"*Something is terribly wrong when a body of law upon which we rely to determine who lives and who dies can no longer, in reality, reasonably and logically be comprehended and applied... Yet this is how cluttered and confusing our nation's effort to exact the ultimate punishment has become. This cannot be what certain fundamental principles of liberty and due process embodied in our Constitution... are all about... Elusive and complicated distinctions, replete with incomprehensible subtleties of the highest order, must not be the talisman that decides whether one should live or die.*"[1]

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1 Dissenting opinion, *Flamer v Delaware*, US Court of Appeals, Third Circuit, October 1995

UNITED STATES OF AMERICA

Memorandum to President Clinton

An appeal for human rights leadership as the first federal execution looms

Introduction

"*Bill Clinton's quest, we are told, is for a legacy. Here is one within his reach: commute the 21 federal death sentences to life in prison. In this way, the president could show moral leadership in an area where few politicians dare to speak their mind*."[2]

A 37-year *de facto* moratorium on federal executions in the United States of America may be about to come to an end. A federal death row inmate, Juan Raul Garza, is scheduled to be executed by lethal injection in the US Penitentiary in Terre Haute, Indiana, on 12 December 2000. The last person to be put to death under US federal law was Victor Feguer, hanged in Iowa on 15 March 1963.

In the decades since Victor Feguer was executed, the international community has agreed to impose strict safeguards and limitations on the death penalty, with a view to its abolition. As the years have passed, the list of countries rejecting the use of this cruel, inhuman and degrading punishment has grown inexorably. In 1963, there were 10 countries that had abolished the death penalty for all crimes. As of October 2000, 108 countries had rejected judicial killing in law or practice.

Since January 1993, the month that President Bill Clinton took office, 28 countries have abolished the death penalty in law.[3] Those same eight years have seen nearly 500 men and women put to death under the capital laws of 29 US states, more than 70 per cent of all executions carried out since the USA resumed judicial killing at state level in 1977.[4] Selected for death under a system marked by arbitrariness, discrimination and political expediency, many were executed in violation of international standards, including over two thirds (12 of 17) of the world's known total of child offenders executed since 1993, numerous people with serious mental impairments, several prisoners whose guilt was in serious doubt, some 13 foreign nationals denied their international treaty-based consular rights, and a multitude of individuals who received inadequate legal representation.

It is clear that the USA is out of step with a majority of countries on this fundamental human rights concern, and that this is an issue crying out for leadership at the highest levels of government. This leadership has not been provided by the federal government, which has continued to turn a blind eye to violations of international standards committed by state authorities. In the past five years, federal complicity in these violations has been compounded by the government's removal of funding for Post-Conviction Defender Organizations, as well as legislation restricting federal judicial oversight of state court decisions and massively expanding the scope of the federal death penalty.

2*Hangman, be gone.* Washington Post, 26 September 2000.

31993: Greece, Guinea-Bissau, Hong Kong, Seychelles. 1994: Italy. 1995: Djibouti, Mauritius, Moldova, Spain. 1996: Belgium. 1997: Georgia, Nepal, Poland, South Africa, Bolivia, Bosnia-Herzegovina. 1998: Azerbaijan, Bulgaria, Canada, Estonia, Lithuania, United Kingdom. 1999: East Timor, Turkmenistan, Ukraine, Latvia. 2000: Malta, Côte d'Ivoire.

4From 1977 to 1 November 2000, 669 executions were carried out in 31 states: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. Mississippi and Wyoming have not carried out an execution since 1989 and 1992 respectively.

The first federal execution is scheduled at a time when national concern over the fairness and reliability of the US death penalty is growing daily. Calls for a moratorium on executions across the country have come from many and varied quarters, particularly since the announcement by Governor Ryan of Illinois on 31 January 2000 that he was suspending executions in his state because of its "shameful" record of wrongful convictions in capital cases. According to President Clinton, "Governor Ryan did the right thing, and it was probably a courageous thing to do, because a majority of the American people support capital punishment, as do I... And I think that if I were a governor still, I would look very closely at the situation in my state and decide what the facts were... Now, we have a different review going on here, a Justice Department review on the racial impact, or whether there was one in the death penalty decisions under the federal law."[5]

Since then, the findings of the Justice Department's review into the federal capital justice system have been made public. The study reveals disturbing statistical evidence of widespread racial and geographic disparities in the application of the federal death penalty. As at the state level, there is strong evidence that it is not only the severity of the crime which determines whether a defendant lives or dies, but where the crime is prosecuted and, quite possibly, the colour of the defendant's skin. The US Government has stated that it is "unalterably opposed" to the unfair application of the death penalty. Now is the time for it to prove it.

In August, President Clinton posed a question relating to the years of his presidency: "Are we better off today that we were eight years ago?" He offered his own answer: "You bet we are... But we're not just better off, we're also a better country. We are today more tolerant, more decent, more humane."[6] Eight years earlier, Governor Bill Clinton of Arkansas had flown back from presidential campaigning in New Hampshire to deny clemency to a profoundly impaired death row inmate named Ricky Ray Rector, a man with the mind of a young child. Rector's execution, in violation of international standards, was widely seen as a sign of the times in the USA – a judicial killing condoned by a political candidate to preempt any accusation of being "soft on crime".[7] The question now is, how much have times changed?

Sixty-six people were executed at state level in the USA in the first eight months of this new century. At a time when the US death penalty is under extraordinary public scrutiny, there was a politically fortuitous lull in executions leading up to the 2000 presidential election, with just four prisoners put to death in September and October. However, the conveyor belt of death is poised to make up for lost time. At the time of writing, 10 prisoners were scheduled to be lethally injected in the 10 days following the 7 November election. They include a prisoner with severe mental retardation, a Mexican national denied his consular rights, an African American sentenced to death by a jury apparently selected along racial lines, and a man condemned by a jury whose foreman now says would not have voted for death but for the inadequacy of the defence lawyer.[8] A further 18 people were scheduled to die before the end of January 2001.

While past experience indicates that the federal government will do nothing to oppose this state-level judicial killing, it is now faced with an execution from which it cannot seek to escape full responsibility. The scheduled execution of Juan Raul Garza provides President Clinton with the opportunity to offer his country a genuine example of human rights leadership. Will he act in accordance with his words about fairness and human rights? Or will history record that he left office as he entered it, after allowing an execution that widened his country's separation from international

5Press Conference, White House, 16 February 2000.

6Remarks by the President to the Democratic National Convention, Los Angeles, 14 August 2000.

7For example, New York political consultant David Garth said of the governor's role in the execution, "He had someone put to death who had only part of a brain. You can't find them any tougher than that." Quoted in *Death in Arkansas*, by Marshall Frady, The New Yorker, 22 February 1993.

8Respectively: John Paul Penry (Texas), Miguel Flores (Texas), Michael Sexton (North Carolina), and James Chambers (Missouri).

standards of justice and decency?

Turning a blind eye: Federal complicity in the state-level death penalty

"*Well, on the Texas case, I didn't read the file, all I know about it is what I've read about it in the press*." President Clinton, referring to the Gary Graham case, 28 June 2000[9]

Gary Graham was executed in Texas on 22 June 2000 in violation of international law. He was the fourth person executed in the USA this year for a crime committed when still a child. He was denied his right to adequate legal representation, and was executed despite serious questions surrounding his guilt. Amnesty International had appealed to President Clinton and Vice President Gore to intervene in the case. It received no reply from either man and presumes that no federal intervention of any sort was made.[10] This inaction comes as no surprise. Throughout the modern era of US judicial killing, the federal government has washed its hands of violations of international standards committed by individual states in their use of the death penalty.

A year after President Bill Clinton took office, Amnesty International wrote him a 21-page open letter on the administration of the death penalty in the USA.[11] The letter outlined ample evidence that US capital justice was riddled with racism, arbitrary application, inadequate legal safeguards and serious miscarriages of justice. Amnesty International called for a Presidential Commission to examine and report on all aspects of the use of the death penalty, with a national moratorium on executions pending the outcome of the commission's enquiry. The organization received no substantive response to its letter.

In the ensuing six years, the flawed nature of the US death penalty has become even more apparent as executions have continued apace. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions concluded in 1998, "the imposition of death sentences in the United States seems to continue to be marked by arbitrariness. Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death."[12] In June 2000, the findings of a substantial long-term study into the US death penalty were released. The report concluded that US death sentences are "persistently and systematically fraught with error". It found that the huge error rate in capital cases at state level were mainly the result of "egregiously incompetent defense lawyers who didn't even look for - *and demonstrably missed* - important evidence that the defendant was innocent or did not deserve to die" and "police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury."[13]

The consistent response of the federal authorities to such evidence has been to hide behind the federal/state divide, by suggesting that the federal government has little or no responsibility for the administration of the death penalty in state jurisdictions. Amnesty International disagrees.

9Press conference by the President, The White House, 28 June 2000.

10*USA: An appeal to President Clinton, Vice-President Gore and Governor Bush of Texas to condemn one illegal execution and to stop another.* AMR 51/96/00, 15 June. It also called for condemnation of the only other execution of a child offender known in the world this year, that of a 14-year-old child in the Democratic Republic of Congo. To Amnesty International's knowledge, no such condemnation was forthcoming.

11*USA: Open letter to the President on the death penalty.* AI Index: AMR 51/01/94. January 1994.

12E/CN.4/1998/68/Add.3, para 148. The Rapporteur's report followed his 1997 mission to the USA.

13*A broken system: Error rates in capital cases, 1973-1995*, James S. Liebman, Jeffrey Fagan and Valerie West. Columbia Law School, New York.

