-be jurors indicated that they knew the defendant had previously been convicted of the crime, and 82 per cent of the jury pool (98 out of 120) indicated that they believed he was guilty as a result of their exposure to publicity from the first trial. At least three such individuals served on the jury. The trial judge refused a change of venue, despite conceding that "it is quite obvious that this case has received great amounts of publicity, and [that] it is very difficult to find a juror… who has not read, heard or seen a great deal about it".[71] John Swindler was again convicted and subsequently became the last person to be executed by electrocution in that state.[72]

- **1300th** – Samuel Villegas Lopez (known as Sammy Lopez), a 49-year-old Mexican American, was executed on 27 June 2012 in Arizona after spending more than half of his life on death row there. At his first trial in 1987, Sammy Lopez, then 24, was represented by a lawyer who had never handled a death penalty case before. He presented no evidence at the first stage of the trial and no witnesses at either stage. In a sworn statement given in February 2012, the lawyer acknowledged that in 1987, he had had "no concept of mitigation" and "did not conduct a mitigation investigation". At his re-sentencing in 1990, Sammy Lopez was represented by another lawyer, who also failed to investigate his client's family or life history. Indeed, the prosecutor urged the judge to pass a death sentence, saying: "Where is there any mitigation in this man's life, either past, present or future, that is in any way socially redeeming? There is none.… We would ask this court to sentence this man to the most severe penalty society can exact." Asked to respond, the defence lawyer

> "I met with Mr Lopez on four occasions, January 19th and 20th, 2005, March 8th, 2005, and May 3, 2005. Mr Lopez was crippled with anxiety about our first two meetings, since he was required to be heavily shackled, and to wear a stun belt. After the first two contact interviews, Mr Lopez specifically asked that my next visit be behind glass".
>
> Declaration of Dr George W. Woods, 2006[73]

said: "there's nothing societally [sic] redeeming in the defendant's background. I wish we could all argue with Paul [the prosecutor] on that. Probably can't." The judge sentenced Sammy Lopez to death again. In 2006, Dr George W. Woods produced a 95-page social history of the Lopez family, providing the detail that the sentencing judge never heard about the "horrifically violent home" in which Sammy Lopez grew up and which left him "acutely traumatized". His childhood was spent in "profound conditions of neglect and poverty" in an area of Phoenix, Arizona, that was a "racially segregated, crime-ridden, and violence plagued community reserved for the metal recycling industry, foundries, and populated almost exclusively by unspeakably impoverished Latino families". In this community, the Lopez family "stood out as being extraordinarily poor". In addition, "multigenerational trauma, substance abuse, anxiety, psychosis and mood disorders left Sammy and his family at an increased risk for developing similar disorders". Sammy Lopez, the doctor wrote, "lived much of his life as a feral child. Born with cognitive impairments… Sammy's neurological deficits were augmented by the bone-and-soul-crushing beatings, paranoia, poverty, neglect, and finally, self-medication with mind-destroying drugs". Dr Woods recounted that "Sammy suffered a childhood of life-threatening trauma" at the hands of his father and others, and "the beatings, neglect, isolation, and fear disrupted his normal development". The "constellation of symptoms, seeing his mother beaten regularly, being beaten regularly himself, not knowing where he was to eat or sleep, extreme paranoia, intrusive nightmares, hypervigilance, and chronic, destructive self-medication Sammy displayed in response to childhood trauma is diagnostic of Post Traumatic Stress Disorder". Samuel Lopez "began using organic solvents, alcohol, and drugs as a child in an effort to self-medicate the overwhelming emotional responses he experienced as a result of life-threatening trauma and became addicted to these substances by the time he reached his teen years", and his dependency on organic solvents continued into adulthood, causing "long-lasting changes in his brain". "Like many traumatized individuals", Sammy Lopez "sought relief from the isolation, rejection and pain he felt by using drugs and alcohol", and as his "symptoms of trauma and depression went untreated, his alcohol, drug, and solvent addiction increased". From about the age of 21, he was homeless, living in cars, the local park and a cemetery. Neurological testing of Samuel Lopez in 2006 revealed "significant neurological impairments including frontal lobe impairments" and symptoms indicative of Post Traumatic Stress Disorder. Dr Woods concluded that Sammy Lopez was further impaired at the time of the crime due to intoxication.

A paragraph of Justice Marshall's opinion in the *Furman* ruling 40 years before the execution of Samuel Villegas Lopez comes to mind at this point:

> "It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation."

Echoes of this last sentence were heard three and a half decades later, in April 2008, when US Supreme Court Justice John Paul Stevens who had joined the Court in 1975 and voted the following year to end the *Furman* moratorium, wrote of his belief that

> "current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits".[74]

As Justice Marshall emphasized in the *Furman* ruling in 1972, none of this is to suggest that the crimes for which those on death row in the USA were convicted were not serious or that they did not cause terrible suffering:

> "The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed… The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is a punishment no longer consistent with our own self-respect"

This remains an urgent question for all in the USA to answer, whether they be members of the public, or whether they be judges, legislators, members of the executive, and whether they be holding office at local, state or federal level.

Citing the *Furman* ruling in the 1995 decision of the Constitutional Court of South Africa that heralded abolition of the death penalty in that country, the future Chief Justice of that Court wrote:

> "It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place".[75]

The act has now been repeated 1,300 times in the USA since the *Furman* ruling, and more than 3,000 people are on death row across the country under the threat of having that act done to them. Enough is enough.

