amnesty international

UNITED STATES OF AMERICA

Wrong Turn

An international perspective on the 30th anniversary of *Furman v Georgia*

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"*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* (1972)

On 29 June 1972, the US Supreme Court found that the death penalty was being applied in an arbitrary and therefore unconstitutional manner.[i] Although only two of the Justices found that the death penalty *per se* violated the Constitution's ban on "cruel and unusual" punishment – a ban which Justice Marshall described as "insulation from our baser selves" – by overturning the country's existing death sentences, the *Furman v Georgia* decision nevertheless did present the country's legislators with a golden opportunity to join the global abolitionist trend. Sadly, they chose the opposite path, electing instead to rewrite their capital statutes. In 1976 the Supreme Court ruled that executions could resume under the new laws.[ii]

Today the United States is approaching its 800th execution since 1976. On more than 780 separate occasions, a human being has been taken from his or her cell by government employees, strapped down, and either hanged, shot, gassed, electrocuted or poisoned to death.[iii] More than 500 of these executions have been carried out since 1995 alone. As this has been happening, the number of countries that have abolished the death penalty in law or practice has steadily climbed to the current total of 111.

What is more, the international community has ruled out capital punishment as a sentencing option in international courts for even the worst crimes – genocide, war crimes and crimes against humanity. Thirty years after *Furman*, it is clear that the United States is seriously out of step on this fundamental human rights issue.

The USA's insistence on retaining the death penalty increasingly damages the country's reputation abroad. In April 2001, it was voted off the United Nations Commission on Human Rights. Harold Koh, Assistant Secretary of State for Democracy, Human Rights and Labor under the previous administration, cited US opposition to a moratorium on the death penalty as one of the reasons behind this development, describing the vote as "a wake-up call that the era of automatic global deference to US leadership on human rights is over."[iv] The abolitionist Council of Europe has now called into question the USA's observer status with the organization because of continuing US resort to the death penalty. Yet another significant consequence of the USA's increasingly anachronistic position on the death penalty is in the area of international law enforcement. More and more countries are refusing to return criminal suspects to the USA without first obtaining guarantees that the death penalty will not be sought against them.[v]

Nevertheless, some US officials seem to feel that international trends and standards have no bearing on how the USA should act. Ruling in *Stanford v Kentucky* in 1989 that it was constitutional to impose the death penalty on 16 and 17-year-old offenders, for example, the US Supreme Court wrote: "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant."[vi] Some on the Court still hold this view. In *Atkins v Virginia* on 20 June 2002, Justice Antonin Scalia, berating six of his eight fellow Justices for finding the execution of people with mental retardation to be unconstitutional, wrote that "the practices of the world community, whose notions of justice are (thankfully) not always those of our people", are "irrelevant".[vii]

In a welcome development, the *Atkins* majority had noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved". The European Union had filed an *amicus curiae* brief with the Court in which it argued that the United States "stands virtually alone in its practice of sentencing to death those defendants who show any significant level of mental retardation".[viii] In another brief, nine senior former US diplomats asserted that for the United States to continue to execute such defendants would "strain diplomatic relations with close American allies, provide ammunition to countries with

demonstrably worse human rights records, increase US diplomatic isolation, and impair the United States foreign policy interests."[ix]

The *Atkins* ruling overturned *Penry v Lynaugh*, the 1989 Supreme Court decision allowing the execution of prisoners with mental retardation. *Atkins* also came 13 years after a resolution was adopted at the United Nations calling on retentionist countries to abolish such use of the death penalty. The United States lags even further behind international law and practice in its failure to eliminate the death penalty for child offenders – those under 18 at the time of their crimes. The International Covenant on Civil and Political Rights of 1966, the American Convention on Human Rights of 1969, and the Convention of the Rights of the Child of 1989 all prohibit such use of the death penalty. This is an internationally illegal practice now virtually unknown outside of the United States, which accounts for 10 of the 14 such executions documented in the world in the past five years. The USA purports to have exempted itself from this non-derogable prohibition, either by not ratifying treaties, or by lodging "reservations" when it does ratify them, a practice which has been roundly condemned by UN treaty-monitoring bodies.

US Secretary of State Colin Powell recently said: "The worldwide promotion of human rights is in keeping with America's most deeply held values... we will not relax our commitment to advancing the cause of human rights".[x] Yet the USA's continuing pick and choose attitude to international standards, including on the death penalty, can only undermine the whole endeavour of creating a viable global system for the protection of fundamental human rights. When any state, let alone a country as powerful as the USA, insists on its right to adopt a selective approach to international standards, the integrity of those standards is eroded. Why should any other state not then claim for itself the prerogative to adhere to only those portions of international human rights law which suit its purposes?