◆ It is the federal government, and not the individual states, which commits the USA to binding obligations under human rights conventions, safeguards which apply throughout the United States. The US Government is obliged to act to prevent violations of international law at any level of government within the USA.[14]

◆ It is the federal government – a combination of the President and the Senate – which selects US Supreme Court Justices, and through these life-term appointments can influence the application of the death penalty. Appointments by President Clinton's immediate predecessors ensured the Court's conservative approach to capital justice. For example, five days after President Clinton was sworn into office, the Supreme Court, sacrificing fairness for finality, ruled that newly discovered evidence of a prisoner's innocence need not be a bar to execution.[15] The ruling flew in the face of an international safeguard adopted by the United Nations nine years earlier.[16]

◆ Likewise, it is the federal government which appoints judges to the lower federal courts. Such appointments can also impact on the death penalty. On 27 October 2000, for example, the US Court of Appeals for the Fifth Circuit vacated a lower court ruling that death row inmate Calvine Burdine should get a new trial because his lawyer had slept during the original proceedings. The state of Texas appealed that it had not been proved that the lawyer's sleeping had made him ineffective. The Fifth Circuit agreed, flouting a fundamental international safeguard.[17] The two judges who voted against Burdine were appointed by Presidents Reagan and Bush. The third judge, an appointee of President Clinton, dissented, saying that the case "shocks the conscience".[18]

◆ It was the federal legislature which in 1995 voted to cut funding for Post-Conviction Defender Organizations (PCDOs), established in 1988 to ensure adequate representation for post-conviction appeals in capital cases. As the *New York Times* predicted at the time: "the

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14Under the Vienna Convention on the Law of Treaties, no system of government – unitary, decentralized or federal – can be used to justify a country's failure to fulfill its international obligations. On 11 May 2000 in Geneva, US Assistant Secretary of State Harold Koh affirmed to the UN Committee Against Torture that "[w]e entirely agree with the Committee's restatement of this principle of treaty law."

15*Herrera v Collins*, 506, U.S. 390, 25 January 1993. The case involved a Texas prisoner, Leonel Herrera, whose guilt was in serious doubt in the light of newly discovered evidence. He went to his death in May 1993 proclaiming his innocence, as have other prisoners since. At the *Herrera* hearing in October 1992, the Assistant Attorney General of Texas was asked by Justice Anthony Kennedy: "Suppose you have a videotape which conclusively shows the person is innocent, and you have a state which, as a matter of policy or law, simply does not hear new evidence claims, is there a federal constitutional violation?" She replied, "No, Your Honor, there is not... such an execution would not be violative of the Constitution." The Assistant Attorney General now heads the US Justice Department's Capital Case Unit, which advises the Attorney General's Review Committee on Capital Cases of the factual and legal issues that are relevant to the Committee's recommendation to the Attorney General whether to seek the death penalty in federal capital cases.

16"Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts." Safeguard 4 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council on 25 May 1984, and adopted by consensus by the UN General Assembly on 14 December 1984.

17Safeguard 5 of the above Safeguards insists that capital defendants must have "adequate legal assistance at all stages of proceedings."

18*Burdine v Johnson*, US Court of Appeals for the Fifth Circuit, No. 99-21034.

legislation will increase the chance that innocent defendants, or defendants whose trials were constitutionally flawed, will be executed."[19] President Clinton signed this legislation into law. Five years later, one of the main public concerns about the death penalty is the large numbers of errors in capital cases.

◆ It was the federal government which passed the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), designed to speed up executions. It placed new, unprecedented restrictions on the review of state criminal convictions by the federal courts. The UN Special Rapporteur concluded in his 1998 report that the enactment of the AEDPA (and the defunding of the PCDOs) had "further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR (International Covenant on Civil and Political Rights) and other international instruments".[20]

The federal government's half-hearted ratifications of human rights treaties continue to allow individual states to flout international standards on the death penalty.[21] The treaty monitoring bodies have condemned this equivocal approach to binding international obligations. For example, the Human Rights Committee, the body which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR) "regrets the extent of the [USA's] reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States."[22] The USA has so far ignored the appeals of treaty authorities to withdraw the conditions it attached to its ratifications of human rights instruments, including those which relate to the death penalty.[23]

The US Government ratified the International Convention on the Elimination of all forms of Racial Discrimination in 1994, 28 years after signing it. Echoes of this tardiness have resonated through the government's reluctance to confront the issue of racial discrimination in state level capital justice. In the same year that it ratified the Convention, Congress failed to pass the proposed Racial

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19 *Shortchanging inmates on death row.* Editorial, 13 October 1995.

20 E/CN.4/1998/68/Add.3 Paragraph 149.

21 For example, in denying clemency to Chris Thomas in January 2000, Governor Gilmore of Virginia said: "It has been asserted that the International Covenant on Civil and Political Rights prohibits the Commonwealth from executing Thomas because he was 17 years old at the time he murdered Mr. and Mrs. Wiseman. Although the United States Senate ratified this treaty on April 2, 1992, it expressly conditioned its ratification on the continued right of states to impose the death penalty on murderers under the age of 18 years."

22 CCPR/C/79/Add.50. (1995)

23 In April 2000, the UN Commission on Human Rights adopted a resolution which urged all states that still maintain the death penalty to withdraw any reservations to article 6 of the ICCPR, such as the USA has made, "given that article 6 of the Covenant enshrines the minimum rules for the protection of the right to life and the generally accepted standards in this area" E/CN.4/RES/2000/65. In May 2000 the Committee Against Torture expressed particular concern at, and urged withdrawal of, the US reservation to article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which it made when it ratified the Convention in October 1994. The USA considers itself bound by the article's prohibition on cruel, inhuman or degrading treatment or punishment only to the extent that it matches what is prohibited under the US Constitution. The US reservation to article 16 was made explicitly with reference to the continued use of the death penalty under US state and federal law, aspects of which the US Government acknowledged in its report to the Committee Against Torture could be considered in some quarters to constitute "cruel and inhuman" treatment or punishment, but which it wished to leave to the US "domestic political, legislative, and judicial processes" to decide upon. The USA entered an identical reservation to article 7 of the International Covenant on Civil and Political Rights, which the Human Rights Committee has stated is "contrary to the object and purpose of the treaty", and which it has urged the US to withdraw.

Justice Act, which would have allowed capital defendants to challenge their death sentence using statistical evidence of discriminatory practices. In his 1995 report on the USA following his mission there in 1994, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance recommended that "measures be taken to abolish the death penalty, or failing that, to eliminate discriminatory application of the penalty."[24] In a letter sent to the Rapporteur soon afterwards, the US Government responded that it was reviewing his report "with interest". The letter stated: "...the United States has repeatedly and consistently condemned racial discrimination. We have undertaken to pursue by all appropriate means a policy of extirpating such discrimination in all its forms."[25] However, as far as the state level death penalty is concerned, such words have amounted to nothing.

The international legal prohibition on the use of the death penalty against children is yet another example of the federal government's failure to uphold human rights standards, even when presented with the opportunity to do so. A child offender, Michael Domingues, challenged his death sentence imposed by a Nevada court as illegal, arguing that it violated US treaty obligations and customary international law. In June 1999, faced with the Domingues appeal, the US Supreme Court requested the US Government to give its position on the issue. Far from seizing this opportunity to promote international standards, however, the US Solicitor General submitted an *amicus curiae* brief to the Court arguing in favour of the US status quo and urging the Supreme Court not to consider the merits of the Domingues claim. In November 1999, the Court dismissed the Domingues appeal without comment. What did this shameful sequence of events show if not an active involvement of the US Government in the death penalty at state level?

Federal officials often seek to justify the USA's continuing use of the death penalty on the grounds that it is what the public want. Yet at the same time, they have failed to educate the public, or even government officials, about international standards and world trends relating to the death penalty. Other governments have begun to protest at such passivity. In October 2000, for example, having expressed concern at violations of international standards in the USA's use of the death penalty, the Swiss delegation to the Organization of Security and Co-operation in Europe (OSCE) noted that "retentionist countries justify their continuing use of the death penalty by arguing that a majority of the public in their country is in favour of it. Switzerland considers, however, that it is essential to raise awareness amongst the general public about all the implications of capital punishment and considers it to be the duty of the political authorities of these countries to take action in this respect."[26]

Both the Human Rights Committee and the Special Rapporteur on extrajudicial, summary or arbitrary executions have expressed concern at the US Government's failure to educate public officials. For example, in his 1998 report, the Special Rapporteur concluded that "a serious gap exists between federal and state governments, concerning implementation of international obligations undertaken by the United States Government. He notes with concern that the ICCPR appears not to have been disseminated to state authorities and that knowledge of the country's international obligations is almost non—existent at state level."[27]

24E/CN.4/1995/78/Add.1. 16 January 1995

25*Letter dated 3 March 1995 from the head of the delegation of the United States of America to the fifty-first session of the Commission on Human Rights, addressed to Mr. Maurice Glélé-Ahanhanzo, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*. UN Document: E/CN.4/1995/158.

26OSCE Human Dimension Implementation Review Meeting, Warsaw (unofficial translation).

27E/CN.4/1998/68/Add.3. Paragraph 142.

State and federal officials continue to display an ignorance of, or contempt for, the USA's international obligations. For example:

◆ On 17 July 2000, Vice-President Al Gore and Governor George W. Bush of Texas were asked whether they would allow the execution of a pregnant woman. The Vice-President responded that he would allow the woman to choose, and Governor Bush said that he would support postponement of such an execution until after the child was born.[28] Both failed to mention that international law forbids the execution of pregnant women, and that the USA has expressly agreed to be bound by this prohibition.[29]

◆ Governor George W. Bush denied that Texas executes the mentally retarded, shortly before his state carried out just such an execution, that of Oliver David Cruz, on 9 August 2000.[30] Not only was the governor's contention inaccurate, but he also failed to mention that such executions by Texas violate international safeguards. At the time of writing John Paul Penry, a man with an IQ of between 50 and 63, is scheduled to be put to death in Texas on 16 November 2000.

◆ The Deputy Assistant Attorney General who chairs the Attorney General's Review Committee on Capital Cases in the US Justice Department wrote in May 2000 that "[t]he execution of juvenile offenders...is fully consistent with international law, which does not prohibit the execution of persons who were 16 or 17 at the time of the crime...".[31]

◆ On 18 October 2000, the US Ambassador to the OSCE stated that "extensive appellate procedures" are available to US capital defendants "to ensure, among other things, that the mentally ill are not executed."[32] Just four months earlier, on 21 June, Thomas Provenzano was executed in Florida, one of several mentally ill inmates put to death in the USA this year. Provenzano had a history of paranoid schizophrenia dating back to before his crime. The judge who found him competent for execution concluded that "Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ", but because of the "minimal standard" governing such cases, he could be put to death.[33]

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28 *Gore and Bush duel on an odd death penalty question.* New York Times, 18 July 2000.