DEFERENCE: TOO MUCH OF A GOOD THING

> *The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts… There is no rational basis for concluding that capital punishment is not excessive*
> Justice Marshall, *Furman v. Georgia*, 29 June 1972

The question of deference was one of the issues at the heart of the *Furman* divide. On the one hand, according to Justice Marshall, the sheer quantity of evidence pointing to the death penalty's flaws meant that to let it pass as constitutional in the name of deferring to the legislature amounted to an abdication of judicial duty. On the other hand, according to Chief Justice Burger's leading dissent, there were "no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned". In the *Gregg* ruling four years later, ending the *Furman* moratorium, judicial deference to the legislature held sway. The *Gregg* opinion stated that "the deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy."

In his dissent from the *Furman* ruling, Justice Rehnquist – who President Ronald Reagan would nominate in 1986 to replace Warren Burger as Chief Justice and who would hold that

position until 2005 – wrote that one "reason for deference to the legislative judgment is the consequence of human error on the part of the judiciary with respect to the constitutional issue before it. Human error there is bound to be, judges being men and women, and men and women being what they are."

The inevitability of human error, of course, is one of the reasons why the death penalty is unacceptable to many people. It is not only judges who can make mistakes – so can jurors, prosecutors, defence lawyers, police officers, forensic investigators, witnesses, victims, and clemency officials. Again, for Justice Marshall, a problem in deferring to the democratic processes was that "Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man".

Forty years later, these dangers are clear for all who choose to look and learn. Since 1973, 140 prisoners have been released from death rows in the USA on the grounds of innocence.[76] For Justice John Paul Stevens, more than 30 years on the Court had led him to believe that "the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." He said:

> "the irrevocable nature of the consequences is of decisive importance to me. Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive."[77]

Despite the irrevocable nature of the death penalty, the "democratic" processes led in 1996 to a move by Congress to speed up executions, rather than move towards abolition in recognition of the death penalty's inescapable flaws. The President agreed with the move. Signing the Antiterrorism and Effective Death Penalty Act (AEDPA) into law on 24 April 2006, President Bill Clinton said:

> "I have long sought to streamline federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served. From now on, criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences."[78]

The AEDPA placed unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted the federal courts' ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited "successive" appeals except in very narrow circumstances. The US Supreme Court has since said that under the AEDPA federal courts must operate a "highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt".[79] Even before the AEDPA was passed, when federal courts addressed claims of, for example, inadequate defence representation, "judicial scrutiny of counsel's performance [had to] be highly deferential".[80] The AEDPA added another layer of deference, so now federal judicial review has to be "doubly deferential".[81]

The fact that Alabama death row inmate Holly Wood's death sentence was upheld relied on federal judicial deference to state court decisions. At the sentencing phase of his 1994 trial, he had been represented by a lawyer who had been admitted to the bar five months earlier, had no trial or criminal law experience, and had never worked on a capital case before. The novice lawyer was appointed to assist the two senior lawyers on the case, but they delegated the penalty phase to him and effectively abandoned him. At the sentencing, the defence case consisted of testimony from Holly Wood's father and two of his sisters. The novice lawyer had met with them for the first time at the courthouse during the guilt phase of the trial (the

sentencing phase began a day after the guilt phase ended). Substantial mitigating evidence about Holly Wood's background of poverty, deprivation and his upbringing in an environment dominated by alcohol and physical abuse was not presented. There was no evidence at all presented about Holly Wood's mental ability despite the lawyers being in possession of an expert report indicating that Wood operated, "at most, in the borderline range of intellectual functioning".

By a vote of 10-2, the jury voted to recommend the death penalty against this African American defendant. Another vote against death would have resulted in a life sentence. The vote was split along racial lines, with the two black jurors voting for life imprisonment and the 10 whites voting for execution. Blacks had been disproportionately removed by the prosecution during jury selection. The judge accepted the jury recommendation and sentenced Holly Wood to death, finding that there were no mitigating circumstances. The Alabama courts upheld the death sentence, ruling that defence counsel had made a strategic choice not to present the mental impairment evidence. In 2006 a federal District Court Judge decision, wrote that he had found "nothing in the record to even remotely support a finding that counsel made a strategic decision not to let the jury at the penalty phase know about Wood's mental condition." He ordered that Holly Wood be re-sentenced to life in prison, or given a new sentencing hearing. In 2008, a three-judge panel of the US Court of Appeals for the 11th Circuit overturned the ruling, citing the "highly deferential standards" to be given to state court decisions by the federal judiciary, including under the AEDPA. The two judges in the majority emphasized that their role under federal law was not to determine anew whether the defence lawyers were ineffective or whether Wood was prejudiced by their ineffectiveness, but whether under the "general framework of substantial deference" for reviewing state court rulings, the latter had been unreasonable. They ruled that they had not. In 2010, the US Supreme Court upheld the decision. Two Justices dissented, arguing that the failure of the trial lawyers to investigate Wood's mental disability could not be said to have been strategic and thereby worthy of deference. Authoring the dissent, Justice Stevens wrote:

> "A decision cannot be fairly characterized as 'strategic' unless it is a conscious choice between two legitimate and rational alternatives. It must be borne of deliberation and not happenstance, inattention, or neglect… Although we afford deference to counsel's strategic decisions, for this deference to apply there must be some evidence that the decision was just that: strategic."

Holly Wood was executed in Alabama on 9 September 2010, borne to the death chamber in part on deference demanded under the AEDPA, legislation seeking to prioritize finality. It has done so at the expense of fairness.