In March 1998, it was reported that Attorney General Ramesh Maharaj of Trinidad and Tobago had met with US Attorney General Janet Reno in Washington, DC.[xi] They were said to have discussed the problems that the Government of Trinidad and Tobago was having overcoming international opposition to executions. Attorney General Reno was reported to have pledged US support in assisting Trinidad's implementation of the death penalty. Attorney General Maharaj also met with a Legal Advisor in the US State Department, who reportedly provided him with documentation concerning how the USA had dealt with the execution of prisoners who had appeals to the Inter-American Commission on Human Rights pending. Within weeks, the Government of Trinidad and Tobago had moved to withdraw from the American

Convention on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights, and to re-accede to the latter with a reservation eliminating the right of any death row prisoner to petition the UN Human Rights Committee about alleged violations of their rights under the Covenant. In June 1999, Trinidad and Tobago carried out its first executions in five years, hanging nine men in three days. Meanwhile, in numerous cases, the USA has continued to ignore calls for stays of execution from the Inter-American Commission on Human Rights.

Whether or not the Government of Trinidad and Tobago received direct advice or encouragement from US Government officials on how to avoid international protections, its resolve to pursue executions can only be strengthened by the example set by its powerful neighbour, as well as the USA's view, consistently put forward in international fora, that the death penalty is an internal matter to be determined primarily by domestic public opinion.[xii] Such influence was also indicated in February 2002, when Nigeria's Minister of Foreign Affairs cited the USA's use of the death penalty when he defended his own country's resort to this punishment.[xiii]

Over the years, the USA's negative influence in this area has extended yet further – government officials from other countries have turned to the United States to actually show them how to execute. Officials from Guatemala and the Philippines visited death chambers in the USA in 1997 and 1998 to learn about lethal injection before adopting that method of execution themselves. In April 2002 it was reported that Thai officials would visit the United States in June on a "study tour" prior to their country's anticipated adoption of lethal injections in 2003.[xiv] This is surely not the type of global reach that Secretary of State Madeleine Albright had in mind when she proclaimed the USA to be "the indispensable nation. We stand tall and we see further than other countries into the future".[xv] The USA's resort to executions is poisoning the present and failing the future.

Justice Marshall's opinion in *Furman v Georgia* carried echoes of Secretary Albright's assertion. He wrote: "This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system... In recognizing the humanity of our fellow human beings, we pay ourselves the highest tribute." Regrettably, his words were not taken to heart by the country's politicians. Their failure to lead their country away from the simplistic response of meeting killing with further killing can only have undermined respect for human rights and human dignity in the USA.

Over the years, US politicians have apparently felt compelled to make their support for the death penalty clear during election campaigns. One of the defining cases of the "modern" era of judicial killing in the USA is that of Ricky Ray Rector in 1992. Rector had shot himself in the head prior to his arrest. The bullet wound and subsequent surgery resulted in the loss of a three-inch section of his brain, in effect a frontal lobotomy. Whether or not to proceed with his execution, as one 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."[xvi]

The governor, who at the time was seeking the highest office in the country, chose not to stop it. Breaking off from presidential campaigning, Bill Clinton flew back from New Hampshire to oversee 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 an hour to find a suitable vein in which to insert the lethal injection needle. Ricky Ray Rector, apparently not comprehending what was happening to him, reportedly 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, Rector reportedly told one of his lawyers, "I'm gonna vote for him for President".

On 14 August 2000, President Clinton, approaching the end of his term in office, described his country as "the leading force for human rights in the world" and one that was "more decent, more humane" than it was eight years earlier.[xvii] His claim came only a matter of weeks after an execution that echoed that of Ricky Ray Rector in 1992. This time it was of Thomas Provenzano, a prisoner with a long history of serious mental illness who was put to death. A Florida judge ruled him competent for execution despite finding "clear and convincing evidence that Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ". On 20 June 2000, Thomas Provenzano was strapped to a gurney and had the lethal injection needles inserted in his arms. Eleven minutes before he was due to be killed, a federal court issued a stay of execution. The needles were withdrawn and he was taken back to his cell. A few hours later, the court lifted the stay, without comment, and Thomas Provenzano was put through the same procedure again, and this time killed.

Despite growing national disquiet about the fairness and reliability of the US capital justice system – now reflected in moratoria on executions in Illinois and Maryland – a politician's support for the death penalty has not become an electoral liability. The current US President,

for example, was elected to office in 2000 despite his failure to promote and uphold international law and standards on the death penalty during his governorship of Texas. Whilst holding office, he failed to use his power of reprieve to oppose the executions of a number of child offenders, mentally impaired inmates, prisoners whose guilt was in doubt, and foreign nationals denied their internationally recognized consular rights. His five-year term as governor saw a total of 152 executions in Texas, almost half the country's judicial death toll during that period. His presidency has seen the first two executions of federal prisoners in nearly 40 years, the second of them ignoring a call by the Inter-American Commission on Human Rights for commutation on the grounds that the prisoner had been denied a fair trial. In addition, in November 2001, President Bush signed a Military Order providing for trials by executive military commissions with the power to hand down death sentences against which there would be no right of appeal to any court in the US or elsewhere.[xviii]

Yet in his State of the Union address of 29 January 2002, President Bush promised that "America will always stand firm for the non-negotiable demands of human dignity". Amnesty International urges him to reflect upon the majority's opinion in *Furman*, in which, for example, Justice William Brennan pointed out that "the deliberate extinguishment of human life by the State is uniquely degrading to human dignity", and Justice Potter Stewart wrote that the death penalty is "unique in its absolute renunciation of all that is embodied in our concept of humanity".