29 Article 6(5) of the International Covenant on Civil and Political Rights states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women". When the USA ratified the treaty in 1992, it made 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)....".

30 When told by a reporter that several US states ban the execution of the mentally retarded, Governor Bush reportedly replied, "So do we, in Texas". *Despite records, Bush denies mentally retarded executed*, Houston Chronicle, 10 August 2000.

31 Letter from Kevin V. Di Gregory to an Amnesty International member in Germany, dated 2 May 2000. Amnesty International has written to this official informing him of his inaccuracy, and pointing out a resolution adopted on 14 August 2000 by the UN Sub-Commission on the Promotion and Protection of Human Rights affirming that "the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law."

32 United States Mission to the OSCE. *Exchange of information on the death penalty.* Delivered by Ambassador George F. Ward Jr., United States Delegation to the OSCE Human Dimension Implementation Review Meeting, Warsaw, 18 October 2000.

33 *Provenzano v State.* Judge Bentley, Circuit Court, Eighth Judicial Circuit, 8 December 1999. Judge

◆ The 1998 International Court of Justice ruling that the USA should "take all measures at its disposal" to stop the execution of Paraguayan national Ángel Francisco Breard in Virginia, was described as an "appalling intrusion" by a spokesman for Senator Jesse Helms, Chairman of the US Senate Foreign Relations Committee: "There's only one court that matters here. That's the Supreme Court. There's only one law that applies. That's the United States Constitution."[34] The issue of foreign nationals denied their consular rights and facing execution, in violation of international law, continues to cause diplomatic friction between the USA and other countries.[35]

Indeed, the refusal of US authorities to adhere to their human rights obligations is damaging the USA's reputation and its claims to be a progressive force for human rights. This should be a matter of serious concern for the US Government, with its interest in projecting a favourable image of the country. The government's position that state-level capital justice is a matter solely for individual states is not a distinction that is recognized by opinion in other countries, or by international law. To the outside world, an execution in Texas or any other state of the Union is a US execution. The US Ambassador to France, Felix Rohaytn, expressed his concern in an article in *Newsweek* on 29 May 2000:

"People in France admire the United States... Not so in the case of the death penalty. I travel a lot. You hear opposition to the death penalty in Bordeaux, you hear it in Toulouse, everywhere. When I speak to audiences, the question always comes up. And I don't believe this is just a French phenomenon. I recently spoke to John Kornblum, our ambassador to Germany, and he told me the death penalty is the single most recurring question there... The death penalty is viewed as a violation of human rights... it is seen as both racist and discriminatory, affecting a disproportionate number of minorities who often are represented by attorneys pictured as incompetent of uninterested.... I think we should recognize [the criticism] and explore changes in our approach to criminal punishment that reflect our basic values."

The Ambassador's article was entitled, *The Shadow over America: How our use of the death penalty hurts our image abroad*. The US Government has made no attempt to lift this shadow, by seeking to promote or enforce international standards on the death penalty. Instead it is set to darken its reputation by resuming federal executions after 37 years without them. This would not be the act of a progressive administration, nor would it lend credibility to President Clinton's recent contention that the USA is "the leading force for human rights around the world".[36]

Against international standards: The expansion of the federal death penalty

Bentley stated that his ruling "should not be misinterpreted as a finding that Thomas Provenzano is a normal human being without serious mental health problems, because he most certainly is not."

34In an earlier case, that of Mario Benjamin Murphy, a Mexican national facing imminent execution in 1997 in Virginia, the Commonwealth Attorney who prosecuted the case displayed similar contempt for the US obligations: "I mean, what's the remedy? I suppose Mexico could declare war on us.. To me, it's a completely ridiculous issue." Both Breard and Murphy were executed in violation of international law.

35The foreign police advisor to Mexico's president-elect has referred to the issue as "a strain on bilateral relations." (*Governments complain America violates rights of foreign inmates*, New York Times, 30 October 2000). The German government described as "barbaric" the execution of two of its nationals in Arizona in 1999. The International Court of Justice is to consider Germany's complaint on the issue at hearings due to begin in The Hague on 13 November 2000.

36Remarks by the President to the Democratic National Convention, Los Angeles, 14 August 2000.

"*[T]he reintroduction of the death penalty and the extension of its scope, both at federal and at state level, contravene the spirit and purpose of article 6 of the ICCPR, as well as the international trend towards the progressive restriction of the number of offences for which the death penalty may be imposed*". UN Special Rapporteur, 1998.[37]

After the US Supreme Court halted executions in 1972 because of the arbitrary way in which the death penalty was being administered, a number of states moved quickly to rewrite their capital statutes in order to meet the Supreme Court's requirements. The Court lifted the moratorium in 1976, and state-level executions resumed the following year. The federal government proceeded more slowly. It was not until 18 November 1988 that the federal death penalty was reintroduced, when President Ronald Reagan signed into law the Anti-Drug Abuse Act of 1988. The new law contained the Drug Kingpin Act, which provided for the death penalty for people convicted of drug-related murders, including of law enforcement officers.

Six years later, on 13 September 1994, President Clinton signed into law the Federal Death Penalty Act. The legislation expanded the death penalty under federal civilian law to more than 50 offences.[38] Amnesty International condemned this massive expansion of the federal death penalty as being contrary to international standards, which seek to progressively limit the scope of the death penalty, with a view to its abolition.[39] For example, article 4 of the American Convention on Human Rights states that "the application of [the death penalty] shall not be extended to crimes to which it does not presently apply" and "the death penalty shall not be reestablished in states that have abolished it."[40] In its comments on the USA in 1995, the Human Rights Committee "deplore[d] the recent expansion of the death penalty under federal law"[41]. Within weeks, President Clinton ran his first television advertisements in his bid for reelection; they focussed on crime and the president's support for expansion of the death penalty.[42]

As a result of the expansion, the number of federal capital defendants against whom the

37Special Rapporteur on extrajudicial, summary or arbitrary executions, in his 1998 report on the USA. He further wrote that "the desirability of its abolition has been strongly reaffirmed on different occasions by United Nations organs and bodies in the field of human rights, inter alia by the Security Council, the Human Rights Committee, the General Assembly and the Economic and Social Council... Three treaties aiming at the abolition of the death penalty further confirm the tendency of the international community towards abolishing the death penalty: the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; and the Protocol No. 6 to the European Convention on Human Rights." E/CN.4/1998/68/Add.3.

38For example, murder committed during a drug-related drive-by shooting; murder committed at an airport serving international civil aviation; murder of a federal judge or law enforcement official; murder of a foreign official; murder by a federal prisoner; murder of a U.S. national in a foreign country; murder during a kidnapping; murder during a hostage-taking; murder of a court officer or juror; murder with the intent of preventing testimony by a witness, victim, or informant; murder involved in a racketeering offense; willful wrecking of a train resulting in death; bank-robbery-related murder or kidnapping; murder related to a carjacking; murder related to rape or child molestation; murder related to sexual exploitation of children.

39The 1996 Anti-Terrorism and Effective Death Penalty Act also expanded the federal death penalty by a further four offences.

40The USA signed the American Convention on Human Rights (ACHR) in 1977, thereby binding itself in good faith not to do anything which would defeat the object and purpose of the treaty, pending a decision on whether to ratify it (Vienna Convention on the Law of Treaties (1979), article 18a). The USA has not yet ratified the ACHR.

41CCPR/C/79/Add.50.

42*Clinton gets early start on ad campaign trail.* New York Times, 27 June 1995.

Attorney General authorized federal prosecutors to seek the death penalty tripled from 47 cases in the first six years (1988-1994) to 159 cases in the next five years. Of the 21 prisoners on federal death row in October 2000, five were sentenced between 1998 and 1994, and 16 were sentenced from 1995 onwards.

In addition, the US Government appears to have "federalized" the death penalty by pursuing death sentences in cases which only tenuously fall under its jurisdiction and which could have been prosecuted at state level. Where this occurs in states which do not allow for the death penalty under state law, it could amount, in effect, to a *de facto* reintroduction of the death penalty, in contravention of the spirit, if not the letter, of international standards. For example, the federal government pursued a death sentence against Ricky Lee Brown at his 1999 trial in West Virginia, which abolished the death penalty in 1965. Brown was charged with killing his children by setting his house on fire. The case was eligible for capital prosecution under federal law because the house was serviced with electricity and gas which crossed state lines, and therefore fell under the definition of a crime involving interstate commerce.[43]

The "Commerce Clause" of the US Constitution, by which Congress has the power to regulate and protect "Commerce with foreign Nations, and among the several States"[44] has been used to extend federal capital jurisdiction in recent years.

Bountaem Chanthadara, a Laotian national, was convicted and sentenced to death in 1996 for the 1994 robbery of a Chinese restaurant in Wichita, Kansas, during which Barbara Sun, co-proprietor of the restaurant, was killed. The federal government argued that it had jurisdiction over the case on the grounds that the crime had obstructed interstate commerce by affecting the restaurant's capacity to buy food from out of state. A request by the defence lawyer for the US Attorney General to deauthorize this case as a capital prosecution, because of the limited federal interest, was rejected.[45] Kansas has not carried out an execution since 1965, but reintroduced the death penalty in 1994, four months before the crime for which Bountaem Chanthadara is now on federal death row. In a similar case, the US Attorney General authorized the US Attorney of Kansas to seek a death sentence against Cody Glover accused of the robbery of a convenience store in Wichita in May 1998 during which a clerk was killed. The Kansas US Attorney had not sought such authorization. In March 1999, Glover escaped the death penalty by agreeing to plead guilty. He was sentenced to life imprisonment.

43In the Ricky Brown case, the jury was unable to reach a verdict. The federal government have now dropped pursuit of the death penalty in this case following the US Supreme Court ruling in another, non-capital, case limiting the interpretation of what buildings can fall under the umbrella of "interstate commerce". Writing the Court's opinion, Justice Ginsburg wrote: "Were we to adopt the Government's expansive interpretation of [the law], hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. *Jones v United States*, 22 May 2000.

44US Constitution, Article 1, Section 8.