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It 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.
>
> For these and other reasons, at least two of my Brothers [Justices Brennan and Marshall] have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide…
>
> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual… I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."
>
> Justice Potter Stewart, *Furman v. Georgia*, 29 June 1972, concurring in the judgment

So the federal courts defer to state courts, and executions are facilitated. Meanwhile, time and time again, faced with compelling arguments for clemency, executive authorities have deferred to the courts having upheld the conviction and sentence when allowing executions to go forward. All too often, the only time deference is given to the condemned prisoner is when that prisoner assists the state in killing him or her. This is a regular occurrence. One in 10 of the 1,300 men and women put to death in the USA since the *Furman* moratorium was lifted had given up their appeals. Four of the first five executions in the USA after 1977 were of "volunteers". Put to death by firing squad, electrocution, and gas, perhaps their personal pursuit of execution made it easier for the USA to return to a punishment that much of the rest of the world was beginning to abandon. Since 1977, 15 US states, and the federal government, have resumed executions with the killing of a prisoner who had waived his appeals.

Any number of factors may contribute to a condemned inmate's decision not to pursue appeals, including mental disorder, physical illness, remorse, bravado, religious belief, a quest for notoriety, the severity of conditions of confinement, including prolonged isolation and lack of physical contact visits, the bleak alternative of life imprisonment without the possibility of parole, or pessimism about appeal prospects. In some cases it appears that the detainee may have committed the crime in order to receive a death sentence. Pre-trial or post-conviction suicidal ideation seems to motivate the decision-making of some such inmates, including some whose backgrounds had left them suffering mental health problems. Given the rate of error found in capital cases on appeal, if the approximately 140 "volunteers" executed since 1977 had pursued their appeals, there is a significant possibility that a number of them would have had their death sentences overturned to prison terms. To look at it another way, the phenomenon of "volunteers" contributes to the arbitrariness that is a part of the post-*Furman* death penalty in the USA.[82]

Recently, a governor took a decidedly less deferential approach to the prisoner's decision to waive his appeals and instead recognized the phenomenon as being part of the problem of the death penalty, not a reason for hastening executions. In November 2011, Governor John Kitzhaber blocked the imminent execution of a prisoner who had dropped his appeals and announced that he would allow no further executions while he was governor, a term in office that is currently due not to expire until 2015. Oregon has carried out two executions since judicial killing resumed in the USA in 1977 – one in 1996 and one in 1997. Both were of inmates who had given up appeals against their death sentences. Both were executed during Governor Kitzhaber's first term in office.

> "Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires… Inevitably, then, there will be occasions when we will differ with Congress or state legislatures with respect to the validity of punishment. There will also be cases in which we shall strongly disagree among ourselves. Unfortunately, this is one of them…
>
> In my judgment what was done in these cases violated the Eighth Amendment."
>
> Justice Byron White, *Furman v. Georgia*, 29 June 1972, concurring in the judgment

Governor Kitzhaber said that he had allowed the two earlier executions to go ahead "despite my personal opposition to the death penalty." He said that at that time he had been "torn between my personal convictions about the morality of capital punishment and my oath to uphold the Oregon constitution". Now, he continued, "I do not believe that those executions made us safer; and certainly they did not make us nobler as a society". Today, he said, he could not "participate once again in something I believe to be morally wrong". Not only was he blocking the execution of the prisoner in question "for the duration of my term in office", he said he was refusing to be a part of "this compromised and inequitable system any longer" and that he would allow no further executions while he is governor.

He said that Oregon's death penalty was "neither fair nor just", nor "swift or certain", and that it was a "perversion of justice that the single best indicator of who will and who will not be executed" in Oregon is whether a prisoner "volunteers" for execution by giving up their appeals. He noted that many judges, prosecutors, legislators and victim family members were now in agreement that Oregon's capital justice system is "broken". He also pointed to the fact that in recent years, legislators and governors in Illinois, New Jersey and New Mexico had banned the death penalty, recognizing its unfairnesses, risks, costs and inequities. It is time, he said, for Oregon "to consider a different approach".

Governor Kitzhaber added that it was his hope and intention that the moratorium on executions he was imposing would bring about "a long overdue reevaluation of our current policy and our system of capital punishment" because "we can no longer ignore the contradictions and inequities of our current system". He concluded by saying that he was sure that Oregon could find a "better solution", one that ensures public safety and "supports the victims of crime and their families". [83]

In April 2012, the Governor of Connecticut signed into law the abolition of the death penalty in his state. He, too, referred to the phenomenom of "volunteers":

> "My position on the appropriateness of the death penalty in our criminal justice system evolved over a long period of time. As a young man, I was a death penalty supporter. Then I spent years as a prosecutor and pursued dangerous felons in court, including murderers. In the trenches of a criminal courtroom, I learned firsthand that our system of justice is very imperfect. While it's a good system designed with the highest ideals of our democratic society in mind, like most of human experience, it is subject to the fallibility of those who participate in it. I saw people who were poorly served by their counsel. I saw people wrongly accused or mistakenly identified. I saw discrimination. In bearing witness to those things, I came to believe that doing away with the death penalty was the only way to ensure it would not be unfairly imposed.
>
> Another factor that led me to today is the 'unworkability' of Connecticut's death penalty law. In the last 52 years, only two people have been put to death in Connecticut – and both of them volunteered for it."

Whether it be in relation to torture, enforced disappearance, or execution, a tendency of one branch or level of the US government to defer to another has contributed to the failure of the USA as a whole to live up to its self-proclaimed status as a, or even the, global champion of human rights.

Deference between branches of government is all very well, but not if it blocks respect for fundamental human rights. Each branch of government is obliged under international law to ensure that the country abides by its human rights obligations. Amnesty International would urge them to go further and recognize that abolition of the death penalty is entirely consistent with deference to international human rights principles.