In his inaugural address, President Bush also promised to be a leader who would "speak for greater compassion and justice". Amnesty International urges him to turn that sentiment into doing all within his power and influence – beginning with declaring a moratorium on federal executions – to work against a punishment which Justice Byron White said in *Furman* is "obviously cruel in the dictionary sense". President Bush, and all other politicians, should apply this dictionary sense, and not wait for the Supreme Court's interpretation of the US Constitution to catch up with the growing international view that the death penalty is the ultimate cruel, inhuman and degrading punishment.

The country's politicians should also reflect upon the fact that two of the four Supreme Court Justices who voted in the minority in *Furman*, Justice Lewis Powell and Justice Harry Blackmun, were later to change their minds. Justice Powell told his biographer that experience had taught him that the death penalty could not be fairly administered.[xix] Around the same time, 1994, Justice Blackmun wrote: "From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive

rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed... There is little

In *Furman v Georgia*, Justice Thurgood Marshall wrote: "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".

Thirty years on, as the evidence of arbitrariness, cruelty, discrimination and error in the US capital justice system continues to mount, it is time for all US officials to ask themselves that same question.

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WHAT YOU CAN DO

Please write to President Bush urging him to re-evaluate his support for the death penalty and to lead by example by declaring a moratorium on federal executions.

George W. Bush
The President
The White House
Office of the President
1600 Pennsylvania Avenue
Washington, DC 20500

doubt now that *Furman*'s essential holding was correct. Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it surely is beyond dispute that, if the death penalty cannot be administered consistently and rationally, it may not be administered at all."[xx]

Fax: +1 202 456 2461
Email: president@whitehouse.gov
Salutation: Dear Mr President
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i. *Furman v Georgia*, 408 U.S. 238 (1972).

ii. *Gregg v Georgia*, 428 U.S. 153 (1976).

iii. See *USA: Arbitrary, discriminatory, and cruel: an aide-mémoire to 25 years of judicial killing* (AMR 51/003/2002, 17 January 2002).

iv. *A wake-up call on human rights.* By Harold Hongju Koh, Washington Post, 8 May 2001.

v. See *No return to execution – The US death penalty as a barrier to extradition* (AMR 51/171/2001, November 2001)

vi. *Stanford v Kentucky*, 492 US 361 (1989). Amnesty International was among the organizations which submitted an *amicus curiae* brief to the Court.

vii. *Atkins v Virginia*, Justice Scalia dissenting.

viii. *Ernest Paul McCarver v. State of North Carolina*: Brief of *Amicus Curiae*, the European Union in Support of the Petitioner, June 10, 2001.

ix. *Ernest Paul McCarver v. State of North Carolina*. Brief of *amici curiae* diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in support of petitioner.

x. Release of the Country Reports on Human Rights Practices for 2001. US State Department, Washington, DC. 4 March 2002.

xi. *Ramesh meets US Attorney General Reno.* Newsday (Trinidad), 1 March 1998.

xii. For example, on 6 June 2002, the US Ambassador to the Organization for Security and Co-operation in Europe (OSCE), responding to a European Union (EU) statement concerning the planned execution of child offender Napoleon Beazley, said: "As we have previously noted here in the Permanent Council, the issue of capital punishment remains a matter of great importance and very vigorous public debate in the United States. With all due respect to our EU colleagues, I would note at the outset, that there is no OSCE commitment prohibiting use of the death penalty, and that international law clearly permits the imposition of the death penalty... polls indicate that a majority of Americans support the death penalty...". The execution of Napoleon Beazley went ahead in violation of international law.

xiii. *Government disagrees with EU over death penalty*. The Daily Trust (Nigeria), 14 February 2002.

xiv. *State execution by injection next year.* Bangkok Post, 16 April 2002.

xv. Interview on NBC-TV "The Today Show" with Matt Lauer, Columbus, Ohio. 19 February 1998.

xvi. *Death in Arkansas*. By Marshall Frady. The New Yorker, 22 February 1993.

xvii. Remarks to the Democratic National Convention, Los Angeles, 14 August 2000.

xviii. See *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay* (AMR 51/053/2002, April 2002), pages 44-59.

xix. See *Another place beyond here: The death penalty moratorium movement in the United States*. Jeffrey L. Kirchmeier, University of Colorado Law Review, Vol 73, No. 1 (2002). Page 28.

xx. *Callins v Collins*, 510 U.S. 1141 (1994). (Blackmun, J., dissenting from denial of petition for writ of

certiorari).