45Under Justice Department policy, US Attorneys must determine, in deciding whether to accept a capital or non-capital case for federal prosecution, if the federal interest in the case is more substantial than the interests of state or local authorities. According to the US Attorneys' Manual, in making this determination, the federal prosecutors may consider a number of factors, including the relative strength of the state's interest in prosecution, the extent to which the criminal activity reached beyond the local jurisdiction, and the relative ability and willingness of the state to prosecute effectively. The Manual specifies that in states which do not allow for the death penalty, "the fact that the maximum Federal penalty is death is insufficient, standing alone, to show a more substantial interest". US Attorneys' Manual, Title 9-10.070.

In 1846, Michigan became the first jurisdiction in the English-speaking world to abolish the death penalty. In 1999, a US district judge ruled that the federal government did not have jurisdiction over a case in which it was seeking a death sentence against Efraim Garcia, accused of the murder of a police informant in the context of street gang activity. The judge ruled that the connection between Garcia's gang's operations and interstate commerce was too weak to allow federal jurisdiction over the murder. The alleged link to interstate commerce included a number of factors, including that one of the gang members used a gun manufactured outside Michigan, and two gang members admitted discussing the case while travelling to Mexico.[46]

A carjacking that results in death can also result in a federal death penalty. Federal jurisdiction is based on the fact that cars involve interstate or foreign commerce; for example, the car may have been manufactured and assembled out of state, or it may have been transported between states. Between January 1995 and July 2000, federal prosecutors submitted cases of 71 defendants charged with carjacking for review by the Justice Department, recommending that the death penalty be sought against 20 of them.[47] The US Attorney General authorized pursuit of a death sentence in 13 of the cases. At the time of writing no decision had been taken on whether to pursue a death sentence against those accused of the murder of Jason Burgeson and Amy Shute in a carjacking in Rhode Island in June 2000. Because Rhode Island law does not provide for the death penalty, relatives of Jason Burgeson have lobbied the state and federal attorneys general to allow a federal death sentence to be sought. The Attorney General of Rhode Island, the state's former US Attorney, stated that he "would be happy to see the federal government take this case and see the man who shot Amy and Jason get the death penalty."[48] Rhode Island has not had an execution since 1930.

The last execution in Washington DC was in 1957, and the city council banned the use of the death penalty in 1981. The city's electorate voted overwhelmingly to reject reintroduction of capital punishment in a referendum held in 1992. A decision by Attorney General Reno in February 2000 to seek the death penalty against Carl Derek Cooper, accused of the 1997 murder of three people in a coffee shop in the city, therefore caused local controversy. According to the *Washington Post*, Attorney General Reno overruled the local US Attorney Wilma Lewis, who had urged pursuit of a sentence of life imprisonment.[49] The newspaper quoted two anonymous law enforcement sources, who had said that the consensus in the US Attorney's office was that the case did not have such a compelling federal interest that it warranted the death penalty. Washington DC's delegate to the US Congress, Eleanor Holmes Norton, described the case as one that was "essentially a local homicide matter with federal charges tacked on."[50] In the event, in April 2000 US Attorney Lewis reached an agreement with Carl Cooper by which he was spared the possibility of a death sentence in return for a guilty plea.[51]

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46 *Judge dismisses federal death penalty charges.* The Michigan Daily, 24 September 1999.

47 Due to an agreement between the US Attorney for Puerto Rico and his local counterpart that the federal government will prosecute carjackings involving death, over a third (26) of the cases of carjacking submitted to the Justice Department came from Puerto Rico. The US Attorney asked to be allowed to seek a death sentence in five of the cases, but the Attorney General has not authorized him to do so in any of them.

48 Associated Press, 14 June 2000.

49 *US Attorney overruled in Starbucks slaying case; Lewis had urged a life sentence.* Washington Post, 10 February 2000.

50 *Killings in a Georgetown coffee shop stir death penalty debate*. New York Times, 20 February 2000

51 Reuters, 25 April 2000. On 30 June, US Attorney Lewis announced that she would be seeking, and had been authorized to seek, a death sentence against Tommy Edelin, accused of over 10 murders.

The conflict between federal and local laws has also been raised in Puerto Rico, whose constitution forbids any use of the death penalty. Between January 1995 and July 2000, the US Attorney General authorized the death penalty in 13 Puerto Rico cases. On 17 July 2000, a federal judge in Puerto Rico ruled that the federal death penalty cannot be applied because local residents have no voting representation in the US Congress, which was responsible for the reinstatement and expansion of federal death penalty statutes. US District Judge Salvador Casellas held that it "shocks the conscience to impose the ultimate penalty, death, upon American citizens who are denied the right to participate directly or indirectly in the government that enacts and authorizes the imposition of such punishment." The federal prosecution stated that it would appeal the decision.[52]

Even where federal jurisdiction is less controversial, federal pursuit of a death sentence in an otherwise death penalty-free state can raise local concern. Federal prosecutors are currently seeking the death penalty against Kristen Gilbert, whose trial began in Massachusetts on 16 October 2000. Kristen Gilbert is charged with killing patients at the Veterans Affairs Medical Center in Northampton, where she worked as a nurse. Because the hospital is under federal jurisdiction, she can be tried under federal law. US Representative William Delahunt, of Massachusetts, was said to be "puzzled that the Justice Department would go out of its way to do something so apparently random and unusual" as to prosecute a murder case that the state was perfectly well-equipped to manage.[53] State law in Massachusetts does not allow for the death penalty. The last execution there was in 1947.

The Justice Department report into the federal death penalty

"*The issues at the federal level relate more to the disturbing racial composition of those who have been convicted and the apparent fact that almost all the convictions are coming out of just a handful of states, which raises the question of whether, even though there is a uniform law across the country, what your prosecution is may turn solely on where you committed the crime*." President Clinton, press conference, 28 June 2000

Both President Clinton and Attorney General Reno have expressed their disquiet at the statistics revealed by a Justice Department review into the federal death penalty. It is right that they should be perturbed, given that the US Government has repeatedly expressed that it only supports the death penalty to the extent that it is applied fairly and without discrimination.

As stated above, Amnesty International received no substantive response to its January 1994 open letter to President Clinton in which the organization had called for a Presidential Commission and a moratorium on executions. Indeed, it was not until 1996, after it had renewed its appeal, that the Department of Justice responded to the organization's concerns. The reply reiterated the US Government's support for the death penalty as "an appropriate sanction" for the most severe crimes, but with one major qualification:

> "...we are unalterably opposed to its application in an unfair manner, particularly if that unfairness is grounded in racial or other discrimination."[54]

In May 1999, Amnesty International published *Killing with Prejudice: Race and the Death*

52 *US Judge kills death penalty in Puerto Rico.* Orlando Sentinel, 19 July 2000.

53 *Feds' death penalty net cast ever wider.* The Boston Globe, 11 June 2000.

54 Acting Assistant Attorney General John C. Keeney; letter to Amnesty International dated 2 October 1996.

Penalty in the USA (AMR 51/52/99), a 30-page report detailing evidence of racial discrimination in capital justice at state and federal level. A copy was sent to the US Government. A reply from the Justice Department acknowledged that it "cannot be disputed that the circumstances of many of the identified cases, as you have described them, raise concerns", but reiterated the constraints on federal oversight of state-level capital cases. The letter then moved on to the federal death penalty:

> "With regard to federal capital prosecutions, every effort has been made to foreclose race as a factor in the decision whether to seek the death penalty... The Department of Justice remains committed to fair and impartial administration of justice with no role for racial bias or animus of any sort. You may be assured that to the extent of the Department's authority such consequences of prejudice will be redressed."[55]

In February 2000, Deputy Attorney General Eric Holder revealed that he had been instructed a few months earlier to review whether inappropriate racial disparities existed in the federal death penalty system: "This study was ordered by the Attorney General... out of an abundance of caution. We don't have anything, to our knowledge, that gives us reason to believe that there is a disparity within the system. But we want to make sure."[56]

The Justice Department released its findings at a press conference on 12 September 2000.[57] Its review had found significant evidence of geographic and racial disparities in the application of the federal death penalty nationwide, despite its own best efforts to ensure that the process was fair and equitable. While the survey does not analyse this data or suggest causes for these revealed disparities, its authors and sponsors were nonetheless disturbed by the results. Speaking at the press conference, Deputy Attorney General Eric Holder said: "I can't help but being both personally and professionally disturbed by the numbers we are discussing today. We have to be honest with ourselves. Ours is still a race-conscious society. And yet, people are afraid to talk about race. . . . It is imperative morally and legally that we respond."[58]

Attorney General Reno stated that she was "sorely troubled" by the data: "We must do all we can in the federal government to root out bias at every step"[59]. She said that a broader study was required to determine whether "bias" played a role in the system. However, she also stated that a moratorium was not merited because the data raised no questions about the innocence of current federal death row inmates. President Clinton expressed concern at the "rather astonishing geographic disparity", along with the racial imbalance, "since we're supposed to have a uniform law of the land". He echoed his Attorney General's position when he stated that there had been "no suggestion, as far as I know, that any of the cases where convictions occurred were wrongly decided."[60]

The position taken by Attorney General Reno and President Clinton is disturbing. As the lawyers for Juan Raul Garza, a Hispanic man convicted in Texas on federal charges and scheduled to be executed on 12 December, have pointed out:

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55 Letter from Kevin V. Di Gregory, Deputy Assistant Attorney General, dated 11 August 1999.
56 Reuters, 10 February 2000.
57 *The federal death penalty system: a statistical survey (1988-2000)*. US Department of Justice.
58 *Disparities Found in U.S. Death Penalty Prosecutions,* Washington Post, 13 September 2000.
59 *Reno Troubled by Death Penalty Statistics*, New York Times, 13 September 2000
60 *Sizable racial disparity found in federal death penalty* cases. Dallas Morning News, 13 September 2000. And, Study *finds racial gap on death row.* Los Angeles Times, 13 September 2000.