CONCLUSION

> *[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.*
>
> Former US President Thomas Jefferson, 12 July 1816 (cited in *Furman v. Georgia, 1972*)

The *Furman* ruling has been described as "a textbook example of bickering and disarray", its "splintered nature" undermining its reach.[84]

Death penalty cases continue to split courts on a regular basis. On 11 June 2012, the Mississippi Supreme Court rejected an appeal to rehear the case of Michael Brawner, facing execution the following day after 10 years on death row. The vote on the state Supreme Court was four votes to four, with a ninth judge not taking part in the decision, as she had been the District Attorney of the county where and when Michael Brawner's crime was committed. Brawner's lawyer appealed to the US Supreme Court to stop the execution, saying that he could find no other case in the USA where an execution had gone ahead after a tied vote in a state supreme court. He argued that such an occurrence did "not comport with the heightened process that is due in death penalty cases". The Court refused to take the case, the Governor of Mississippi declined to intervene and the execution went ahead.

A dozen years earlier, in 2000, the US Court of Appeals for the Sixth Circuit split seven votes to seven on whether to grant Tennessee death row prisoner Philip Workman a hearing on new evidence supporting his claim of innocence (the 7-7 tie meant that he lost).[85] He eventually received a stay, but as his execution again loomed in 2007, a three-judge panel of the Sixth Circuit rejected his appeal for a stay of execution, again to pursue his claim of innocence. Two of the judges ruled that he had "not met his burden of showing a likelihood of success" on the merits of his appeal. They emphasised society's need for finality over the individual's claims.[86] The third dissented. A week later, Philip Workman was executed.

Close votes on divided courts add to the arbitrariness or to a perception of arbitrariness in the application of the death penalty. If the legal issues in a capital case are so open to interpretation that courts are split down the middle, with perhaps a single vote tipping the balance between life and death, is this acceptable where an irrevocable punishment is concerned?

> "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity… Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief. An executed person has indeed lost the right to have rights. As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, *You are not fit for this world, take your chance elsewhere*'."
>
> Justice William Brennan, *Furman v. Georgia*, 29 June 1972, concurring in judgment

The same goes for categorical decisions that go beyond the individual case. When the US Supreme Court ruled in 1989 that states could continue executing prisoners for crimes committed when they were 16 or 17 the vote was 5 to 4.[87] If one of the Justices in the majority had voted with the dissent, the ruling would have gone the other way and it would have meant 19 fewer executions in the USA violating international human rights ban on the execution of people who were under 18 years old at the time of the crime, and dozens fewer death sentences incompatible with international law. One the same day, the Supreme Court ruled, again 5-4 (the same combination as in the other ruling), that the execution of people with "mental retardation" was also constitutional.[88] Again, if one of the Justices had switched it would have meant perhaps three dozen fewer executions in the USA that contravened international standards on the death penalty.[89]

Two years before these decisions, on 22 April 1987, the Supreme Court by five votes to four rejected the appeal of Warren McCleskey, an African American man condemned to death in Georgia for the murder of a white police officer.[90] The Justices had been presented with a detailed study showing that defendants who killed whites in Georgia were more than four times more likely to be sentenced to death than those who killed non-whites, a probability that was even higher if the defendant was black and the victim white. A majority of Justices

held that "apparent disparities in sentencing are an inevitable part of our criminal justice system", and that for a defendant to be successful in an appeal, he or she would have to provide "exceptionally clear proof" that the decision-makers in his or her particular case had acted with discriminatory intent.[91] Absent such evidence of intentional discrimination, statistical evidence of racial disparities in death penalty case could not be used to prove a violation of the constitution, the Court said. McCleskey was executed in September 1991.

More than 1,100 people have been executed in the USA since then, three quarters of whom had been convicted of killing white victims (in a country where blacks and whites are the victims of murder in approximately equal numbers). Twenty per cent of those executed were African Americans convicted of killing whites; two per cent were whites convicted of killing blacks.

Justice Powell, who authored the 5-4 *McCleskey v. Kemp* decision, said after he retired from the Supreme Court that he wished he had voted differently in the 1987 ruling, and that he had come to think that the death penalty should be abolished.[92] The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, in his 1998 report on the USA, suggested that the *McCleskey* decision might be incompatible with the country's obligations under the Convention on the Elimination of All Forms of Racial Discrimination, "which requires States parties to take appropriate steps to eliminate both direct and indirect discrimination".[93]

Since retiring from the US Supreme Court, former Justice John Paul Stevens has said that there was one vote during his nearly 35 years on the Court that he regretted – his vote with the majority in *Gregg v. Georgia* which he now thinks was an "incorrect decision".[94] As noted above, in 1994, nearly two decades after he had voted with Justice Stevens to lift the *Furman* moratorium, Justice Harry Blackmun announced that he would no longer "tinker with the machinery of death".[95] Given that the *Gregg* ruling was passed by seven votes to two, if Justices Blackmun, Powell and Stevens had voted in 1976 how they later suggested they would have voted had they known how the USA's experiment with the death penalty would turn out, judicial killing would not have been resumed in 1977, if at all.

Three years ago, in a landmark speech on national security, President Obama stated his opposition to an independent commission of inquiry into human rights violations committed in the counter-terrorism context during the administration of President George W. Bush on the grounds that "our existing democratic institutions are strong enough to deliver accountability". Nevertheless, despite the existence of such institutions, indeed perhaps because of the willingness of each branch of government to defer to another or to pass the buck between each other, accountability and remedy have remained largely absent.

Something similar has happened in relation to the death penalty – portrayed as a purely domestic issue, subjected only to constitutional restraints, with existing institutions able to reflect popular will as well as ensuring fairness, equality and justice. Democratic processes have not necessarily meant respect for human rights principles in the USA or by US authorities outside the USA, however. Indeed, it was democratic processes – collaboration between the two elected branches of the federal government – specifically the Senate and the administration – which undermined the USA's ratification of the International Covenant on Civil and Political Rights. Ostensibly to protect the USA's death penalty system – a punishment perceived as supported by popular opinion – from international legal constraint, this conditionality has since played a part, however small, in crimes under international law committed by the USA in the context of its counter-terrorism policies following the attacks of 11 September 2001.