> "Taken to its logical conclusion... that position as applied to particular cases is not just wrong but unconscionable: it sanctions the execution of defendants who, but for their race or ethnicity, might never have been sentenced to death, and it demeans human life by implying that, for defendants who cannot prove their innocence, there is no legal or moral difference between executing them and imprisoning them."[61]

The Attorney General noted that "the clemency process is in place to address any question" regarding the implications of the Justice Department survey. While Amnesty International urges the President to grant clemency in every death penalty case that comes before him as a minimum step, the organization believes that he should act now to commute all current federal death sentences in recognition that the whole system is tainted. In so doing he would be acting in accordance with his stated belief that the USA has become a world leader in human rights during his presidency, and would be demonstrating that his administration is "unalterably opposed" to the unfair application of the death penalty.

Time to stop tinkering with the machinery of death

"*It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants "deserve" to die? – cannot be answered in the affirmative."* Justice Blackmun, US Supreme Court, 1994[62]

It was a year after Justice Blackmun's now famous dissent that the US Department of Justice initiated new internal procedures "designed to promote consistency and fairness" in the federal capital justice system. Five years later, the Department's survey of the federal death penalty demonstrates that its own best efforts have failed.

The Justice Department adopted its new internal procedures on 27 January 1995. Prior to that date, US Attorneys (the prosecutors in the USA's 94 federal judicial districts) were only required to obtain Justice Department review of cases after they had already decided to seek authorization to pursue a death sentence. Under the new procedures, known as the death penalty protocol, every case in which a defendant is charged with an offence eligible for the death penalty under federal law must be submitted to the Justice Department by the local US Attorney, regardless of whether he or she is seeking authorization to pursue the death penalty. The cases are reviewed by the Attorney General's Review Committee on Capital Cases, which then makes an independent recommendation to the Attorney General. The ultimate decision on whether to permit a death penalty prosecution thus rests with the Attorney General and not the local federal prosecutors. Any case information provided by local prosecutors that might reveal the race of the defendant is removed before consideration of the case by the Review Committee and the Attorney General.[63]

The Justice Department's survey shows that racial, ethnic and geographic disparities have continued unabated since the introduction of the screening process. The findings include:

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61 *In re Juan Raul Garza*. Memorandum in support of petition for clemency and for commutation of sentence of death to sentence of life imprisonment without possibility of release. 28 September 2000.

62 Dissenting opinion, *Callins v Collins*, 22 February 1994.

63 Although evidence concerning the race of the defendant or the victim might still presumably be included in the material submitted to the Review Committee, either through presentations made by the defence lawyer or through the submission of crime scene evidence.

◆ 80 percent of the defendants who faced federal capital charges since 1995 were members of racial or ethnic minorities. In that same time, US attorneys recommended the death penalty for 183 defendants, 74 per cent of whom were from ethnic or racial minority groups. The Attorney General authorized pursuit of the death penalty in 159 of these cases, 72 per cent of whom were from ethnic or racial minorities.

◆ White capital defendants have been far more likely than Hispanic and African American defendants to benefit from a plea bargain. Since 1988, 47 per cent of all white defendants for whom the Attorney General authorized the death penalty were subsequently allowed to plead guilty, as part of an arrangement to avoid the death penalty. In contrast, only 27 per cent of Hispanic defendants and 27 per cent of African-American defendants benefited from such plea bargains. The rates before and after 1995 have remained relatively unchanged.

◆ While the proportion of white defendants remains relatively constant at every stage in the federal death penalty determination process, African American defendants become far more likely to be exposed to the death penalty by the latter stages of case review. Blacks make up 48 per cent of the initial cases presented for review but represent 68 per cent of the death sentences imposed since 1995.

◆ Six of the 21 prisoners currently under federal sentence of death were convicted of crimes against at least one victim of a different race or ethnicity. Five of these prisoners are black, convicted of killing white victims.[64] The other is white, convicted of killing multiple victims.[65]

◆ As of July 2000, there were 19 men on federal death row, 13 black, four white, one Hispanic and one Asian. Two Hispanic defendants were awaiting formal sentencing following a jury's recommendation of death.[66] Of these 21cases, 14 (66 per cent) are from three states – six from Texas, four from Virginia and four from Missouri.

◆ Geographic disparities were apparent both before and after 1995. For example, from 1988 to 1994, just two of the country's 94 federal judicial districts (Western Missouri and Eastern Virginia) accounted for 23 per cent (12 of 52) of the federal cases in which the local federal prosecutor sought authorization to pursue the death penalty. From 1995 to 2000 the same two districts accounted for 16 per cent (29 of 183) of such requests. Six of the 21 (29 per cent) men currently under federal sentence of death were prosecuted in these two districts.

Disturbing as the Justice Department's findings are, they should come as no surprise. Racial and geographical disparities in the use of the death penalty in the USA have been widely documented in the state and federal capital justice systems. At both levels, prosecutorial discretion may be one of the major contributing factors.

64Christopher Vialva and Brandon Bernard were convicted of killing the same two white victims; Norris Holder and Billie Allen were convicted of killing the same white victim; and Louis Jones was convicted of killing a white victim.

65Timothy McVeigh, convicted of killing 160 people - 121 whites, 32 blacks, five Hispanics and two other - in the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Note: Although 168 people were killed in the bombing, the Justice Department statistics only break down the figures on the 160 people known to have died at the time of the indictment.

66Another federal jurisdiction, the military, displays a similar racial disparity. There are seven men on the military's death row. Five are black, one is Asian and one is white.

Prosecutorial discretion

At state level, the discretionary power of local, usually elected, prosecutors to choose which aggravated murders they will seek the death penalty for contributes to marked geographical disparities in capital sentencing. For example, Harris County in Texas has supplied more death row inmates than any other US county. From 1977 to the end of October 2000, 63 Harris County defendants had been executed, almost 10 per cent of the national total. From 1979, the office of District Attorney of Harris County has been held by Johnny B. Holmes Jr. In 1999 he announced that he would not be seeking re-election in 2000, having won the previous five elections, because he believed that "it's time go home from a vacation when you're still having fun."[67] Under his leadership, his office has obtained more than 200 death sentences.

One recent study of proportionality in death sentencing practices at the state level has noted the undeniable but unquantifiable effect of prosecutorial discretion. A report commissioned by the New Jersey Supreme Court stated that:

> "A death sentence may be disproportionate, at least in part, because prosecutors frequently exercise their discretion not to seek the death penalty for a particular type of homicide. . . A death sentence may be 'aberrant' or 'freakish' because in all factually similar cases, prosecutors engage in plea negotiations, thereby obviating the potential for capital punishment in those matters."[68]

Even within the US Justice Department procedures introduced in 1995, federal prosecutors, like their state counterparts, have wide discretion in capital cases.

- US Attorneys are not required to submit to the Attorney General for review cases in which they initially considered the case for federal prosecution, but ultimately decided to defer prosecution to state authorities, for example, because of the lack of a substantial federal interest.

- US Attorneys retain the discretion not to charge defendants facing federal prosecution for a homicide with a capital-eligible offences if they do not believe such a charge could be sustained.

- At any time, either before or after indictment, US Attorneys have the discretion to conclude a plea agreement with a defendant, which has the effect of foreclosing the death penalty. This occurs in about a third of cases in which the US Attorney General has authorized pursuit of the death penalty.[69]

A recent example of prosecutorial discretion involved the case of Chris William Dean, accused of killing 17-year-old Christopher Marquis in Vermont, by means of a bomb sent to Marquis

67Associated Press, 12 October 1999.

68Appellate Division Judge David Baime, Special Master to the NJ Supreme Court, cited in *NJ Finds Death Penalty Statistical Models Unstable*, New Jersey Law Journal, 10 May 1999.

69Of the 159 defendants against whom the US Attorney General has authorized the US Attorney to seek the death penalty since 1995, 51 (32 per cent) entered into plea agreements that ended the possibility of a death sentence. Given that over 40 of the remaining defendants have yet to come to trial, the eventual proportion could be higher.

by mail from Indiana. The US Attorney for Vermont did not want to pursue a death sentence against Dean, but Attorney General Reno disagreed and authorized the prosecutor to seek Dean's execution. In September 1999, the Vermont prosecutor reached a plea agreement, in which he agreed not to pursue the death penalty against Dean in return for a guilty plea. The US Attorney said: "This office recommended that we not seek the death penalty. There were a number of reasons. You have to have the grounds to seek the death penalty, and we did not feel they existed. Other factors that I took into account were the history and culture of this state... and the views of the victim."[70] Christopher Marquis' mother, herself seriously injured in the bombing, did not want the government to pursue the death penalty. Vermont last carried out an execution in 1954, and state law does not allow for the death penalty.

As the Vermont US Attorney indicated, in addition to pressures associated with any particular case, such as victims' relatives adopting a position for or against a death sentence, the state's "death penalty culture" may have an impact on the prosecutor's decision-making.[71] Vermont is one of the 12 states whose laws do not allow for capital punishment. According to the Justice Department's statistics, in these states local federal prosecutors recommend the death penalty at a lower rate than in those states which carry out the most executions. Since 1995 there have been 78 capital case submissions to the Justice Department from these 12 otherwise death penalty-free states.[72] The local US Attorneys recommended pursuit of the death penalty in 15 per cent of these cases. In the same period the 12 states which have carried out the most executions at state level submitted 195 cases and recommended seeking the death penalty in 43 per cent of these cases.[73]

Of the 183 cases where US attorneys recommended the death penalty, over a third came from federal prosecutors in just four US states, Texas (14), New York (14), Missouri (13) and Virginia (25). Texas, Virginia and Missouri account for more than half of the executions (358 out of 669) carried out under state laws from January 1977 to 1 November 2000 (New York only reintroduced the death penalty in 1995 and has not yet carried out an execution). It is difficult to comprehend why a relatively small state like Virginia should account for such a large number of cases in which federal prosecutors recommended the death penalty, unless the local political climate is influencing those decisions. While Texas executes more death row prisoners than any other US state, Virginia has a higher per capita execution rate.[74]

In seeking to explain why her office accounts for a disproportionate number of cases submitted to the Justice Department, the US Attorney for the Eastern District of Virginia, pointed to prosecutorial discretion as a factor: "[W]e may have more murder cases listed because we are very faithful to the protocol and send down to the department every [capital] case. So they probably have a more complete picture on our district than they have on others." Another leading prosecutor in this US Attorney's office explained that "[The US] Congress has given federal prosecutors powerful tools to address violent crime, particularly drug-related murders, and this district has taken that congressional mandate seriously... it appears many other districts are not applying those same tools to

70 *Chris William Dean agrees to plead guilty to pipe bombing.* Concord Monitor, 28 September 1999.

71 However, unlike their state-level counterparts, US Attorneys are not elected officials, but are appointed by the President with the advice and consent of the Senate.

72 Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

73 Alabama, Arizona, Arkansas, Florida, Illinois, Louisiana, Missouri, North Carolina, Oklahoma, South Carolina, Texas, Virginia.

74 As of 29 February 2000, Texas had an execution rate of 0.106 per 10,000 population, whereas Virginia had a rate of 0.111. Source: Death Penalty Information Center.

address drug-related violence anywhere nearly as aggressively as we are."[75]

While some commentators have said that geographical disparities are a sign of officials representing the wishes of their local community, it clearly raises questions of arbitrariness if, as the evidence suggests, the same aggravated murder would provoke pursuit of a death sentence in one county or federal district, and pursuit of a prison sentence in another. The wide state-to-state variation in the ratio between US Attorneys' recommendations for or against the death penalty is therefore troubling. In New York, for example, federal prosecutors proposed seeking the death penalty in just 12 per cent of the cases submitted for review (14 out of 114); in Maryland it was 15 per cent (six out of 41); in Arizona it was eight per cent (one out of 12). In comparison, in Pennsylvania, the rate at which the prosecutors sought authorization for the death penalty was 66 per cent (eight out of 12); in Tennessee it was 59 per cent (10 out of 17).

While these variations might be explained by the individual circumstances of the cases submitted, other data from the report defies rational explanation. For example, federal prosecutors in Missouri submitted 13 cases for review, calling for the death penalty in every single one. Their counterparts in Connecticut, however, submitted 11 cases and recommended against the death penalty each time. It verges on the impossible that 100 per cent of federal death-eligible cases in Missouri merited capital prosecution, while 100 per cent of similar cases in Connecticut did not.

According to the Justice Department's own statistics, the Review Committee on Capital Cases rarely disagrees with the local prosecutors' recommendations for or against the death penalty, and the Attorney General likewise rarely disagrees with the Review Committee. As a consequence, 87 per cent of the case recommendations by the local prosecutor were approved – almost the same rate as pertained prior to 1995.[76] In other words, the screening process has screened very little. If bias of any sort intruded in the prosecutor's initial recommendations, or in a subsequent decision to offer a plea bargain, the Justice Department's procedures do nothing to remedy that flaw.

A former member of the Attorney General's Review Committee on Capital Cases, Professor Rory Little, has said: "What I saw at the department was that some aggressive prosecutors with talented writing skills could transform virtually any killing for which federal jurisdiction existed into a potential death penalty case. Yet other prosecutors would not even submit the same case for review, perhaps out of conscious antipathy for the death penalty but more likely because it simply would not occur to them that the case should be considered death-eligible"[77]

Little noted that the attempts to maintain uniform standards for imposing the federal death penalty were still highly vulnerable to the attitudes prevailing among prosecutors. He concluded that prosecutors' views – including "unconscious racial empathy" – were especially likely to intrude in their decisions on selecting cases to recommend for the death penalty and on striking plea bargains after cases had been authorized.

Racial disparities

75 *Virginia district tops death penalty list.* Richmond Times-Dispatch, 18 September 2000.

76 From 1988 to 1994, US Attorneys sought approval from the US Attorney General to seek the death penalty 52 times, and received it 47 times (90 per cent) From 1995 to 2000, US Attorneys sought authorization 183 times and received it 159 times (87 per cent).

77 R. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urban Law Journal 347 (1999).

"*[President Clinton] cannot allow the Justice Department, which routinely investigates bias by state and local governments, to operate a system that disproportionately condemns minority members to death*."[78]

A closer examination of the data reveals disturbing patterns of possible racial bias in some prosecutors' recommendations for or against the death penalty. For example:

- The Eastern District of Virginia accounted for more recommendations to seek the death penalty than any other federal district in the country. Of the 21 cases in which the death penalty was recommended, 20 of the defendants were African Americans and one was Hispanic. Federal prosecutors recommended that the death penalty not be sought in all five cases submitted in which the defendant was white. Four of the 21 inmates currently under sentence of death were prosecuted in the Eastern District of Virginia. All four are black.

- In the Northern District of Texas, federal prosecutors submitted a total of 10 cases, recommending pursuit of the death penalty in six of them. The defendants in the 10 submitted cases included four whites, four blacks and two Hispanics. However, prosecutors recommended the death penalty for 25 per cent of the white defendants (one out of four), 75 per cent of the African American defendants (three out of four) and 100 per cent of the Hispanic defendants (two out of two).

The role of racial bias in the administration of justice has been the subject of extensive and often controversial research in the USA. Numerous studies have found empirical evidence of disparate treatment of criminal defendants on the basis of race or ethnicity. Critics of these findings argue that the statistical results are skewed by factors such as the generally higher crime rates in minority communities or poor methodology in the research. Nonetheless, many social scientists have concluded that, when compared to white defendants, minority groups face a greater likelihood of imprisonment and serve longer sentences for identical offences.[79] For example, a recent study of the juvenile justice system, sponsored by the US Justice Department and six of the country's leading foundations concluded:

> "While "Equal Justice Under Law" is the foundation of our legal system, and is carved on the front of the US Supreme Court, the juvenile justice system is anything but equal. Throughout the system, minority youth – especially African American youth – receive different and harsher treatment. This is true even when white youth and minority youth are charged with similar offenses."[80]

In 1998, the Presidential Advisory Board on Race recognised that discrepancies in

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78 *The federal death row.* Editorial, New York Times, 8 July 2000.

79 For example a 1992 study by the Federal Judicial Center of federal firearms and drug trafficking charges found that the average sentence for blacks was 49 per cent longer than for whites convicted of the same crimes.

80 *And Justice for some: Differential treatment of minority youth in the justice system.* Eileen Poe-Yamagata and Michael A. Jones, National Council on Crime and Delinquency, April 2000. Another study has since found, among other things, that minority youth are disproportionately charged in adult court; that white youth are nearly twice as likely as African-American youth to be represented by a private lawyer and that privately-represented youth are less likely to be convicted and more likely to be transferred back to juvenile court; and that African American and Latino youth are more likely than white youth to be incarcerated. *Youth crime/Adult time: Is justice served?* Building Blocks for Youth, 26 October 2000.

incarceration rates could not be explained solely by the higher crime rates in minority communities:

> "These disparities are probably due in part to underlying disparities in criminal behavior. But evidence shows that these disparities also are due in part to discrimination in the administration of justice and to policies and practices that have an unjustified disparate impact on minorities and people of color."[81]

While controversy continues to surround many of the issues involving race and the criminal justice system, the findings in one area of study are virtually unanimous. Research into the death penalty over the past two decades has consistently shown a pattern of sentencing anomalies which cannot be explained without reference to racial factors.[82]

A staff report issued in March 1994 by the Congressional Subcommittee on Civil and Constitutional Rights pointed out that three-quarters of those convicted of participating in a drug enterprise under provisions of the federal Anti-Drug Abuse Act of 1988 were white and 24 per cent black. However, of those chosen for death penalty prosecutions under this legislation, just the opposite is true: 78 per cent of the defendants were black and only 11 per cent white. At a 1993 hearing on this issue, this disparity prompted Texas Representative Craig Washington to tell the Deputy US Attorney General that "if some redneck county in Texas had come up with figures like that, you'd be down there wanting to know why."

A report released in June 1998 by the Death Penalty Information Center summarized the nationwide research to date and reached this conclusion: "Examinations of the relationship between race and the death penalty, with varying levels of thoroughness and sophistication, have now been conducted in every major death penalty state. In 96% of these reviews, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both. The gravity of the close connection between race and the death penalty is shown when compared to studies in other fields. Race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease. The latter evidence has produced enormous changes in law and societal practice, while racism in the death penalty has been largely ignored..."[83]

It is equally apparent that the US appellate courts will not remedy systemic racial bias in death penalty procedures. In 1987, the US Supreme Court turned its attention to the issue of racial disparities in death sentencing. Attorneys representing Georgia death row inmate Warren McCleskey appealed to the Supreme Court on the basis of a rigorous statistical analysis of Georgia sentencing procedures. The study found that the odds of a death sentence being imposed in a case involving a white victim were higher than for any other category, and increased further if the defendant was

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81 *One America in the 21st Century. Forging a New Future*. Page 77.

82 In 1990, the General Accounting Office (an independent agency of the US government) issued a report on death penalty sentencing patterns. After reviewing and evaluating 28 major studies, the report concluded that 82 per cent of the surveys found a correlation between the race of the victim and the likelihood of a death sentence. The finding was "remarkably consistent across data sets, states, data collection methods and analytic techniques. . .[T]he race of victim effect was found at all stages of the criminal justice system process . .". *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities,* United States General Accounting Office, Report to Senate and House Committees of the Judiciary, 26 February 1990.

83 *The Death Penalty in Black and White, Who lives, Who Dies, Who Decides*. Available from: Death Penalty Information Center, 1320 18th St NW, 5th Fl. Washington, DC 20036, USA (www.essential.org/dpic).

African American.[84] McCleskey, black, had been condemned to death for the murder of a white police officer. The Court accepted the validity of most of the study's findings but, in a remarkable opinion, ruled that:

> "...at most the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an *inevitable part of our criminal justice system*" (emphasis added).

While the consequences of a racist past may well permeate the administration of criminal justice in today's USA, there is nothing "inevitable" about the federal death penalty. It exists solely because the political leadership of the United States brought it into being. It thrives because successive administrations have aggressively expanded its use, as a convenient political placebo to sedate the legitimate public anxiety over violent crime. It endures despite every indication of its deficiencies, because that same political leadership responds to overwhelming evidence that the federal death penalty is flawed to its core – by calling for more studies of the problem.