The death penalty is bad for the USA. It surely undermines respect for human dignity and life, diverts energies and resources away from more constructive responses to violent crime, encourages simplistic solutions to complex human problems, and in the way that the USA applies it, encourages a domestic view of the US Constitution as trumping international law

even when standards under the former are clearly incompatible with the latter.

The world is evolving towards a future without this cruel, degrading and brutalizing punishment. There are signs that the USA may slowly be moving in this direction, but the USA's institutions of government are failing to move this forward beyond a largely glacial pace compared to much of the rest of the word.

On 21 May 2012, former US Supreme Court Justice John Paul Stevens told an audience at the American Law Institute:

> "I really think that in regard to the death penalty. … I'm not sure that the democratic process won't provide the answers sooner than the [Supreme] Court does, because I do think there is a significantly growing appreciation of the basic imbalance in cost-per-person benefit analysis. And the application of the death penalty does a lot of harm, and does really very little good."[96]

Perhaps he is right that in the end the "democratic process" will lead to the necessary legislation across the country. Amnesty International hopes that such progress will soon come to California, the state that accounts for one in five of the USA's death row inmates. Some 800,000 citizens in California have endorsed putting abolition to the popular vote. As a result the choice to repeal the death penalty will now be on the ballot for California voters at the general election on 6 November 2012.[97] If the initiative is passed, the state's death penalty will be replaced by life imprisonment without the possibility of parole, repeal will apply retroactively to the more than 700 prisoners already on the state's death row, and a fund of US$100 million will be created for use by law enforcement agencies in investigating murders and rape.[98]

More generally, Amnesty International urges the USA to recognize that while international law may not yet prohibit the death penalty, regional and international human rights law and standards view abolition as fully consistent with progress on human rights and respect for human dignity. The USA should withdraw its reservations and other limiting conditions lodged with its ratification of international treaties, including in relation to provisions on the death penalty. It should join the global movement against judicial killing, and work to ensure that its treatment of detainees and prisoners meets international, not just constitutional, standards. Political leaders of all persuasions should seek to lead the process towards abolition, not just to follow perceived public opinion. They should support an immediate moratorium on executions.

In this 40th anniversary year of the *Furman v. Georgia* ruling, and the 20th anniversary year of US ratification of the International Covenant on Civil and Political Rights, the USA would do well to reflect on the words of Justice Thurgood Marshall in his lengthy *Furman* concurrence when he encouraged the USA to think of itself as a country that "cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system." In striking down the country's death penalty laws, he said,

> "this Court does not malign our system of government. On the contrary, it pays homage to it… In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve a major milestone in the long road up from barbarism and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment."

Today that total has doubled to more than 140 countries. The USA should ask itself why it has fallen so far behind much of the rest of the world on this fundamental human rights issue. It should ensure that its constitutional system and democratic processes are used as a progressive force for human rights not as an obstacle to them. Democracy, deference and domestic standards do not have to be a deadly combination.

ENDNOTES

[1] The cases directly applied only to three death row prisoners, the cases being *Furman v. Georgia*, *Jackson v. Georgia* and *Branch v. Texas*. According to Justice Lewis Powell, dissenting from the ruling, *Furman* would nullify the capital laws of 39 states and the District of Columbia as well as death penalty provisions of the US criminal code and of the Uniform Code of Military Justice.

[2] See http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries

[3] *Furman v. Georgia*, Justice Brennan concurring.

[4] *People v. Anderson*, California Supreme Court, 1972, see note 1 supra. While the *Furman* ruling eventually consisted of three consolidated cases as noted above, a fourth case, *Aikens v. California*, was originally to be considered at the same time. However, it was mooted and removed from the docket after the California Supreme Court struck down California's death penalty law as unconstitutional in the *Anderson* decision in February 1972.

[5] Each of the four *Furman* dissenters wrote a separate opinion, and except in the case of Justice Harry Blackmun's opinion (presumably because of description of the depth of Blackmun's personal opposition to the death penalty, as described below), each of these dissents was joined by the other three Justices.

[6] Ronald Dworkin, The Jurisprudence of Richard Nixon. The New Yorker, 4 May 1972.

[7] Richard Nixon, Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida, 8 August 1968, http://www.presidency.ucsb.edu/ws/index.php?pid=25968#ixzz1yhrjD6S0

[8] The *Gregg v. Georgia* ruling included the following: "But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators. Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people' *Furman v. Georgia*, (Burger, C. J., dissenting)."

[9] *The State v. T Makwanyane and M Mchunu*, Constitutional Court of South Africa, 6 June 1995, Kriegler J, concurring in judgment.

[10] David M. Oshinsky, Capital punishment on trial: *Furman v. Georgia* and the death penalty in modern America. University Press of Kansas (2010), page 57.

[11] *Callins v. Collins*, Justice Blackmun, dissenting from denial of certiorari, 22 February 1994.

[12] In 1992 there were 31 executions in the USA; in 1999, there were 98. Since 1999, the number of executions has declined and is now around 40 to 50 a year.

[13] Most capital cases in the USA are conducted under state laws and most condemned inmates are on death row at state level under such laws. Congress has also enacted the death penalty under federal law, and the administration regularly pursues the death penalty under such laws. The US military also has the death penalty.

[14] See for example, No return to execution - the US death penalty as a barrier to extradition, November

2001, http://www.amnesty.org/en/library/info/AMR51/171/2001/en

[15] See USA: Human rights betrayed. 20 years after US ratification of ICCPR, human rights principles sidelined by 'global war' theory, 7 June 2012, http://www.amnesty.org/en/library/info/AMR51/041/2012/en. The ratification was lodged with the United Nations on 8 June 2002, and the ICCPR entered into force for the USA on 8 September 1992.

[16] Preamble, Second Optional Protocol to the ICCPR "Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights; Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966; Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable; Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life; Desirous to undertake hereby an international commitment to abolish the death penalty". Article 1.1. "No one within the jurisdiction of a State Party to the present Protocol shall be executed." 1.2. "Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."

[17] Response of the United States of America to recommendations of the United Nations Human Rights Council, Harold Hongju Koh, Legal Advisor US Department of State, Geneva, Switzerland, 9 November 2010, para. 5 http://www.state.gov/s/l/releases/remarks/150677.htm.

[18] The only category of person the administration of President George H.W. Bush said that it was prepared to accept the prohibition on execution was pregnant women. It noted that no legislation would be required in this regard, however, as neither the federal government nor any state "in fact carry out executions until after the birth of the condemned woman's child".

[19] In its recommendations to the Senate Foreign Relations Committee on ratification of the ICCPR, the administration of President George H.W. Bush, when suggesting the eventual reservation that was lodged to article 6, noted "the sharply differing view taken by many of our future treaty partners on the issue of the death penalty (including what constitutes 'serious crimes' under Article 6(2))".

[20] See for example, Amnesty International, *People can change. Will Texas?* May 2010, http://www.amnesty.org/en/library/info/AMR51/048/2010/en (case of David Powell, executed in 2010 after 32 years on death row in Texas).

[21] In a state (as opposed to federal) capital trial in the USA, 12 citizens from the county in which the trial is held (the county where the crime is committed unless a change of venue is granted) are selected to sit as a "death qualified" jury. At jury selection, the defence and prosecution will question the prospective jurors and have the right to exclude certain people, either for a stated reason (for cause) or without giving a reason (a peremptory challenge). Those citizens who would be "irrevocably committed" to vote against the death penalty can be excluded for cause by the prosecution, under the 1968 US Supreme Court ruling in *Witherspoon v. Illinois*. In 1985, in *Wainwright v. Witt*, the Supreme Court relaxed the *Witherspoon* standard, thereby expanding the class of potential jurors who could be dismissed for cause during jury selection. Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath".

[22] William A. Schabas, The abolition of the death penalty in international law. Cambridge University Press, Second Edition (1997), page 83.

[23] *Stanford v. Kentucky*. On the same day, 26 June 1989, the US Supreme Court also handed down its decision in *Penry v. Lynaugh* in which it found that the execution of people with "mental retardation" did not violate the Eighth Amendment. See USA: Indecent and internationally illegal: The death penalty against child offenders, September 2002, http://www.amnesty.org/en/library/info/AMR51/143/2002/en

[24] *Roper v. Simmons*, 2005. The decision did acknowledge the international isolation of the USA on this issue in a world that largely abided by the international prohibition on the execution of anyone who was under 18 at the time of the crime, but made clear that this was not a controlling factor in the Court's ruling ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions).

[25] "The United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."

[26] See 'List of issues to be taken up in connection with the consideration of the Second and Third Periodic Reports of the United States of America', 17 July 2006, http://www.state.gov/j/drl/rls/70385.htm, #17.

[27] *Ibid.*, #2.

[28] For example, see case of Walter Mickens, http://www.amnesty.org/en/library/info/AMR51/081/2002/en. He was executed in Virginia in June 2002, http://www.amnesty.org/en/library/info/AMR51/097/2002/en

[29] In September 2000, Botswana signed and ratified the ICCPR, with effectively the same reservation to article 7 as made eight years earlier by the USA. The USA and Botswana remain the only two countries to have made reservations to article 7 ("The Government of the Republic of Botswana considers itself bound by: a) Article 7 of the Covenant to the extent that "torture, cruel, inhuman or degrading treatment" means torture inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana.") Like in the case of the USA, the UN Human Rights Committee has called on Botswana to withdraw the reservation to article 7. In 2008, the Committee stated: "With regard to the reservation entered into in relation to article 7 of the Covenant, it recalls that reservations offending peremptory norms of international law including the prohibition of torture are incompatible with the objects and purposes of the Covenant. The State party should immediately withdraw its reservation to article 7 of the Covenant" (UN Doc: CCPR/C/BWA/CO/1, 24 April 2008). Like the USA, Botswana has not withdrawn the reservation, telling the Human Rights Committee in September 2011 that the government had "not yet considered" revocation, and in November 2011 the Committee expressed its regret at this. Like the USA, Botswana rejected calls from other countries during the UPR process in 2009 for it to impose a moratorium on executions and to abolish the death penalty, stating that it had no intention of taking either step. It rejected a recommendation from Denmark to do more against torture or other ill-treatment, stating that there were no attested cases of such abuse.

[30] See *Soering v. United Kingdom*, European Court of Human Rights, 7 July 1989 ("having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 [of the European Convention on Human Rights, prohibiting torture an inhuman or degrading treatment or punishment]".

[31] Para 150 of US report, report available at http://www.state.gov/documents/organization/133836.pdf

[32] In its 1995 conclusions on the USA's initial report to it, the Human Rights Committee addressed a number of death penalty issues: "The Committee is concerned about the excessive number of offences punishable by the death penalty in a number of states, the number of death sentences handed down by courts, and the long stay on death row which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states. It also deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under

18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded." In its conclusions in 2006 on the USA's second and third periodic reports to it, the Committee said: "The Committee regrets that the State party does not indicate that it has taken any steps to review federal and state legislation with a view to assessing whether offences carrying the death penalty are restricted to the most serious crimes, and that, despite its previous concluding observations, the State party has extended the number of offences for which the death penalty is applicable. While taking note of some efforts towards the improvement of the quality of legal representation provided to indigent defendants facing capital punishment, the Committee remains concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities as well as on low-income groups, a problem which does not seem to be fully acknowledged by the State party (articles 6 and 14). The State party should review federal and state legislation with a view to restricting the number of offences carrying the death penalty. The State party should also assess the extent to which death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the State party should place a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty."