The question of arbitrariness

Between January 1995 and July 2000, US Attorneys selected and submitted the cases of 682 capital defendants to the Justice Department for review. The US Attorneys sought permission to pursue a death sentence against 183 of them (27 per cent). The US Attorney General authorized such pursuit in 159 cases. Of these 159 defendants, 66 have so far been spared the death penalty before the case went to trial, the majority (51) through a plea agreement. Of the remaining 93 defendants, 42 had been tried by July 2000, 41 of whom were found guilty of a capital offence. Juries voted for death in 20 cases. Of these, 16 currently remain under sentence of death. These 16 represent around two per cent of the original total of 682.

Was the process that selected these 16, and the five sentenced before 1995, fair and consistent? It requires a huge leap of faith to believe beyond a reasonable doubt that this is so. The experience of capital justice at state level, and the racial and geographic disparities revealed in the Justice Department's report, do not inspire the confidence needed to make that leap.

Juan Raul Garza was convicted of involvement in three drug-related murders. His clemency petition lists numerous cases in which defendants have been accused of drug-related crimes involving multiple murder victims, but who, unlike Garza, have been spared the death penalty, mainly as a result of local prosecutorial discretion. For example, the defendants in one case from one from Washington DC were allegedly responsible for 19 murders committed over a decade of a drug conspiracy. Another two cases from New York involved a total of 16 alleged drug-related murders. The local US Attorney in each case did not seek authorization of the death penalty.[85] As the Garza clemency petition states:

> "This is not to suggest that a decision to seek the death penalty must be based on a mechanical tallying of murders or other generic facts. However, fairness in the administration of the death penalty clearly does require, at a minimum, that the reasons for seeking the death penalty in some cases but not others be articulable and understandable and

84 *Equal Justice and the Death Penalty: A Legal and Empirical Analysis.* David Baldus, George Woodworth and Charles Pulaski, Northeastern University Press, 1990.

85 According to the Justice Department's statistics, US Attorneys sought authorization for the death penalty in 23 per cent of cases involving a single victim, and in 43 per cent of cases involving multiple victims.

> founded neither on quirks of geography or other arbitrary or ephemeral factors nor on more insidious factors such as race or ethnicity."

Article 6(1) of the International Covenant on Civil and Political Rights states that "No one shall be arbitrarily deprived of his life". In his 1998 report on the USA, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote that "[t]he concept of arbitrariness cannot be equated to "against the law", but has to be interpreted more broadly, to include the notion of inappropriateness and injustice".[86] If capital justice is as much a function of factors such as where the crime was committed as it is on the crime itself, then article 6(1) is arguably violated.

When the Justice Department's new screening procedures were still under development prior to being introduced in January 1995, Attorney General Janet Reno stated that they were part of efforts to ensure "absolutely no bias in our ongoing administration of capital punishment" and "that decisions to seek the death penalty are made in a uniform, fair, and non-discriminatory manner, so that defendants who commit similar acts and who have similar degrees of culpability are treated similarly by the Department."[87]

It is difficult to draw any conclusion other than that these efforts to ensure uniform application of the law have failed completely. As Justice Blackmun said in 1994, "it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all."[88] It is time for the US Government to recognize this fact and, in Justice Blackmun's words, to stop tinkering with the machinery of death.

86E/CN.4/1998/68/Add.3. Paragraph 18.

87Letter to US Representative Cleo Fields from the Attorney General, dated 17 August 1994. Quoted in Juan Raul Garza's supplementary clemency brief to President Clinton, 28 September 2000.

88Dissenting opinion, *Callins v Collins*, 22 February 1994.

Other echoes of state-level flaws in the federal death penalty

"*It is disturbing enough that the ultimate punishment may be meted out unfairly at the state level. But it should be even more troubling for my colleagues when the federal government, which should be leading the states on matters of equality, justice and fairness, has a system that is unjust. We are at a defining moment in the history of our nation's administration of the death penalty. The time to do something is now.*" US Senator Russ Feingold, 14 September 2000.

The flaws in capital justice at federal level appear to go beyond the question of racial and geographic disparities raised by the Justice Department's survey. The number of federal cases is small in comparison to those in the individual US states: 21 federal death row prisoners compared to some 3,700 at state level. However, many of the problems that plague capital justice in individual states and which lie behind the increasing calls for executions to be halted, are also evident in the federal death penalty. Three examples are given here: inadequate legal representation; juror confusion; and the cases of foreign nationals accused of capital crimes.

The case of David Ronald Chandler: Death by omission?

"*I don't believe that adequate assistance of counsel is an issue in the federal cases.*" President Clinton, White House press conference, 28 June 2000

In 1984, the US Supreme Court ruled that errors by lawyers would not merit the reversal of the conviction or sentence unless the defendant could prove that such errors had prejudiced the outcome of the case, a standard of proof that is very hard to meet.[89] The Court held that, "the government is not responsible for, and hence not able to prevent, attorney errors." The result of this ruling has been that many prisoners have been executed under state law in the USA despite not having received adequate legal representation. The federal capital case of Ronald Chandler would appear to demonstrate that this human rights scandal is not confined to the states.

Ronald Chandler was the first person to be sentenced to death under the Anti-Drug Abuse Act which reintroduced the federal death penalty in 1988. At his 1991 trial, he was convicted of the murder for hire of Marlin Shuler, one of his subordinates and a suspected police informant in a marijuana growing and distribution operation in northern Alabama. Claiming innocence, Ronald Chandler refused a pre-trial offer of life imprisonment. The actual gunman in the crime, Charles Ray Jarrell, was granted leniency in exchange for testimony against Chandler.[90] The jury decided that Chandler had offered to pay, and induced, Jarrell to kill Shuler, and the defendant was sentenced to death. Since the trial, Charles Jarrell has recanted his testimony, saying that he lied at the trial, and that he had shot Shuler because he had abused Jarrell's sister and mother.

Ronald Chandler's lawyer concentrated all his efforts on the initial phase of the trial, the stage at which the jury had to decide upon his client's guilt or innocence. The evidence was uncontroverted that it was Charles Jarrell who had shot Marlin Shuler, so the defence strategy was to convince the jury that he had not been induced to do so by the defendant. The defence lawyer

89 *Strickland v Washington*.

90 In another drug-related case from the Northern District of Alabama, involving the 1991 murder of an informant in a marijuana conspiracy, defendant Marvin Lee Holley was spared the death penalty. The government had originally sought the death penalty against Holley and an associate, Charles Holland. However, the prosecution later agreed to a 15-year prison sentence for Holland in exchange for his testimony against Holley. At the 1998 trial, the jury voted to sentence Holley to life imprisonment.

presented evidence that Jarrell was drunk at the time of the shooting having consumed 23 beers; that Jarrell had several months earlier independently attempted to kill Shuler; that there was a history of animosity between Jarrell and Shuler; and that Jarrell had made inconsistent statements about Chandler's responsibility in the murder. Nevertheless, the jury convicted Chandler and the trial moved into the separate sentencing phase the following day.

The defence lawyer had spent almost no time preparing for this second stage of the trial, the phase at which the government argues for execution and the defence is required to present reasons for leniency.[91] The defence lawyer, by his own admission (at a later post-conviction hearing), failed to think about the sentencing phase until the night before it was due to begin, and therefore failed to present any of the numerous witnesses who would have testified to Chandler's positive character traits and non-violent nature.[92] In October 1999, a three-judge panel of the US Court of Appeals for the 11th Circuit voted 2-1 to grant Ronald Chandler a new sentencing hearing on the grounds that the defence lawyer's performance had been inadequate. The majority wrote: "In failing to present any of the mitigating evidence that was available at the time of Chandler's sentencing hearing, evidence that revealed a markedly different and more admirable side of Chandler than that which the jury received at the guilt phase of the trial, counsel's performance brought into question the reliability of the jury's determination that death was the appropriate sentence."[93]

The government appealed this ruling, and in July 2000, the full 11th Circuit Court narrowly voted to uphold the death sentence.[94] Five of the 11 judges dissented. One of them accused the majority of "gloss[ing] over the record evidence of [the defence lawyer's] complete lack of preparation for or effort in the crucial penalty phase." Another of the dissenters charged that "the majority places the acceptable level of attorney assistance so low as to risk undermining the public's confidence in the criminal justice system... Before we, as a civilized society, condemn a man to death, we should expect and require more of an advocate."

It is ironic that the decision to let Ronald Chandler's death sentence stand comes at a time when national concern about the seriousness of the problem of inadequate counsel in death penalty cases has reached unprecedented levels.

A month before the 11th Circuit Court's ruling, Attorney General Reno had said that "people should not be prosecuted for a capital crime until they have a lawyer who can properly represent them... there are too many people in this country who do not have competent counsel to represent

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91 The defence lawyer relied on two statutory mitigating factors, which were not disputed by the government, namely that 1) Chandler had no substantial criminal record, and 2) that Charles Jarrell, who was as responsible for Shuler's death, was not facing the death penalty. The prosecution alleged three statutory aggravating factors that warranted execution: 1) that Chandler had intentionally engaged in conduct resulting in the death of another; 2) that he had procured the killing of another for money; and 3) that the murder had been committed after substantial planning and premeditation. The jury found the existence of the first two aggravators and unanimously recommended a death sentence.

92 Circuit Judge Rosemary Barkett, illustrating the easy availability of witnesses prepared to testify in mitigation, noted that the appeal lawyers had "discovered in one afternoon at Chandler's church 40 witnesses who had specific knowledge and examples of Chandler's good character traits, including compassion, generosity, love for children, respect for the elderly, strong religious beliefs, patriotism, a strong work ethic, and a non-violent disposition." *Chandler v United States*, US Court of Appeals, 11th Circuit, 21 July 2000

93 *Chandler v United States*, 29 October 1999.

94 *Chandler v United States*, 21 July 2000.

them in capital cases."[95]

Ronald Chandler continues to maintain his innocence.

The case of Louis Jones: Death by confusion?

"*I would vacate the jury's sentencing decision and remand the case for a new sentencing hearing, one that would proceed with the accuracy that superintendents of the Federal Death Penalty Act should demand*." Dissenting opinion, US Supreme Court, the case of Louis Jones[96]

In most US capital trials, including at federal level, it is the jury which has the last word on whether the defendant should be sentenced to death or not.[97] It is disturbing, therefore, when evidence emerges that a death sentence may have been the result of confusion or coercion in the juryroom. This is one of the legal concerns relating to the case of Louis Jones, the first prisoner sentenced to death under the 1994 Federal Death Penalty Act signed into law by President Clinton. Jones remains on federal death row.