[33] Para 3 of US report, report available at http://www.state.gov/j/drl/rls/179781.htm

[34] UN Doc.: CAT/C/GC/2, 24 January 2008, UN Committee Against Torture, General Comment No. 2.

[35] #2, List of Issues To Be Taken Up in Connection With the Consideration of the Second and Third Periodic Reports of the United States of America, 16 July 2006, http://www.state.gov/j/drl/rls/70385.htm

[36] Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban. Memorandum for the President, From Alberto R. Gonzales, 25 January 2002, Draft, 3.30 pm

[37] President Discusses Creation of Military Commissions to Try Suspected Terrorists, 6 September 2006, available at http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html

[38] See 'Paine on preserving liberty', Harper's Magazine, 5 July 2007, http://www.harpers.org/archive/2007/07/hbc-90000396

[39] Re: Standards of conduct for interrogations under 18 U.S.C. §§ 2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[40] Interrogation of al Qaeda operative. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[41] Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting.

[42] Legal brief on proposed counter-resistance strategies. Memorandum for Commander, Joint Task Force 170, From Diane E. Beaver, LTC, USA, Staff Judge Advocate, 11 October 2002.

[43] Citing *Knight v. Florida*, 8 November 1999, Justice Thomas concurring in the denial of certiorari.

[44] Re: Military interrogation of alien unlawful enemy combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defence, From John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

[45] Re: Application of United States obligations under Article 16 of the Convention Against Torture to certain techniques that may be used in the interrogation of High Value al Qaeda Detainees.

Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005.

[46] Re: Application of the Detainee Treatment Act to conditions of confinement at Central Intelligence Agency detention facilities, Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

[47] "because releasing a detainee from the shackles to utilize toilet facilities would… interfere with the effectiveness of the technique, a detainee undergoing extended sleep deprivation frequently wears a disposable undergarment designed for adults with incontinence or enuresis."

[48] Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high-value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007.

[49] See, for example, USA: Bringing George W. Bush to justice: International obligations of states to which former US President George W. Bush may travel, November 2011, http://www.amnesty.org/en/library/info/AMR51/097/2011/en

[50] Of the 1300 executions carried out in the USA since the Furman moratorium was lifted in Gregg v. Georgia in 1976, until 29 June 2012, 482 were carried out in Texas.

[51] See Amnesty International Urgent Action, http://www.amnesty.org/en/library/info/AMR51/213/1999/en. The execution, of Glen McGinnis, for a crime committed when he was 17 years old, was carried out on 25 January 2000, see http://www.amnesty.org/en/library/info/AMR51/013/2000/en

[52] See http://www.amnesty.org/en/library/info/AMR51/011/2000/en

[53] See USA: Aiming for execution, denying fair trial: Government wants death penalty option at upcoming military commission trials in Guantánamo, 3 June 2011, http://www.amnesty.org/en/library/info/AMR51/049/2011/en

[54] Remarks by the President on National Security, National Archives, Washington, DC, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[55] See USA: Guantánamo and beyond – The continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005, pages 98-99.

[56] See, for example, Killing for Votes: The Dangers of Politicizing the Death Penalty Process. Death Penalty Information Center, Washington, DC (1996), http://www.deathpenaltyinfo.org/node/379

[57] See: USA: The execution of mentally ill offenders, January 2006, http://www.amnesty.org/en/library/info/AMR51/003/2006/en

[58] "It has often been noted that American citizens know almost nothing about capital punishment… I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional".

[59] By the time Justice Scalia took his seat on the Supreme Court on 26 September 1986, there had been 66 executions in the USA, so his time as a Justice has coincided with 95 per cent of the USA's executions carried out since 1976.

[60] *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring (parentheses omitted). Justice Scalia noted "It is commonly recognized that many European countries…abolished the death penalty in spite of

public opinion rather than because of it" (internal quotation marks omitted).

[61] Reagan on death penalty, Associated Press, 17 December 1983, http://www.nytimes.com/1983/12/17/us/reagan-on-death-penalty.html

[62] Initial report of the USA to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/81/Add.4 (24 August 1994). In the latest US report to the Human Rights Committee, in December 2011, the administration of President Barack Obama said that "the death penalty continues to be an issue of extensive debate and controversy in the United States".

[63] UN Doc: CCPR/C/SR.1406, 24 April 1995.

[64] *Furman v. Georgia*, US Supreme Court, 29 June 1972, Justice Marshall concurring.

[65] *Baze v. Rees*, 16 April 2008, Justice Stevens concurring in the judgment.

[66] Deterrence and the death penalty. National Research Counsel. The National Academies Press, Washington, D.C., 2012.

[67] Cited in USA: 'A macabre assembly line of death': Death penalty developments in 1997, April 1998, http://www.amnesty.org/en/library/info/AMR51/020/1998/en

[68] Email reply from Public Affairs Office, US Embassy, Vienna, Austria, 15 June 2012.

[69] See Amnesty International Urgent Action http://www.amnesty.org/en/library/info/AMR51/040/2012/en, and update http://www.amnesty.org/en/library/info/AMR51/045/2012/en

[70] See USA: Death by discrimination – the continuing role of race in capital cases, April 2003, http://www.amnesty.org/en/library/info/AMR51/046/2003/en

[71] See *Swindler v. Lockhart*, US Supreme Court, 23 April 1990, Justice Marshall, dissenting from denial of *certiorari*.

[72] Less than a week before the 40th anniversary of the Furman ruling, the Arkansas Supreme Court halted lethal injections in the state after finding the state's Method of Execution Act in violation of the state constitution, the latest in a series of problems faced by states in pursuing lethal injection executions in recent years. *Hobbs et al. v. Jones et al*. Supreme Court of Arkansas, 22 June 2012. For more on the lethal injection issue, see USA: USA: An embarrassment of hitches: Reflections on the death penalty, 35 years after *Gregg v. Georgia*, as states scramble for lethal injection drugs, 1 July 2011, http://www.amnesty.org/en/library/info/AMR51/058/2011/en

[73] See also USA: Cruelty in control? the stun belt and other electro-shock equipment in law enforcement, June 1999, http://www.amnesty.org/en/library/info/AMR51/054/1999/en

[74] *Baze v. Rees*, 16 April 2008 Justice Stevens concurring in the judgment. "A long habit of not thinking a thing *wrong*", wrote Thomas Paine in 1776, "gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defence of custom". Thomas Paine. Common sense. 1776.

[75] *The State v. T Makwanyane and M Mchunu*, Constitutional Court of South Africa, 6 June 1995. Justice Ismael Mahomed, concurring in judgment. Justice Mohamed, who became the first black Chief Justice of the Court, died in 2000. The Furman ruling was cited throughout *State v. Makwanyane*. Compare with the poor example set by the USA's ratification of the ICCPR, note 29 *supra*.

[76] For list and criteria, see http://www.deathpenaltyinfo.org/innocence-and-death-penalty

[77] *Baze v. Rees*, 16 April 2008 Justice Stevens concurring in the judgment.

[78] President William J. Clinton, Remarks on signing the Anti-terrorism and Effective Death Penalty Act of 1996, 24 April 1996.

[79] *Woodford v. Visciotti*, 537 U.S. 19 (2002).

[80] *Strickland v. Washington*, 466 U.S. 668 (1984).

[81] See *Knowles v. Mirzayance*, US Supreme Court (2009).

[82] See, USA: The illusion of control: "Consensual" executions, the impending death of Timothy McVeigh, and the brutalizing futility of capital punishment, April 2001, http://www.amnesty.org/en/library/info/AMR51/053/2001/en; USA: Prisoner-assisted homicide - more 'volunteer' executions loom, May 2007, http://www.amnesty.org/en/library/info/AMR51/087/2007/en

[83] Governor Kitzhaber issues reprieve - calls for action on capital punishment, Press release, 22 November 2011, http://governor.oregon.gov/Gov/media_room/press_releases/p2011/press_112211.shtml

[84] David M. Oshinsky, Capital punishment on trial: *Furman v. Georgia* and the death penalty in modern America. University Press of Kansas (2010), page 56.

[85] Notably, the seven judges voting for a hearing had all been appointed by Democratic presidents. Five were appointed by President Bill Clinton, two by President Jimmy Carter. The seven voting against had all been appointed by Republican presidents, four by President Ronald Reagan, three by President George H.W. Bush.

[86] "Nearly twenty-five years after Workman's capital sentence and five stays of execution later, both the state and the public have an interest in finality…" These two judges were appointed to the Sixth Circuit by Republican Presidents George H.W. Bush and George W. Bush. The third judge, appointed by Democratic President Bill Clinton, dissented from the refusal to stay the execution, rejecting his colleagues' reasoning. To point this out is not to suggest either that US federal judges lack independence or that the system of appointing them is undemocratic. For example, as indicated in the introduction, voters would or could have known that Richard Nixon would nominate judges with a conservative judicial philosophy if elected as President. Similarly in the case of George W. Bush, his opponent in the 2004 election, Senator John Kerry, said in the second presidential debate: "A few years ago, when he came to office, the President said – these are his words – 'What we need are some good 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".

[87] *Stanford v. Kentucky*, 1989

[88] *Penry v. Lynaugh*, 1989.

[89] See http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states

[90] See also, USA: 'Unconscionable and unconstitutional': Troy Davis facing fourth execution date in two years, 19 May 2009, http://www.amnesty.org/en/library/info/AMR51/069/2009/en

[91] *McCleskey v Kemp*, 481 U.S. 279 (1987).

[92] Justice Powell was asked in 1991 by his biographer if he would change his vote in any case. He said, "Yes, *McCleskey v. Kemp*." He went on to say, "I would vote the other way in any capital case." Even in *Furman v. Georgia*, his biographer asked. "Yes" and "I have come to think that capital punishment should be abolished." See J. Jeffries, Justice Lewis F. Powell, Jr., page 451 (Scribners 1994).

[93] UN Doc.: E/CN.4/1998/68/Add.3, para 65.

[94] See Justice Stevens: An open mind on a changed court, NPR, 4 October 2010, http://www.npr.org/templates/story/story.php?storyId=130198344.

[95] *Callins v. Collins*, op. cit., Justice Blackmun dissenting.

[96] Address by the Honorable John Paul Stevens, Associate Justice (retired), Supreme Court of the United States, at the American Law Institute 89th annual meeting, 21 May 2012.

[97] Fifth measure qualifies for November California ballot. News release, Debra Bowen, California Secretary of State, 23 April 2012, http://www.sos.ca.gov/admin/press-releases/2012/db12-052.pdf

[98] E.g. see http://www.safecalifornia.org/facts/unsolved ("In an average year in California, over one thousand homicides go unsolved – 46% of homicide cases are never closed – and 56% of reported rapes go unsolved. Killers walk our streets free and threaten our safety, while we spend hundreds of millions of taxpayer dollars on a select few who are already behind bars forever on death row. These resources would be better spent on violence prevention and education, to keep our families safe."). Also The Silent Crisis in California. California Crime Victims for Alternatives to the Death Penalty, 7 April 2010, http://www.californiacrimevictims.org/Publications/The%20Silent%20Crisis%20in%20California.pdf