Louis Jones, who is African American, was convicted of the kidnapping, rape and murder of a 19-year-old white woman named Tracie McBride. Tracie McBride was abducted from the Goodfellow Air Force Base, San Angelo, Texas, on 18 February 1995. She was a US Army soldier assigned to the base for training.

After the jury convicted Louis Jones of the crime, they were presented with substantial mitigating evidence to weigh against the government's contention that the aggravating factors relating to the crime and the defendant should result in a death sentence. The defence evidence included details of Jones' childhood of physical and sexual abuse[98]; his achievements during his 22-year career in the army; possible post-traumatic stress disorder as a result of his experiences on active service[99]; and evidence of various mental impairments at the time of the crime.[100]

Louis Jones was facing one of two sentences: a death sentence or life imprisonment without the possibility of parole. Because of the kidnapping charge, under federal law he would never be released if the jury voted for imprisonment. However, the judge instructed the jury that it could

95Media briefing, Department of Justice, 15 June 2000.

96*Jones v United States.* No. 97-9361. 21 June 1999

97In a federal capital case, the jury's sentencing recommendation is binding on the judge.

98He was subjected to brutal beatings by his father. At the age of nine or 10, he was taken from the custody of his father by a stepgrandmother, who found that the child had cigarette burns all over his body. He went to live with his mother who had moved away. When the mother was working, her brother would look after the children. He allegedly raped and sexually and physically abused Louis.

99In 1971 at the age of 21, Louis Jones joined the army, where he flourished, rising to the rank of Master Sergeant, and receiving decorations. After serving in Operation Desert Storm/Desert Shield in Saudi Arabia in 1990 and 1991, however, he displayed significant behavioural changes and began drinking. He suffered from daily headaches. At the trial a psychologist testified that, in his judgment, Louis Jones' experience had intensified the post-traumatic stress disorder that he had first displayed after his involvement in the US invasion of Grenada in 1983. Jones decided to retire from the army in 1993, and did a series of low paid jobs such as working in fast food restaurants.

100At the trial, a psychologist, a neurologist and a psychiatrist variously stated their opinion that on the night of the crime, Louis Jones was suffering from various mental problems, including a major depressive disorder, a dissociative disorder, post-traumatic stress disorder, cognitive disorder and alcohol intoxication.

recommend death, life without the possibility of release, or a lesser sentence. If they chose the latter, he, the judge, would decide its length. The jury evidently did not reach its verdict easily. It took a day and a half to decide, during which time it rejected three of the aggravating factors alleged by the government, including that Jones posed a future danger to society and that his crime had involved substantial planning or premeditation. Nevertheless, it returned a unanimous vote for death.

After the trial, two jurors provided affidavits that there had been confusion and coercion in the jury room. They said that the judge's instruction had led some jurors to believe that if they could not reach a unanimous verdict either on death or life without the possibility of release, that the judge would impose a lesser sentence. The whole jury was agreed that they did not want this to happen. After a while, the vote stood at 10 for death with two women (the signatories to the affidavits) holding out for imprisonment. The majority pressed the two women to change their vote. One of them, the lone African American on the jury, was singled out after she began crying and saying that she could not impose a death sentence. The majority, the other woman's affidavit claimed, began "getting on her" and "pushing her hard" until the black woman finally changed her vote. At that point the second woman changed her vote too. In her affidavit, the African American juror stated: "I do not feel that the death sentence is the appropriate sentence in this case and I changed my vote because of the intense pressure from other jurors and the information that Mr Jones would get a sentence that would result in his release from prison if we had a hung jury."

In 1999, a sharply divided US Supreme Court upheld the death sentence. Four of the nine Justices dissented, believing that the jury had been misinformed by the judge's instruction, and that there was, at least, a reasonable likelihood that this had tainted the jury deliberations. Furthermore, the dissenting Justices agreed with the defence contention that: "Capital sentencing should not be a game of 'chicken', in which life or death turns on the happenstance of whether the particular 'life' jurors or 'death' jurors in each case will be the first to give in...".

This year alone, at least two prisoners have been executed at state-level in the USA despite strong evidence that the juries who sentenced them to death would likely have spared them if they had been clearly informed of their sentencing options.[101] Another prisoner, James Chambers, is scheduled for execution in Missouri on 15 November 2000. The foreman of the jury which sentenced him to death has since admitted that he "harangued" an elderly juror into voting for death.[102] Alexander Williams came 48 hours from execution in Georgia in August 2000. Several of the original jurors opposed the execution; one recalled how a single holdout juror had been aggressively pressured into changing his vote.[103] The same issue arose in the case of Louis Truesdale – like Louis Jones, a black

101Lonnie Weeks was executed in Virginia on 16 March 2000. In January, a sharply-divided US Supreme Court had upheld the death sentence 5-4. The four dissenting Justices said that it had been "a virtual certainty" that the jury had been confused, and had voted for death as a result of a misunderstanding of their duty under the law. Two jurors signed affidavits that this had been the case. Also in Virginia, Bobby Ramdass was executed on 10 October 2000. His jury had asked the judge whether Ramdass would be ever be released if they spared his life. The answer was no, but the judge refused to say so. In June 2000, the US Supreme Court upheld the death sentence by five votes to four. The four dissenting judges protested at the "acute unfairness" of the case. Four jurors came forward to say that they would not have voted for death if they had been properly informed.

102"During the penalty phase of the trial one of the jurors, an elderly woman whose name I do not recall, was steadfast for several hours in her opposition to voting for the death penalty. I harangued the juror until, nearly in tears, she agreed to vote in favor of Mr Chambers' execution. Without my pressure I am confident the woman would not have done so." Affidavit, Eric J. Chism, 25 October 1999.

103"For years, I have harbored a silent regret over my role in that jury room, and that this juror had felt forced to sacrifice his convictions to a group which had lost its patience" See *Crying out for clemency: The*

man convicted of the murder of a white woman. The only African American on the jury which sentenced Truesdale to death later came forward to say that she had wanted to vote for life imprisonment, but had been intimidated by the racism prevailing in the juryroom into changing her vote for death. Louis Truesdale was executed in South Carolina on 11 December 1998.

President Clinton should lead by example. He should demonstrate to the states that there is another way, and not allow federal executions to resume.

Foreign nationals and the federal death penalty: Double standards

"*Our own consular officers regularly raise this issue with foreign governments when US citizens are arrested abroad, that they have the opportunity to speak with their consular representatives. So it is entirely appropriate to raise this case with us.*" US State Department, October 2000.[104]

Three of the 21 men under sentence of death at federal level are foreign nationals: Bountaem Chanthadara (Laos), German Sinisterra and Arboleda Ortiz (both Columbian). None was informed upon arrest of their right to communicate with their consulate, in violation of the USA's binding obligations under international law. This reflects a severe and widespread problem across the country. In total, at least 91 people of 31 nationalities await their deaths at the hands of US executioners. In virtually every case, the arresting authorities failed to apprise the detainee of their consular rights, an inexcusable breach of article 36 of the Vienna Convention on Consular Relations.[105]

Despite vigorous protests from their home governments in many cases, a further 13 foreign nationals have already been executed.[106] All were sentenced to death without the opportunity to obtain the crucial support and assistance of their consular representatives. These executions proceeded despite compelling evidence in many of the cases that prompt consular intervention would have meant the difference between life and death, by providing the defendants with the legal support necessary to guarantee fair trials and due process of law.

The most succinct explanation of the significance of consular assistance for nationals detained abroad comes from the government of the United States. Following the seizure of the US Embassy in Tehran in 1979, the United States government brought an action against Iran before the International Court of Justice. Among other concerns, the USA argued that the detention of US Embassy personnel without access to consular assistance violated international treaties, including the VCCR. In its submission to the International Court, the USA stated: "The channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its

case of Alexander Williams, mentally ill child offender facing execution (AMR 51/139/00, September 2000).

104 Philip T. Reeker, US State Department spokesman, quoted in *Governments complain America violates rights of foreign inmates.* New York Times, 30 October 2000.

105 See *Worlds Apart: Violations of the rights of foreign nationals on death row - cases of Europeans.* AMR 51/101/00, July 2000.

106 At the time of writing, a Mexican national, Miguel Angel Flores, is scheduled to be executed in Texas on 9 November 2000. Texas violated its obligation to inform Miguel Flores of his right upon arrest, to seek assistance from his country's consulate. Mexican consular officials have since declared that they would have advised Flores of his legal rights upon arrest, ensured that he was represented by competent lawyers and assisted in the presentation of mitigating evidence at the sentencing phase of the trial, all matters which could have meant the difference between a life and a death sentence. See Urgent Action 296/00, AMR 51/146/00, 26 September 2000.

preclusion would render meaningless the entire establishment of consular relations... *Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.*"[107] [Emphasis added].

This insistence on the consular rights of US citizens abroad stands in stark contrast to the position of the US Government on the identical rights of foreign nationals detained within the United States. In several recent cases, the Department of State and the Department of Justice have argued in the US appellate courts that article 36 confers no legal rights at all on detained foreign nationals within the USA. According to the US Government, the only remedy for non-compliance with the treaty is an apology to the affected country and an assurance of future compliance. A number of federal courts have relied on this self-serving interpretation of consular rights to deny foreign nationals any form of judicial remedy for undisputed and clearly harmful violations of the VCCR.

Federal regulations enacted by Congress require both Immigration and Naturalization Service and Department of Justice agents to promptly inform detained foreign nationals of their right to consular communication. Although the clear purpose of these regulations is to give effect to Vienna Convention obligations, there is evidence that federal authorities are no more mindful of their treaty responsibilities than their state or local counterparts.[108] By failing to enforce federal regulations while simultaneously asserting that there are no legal remedies for breaches of the law, the federal government is fostering a climate of impunity.

If a US citizen were arrested, sentenced to death and executed abroad without notification of their right to contact the US consulate, it is difficult to imagine that the US Government would consider a posthumous apology to be a sufficient remedy.

The federal death penalty: A solution to, or a symptom of, a culture of violence?

"*You'll never hear another sound like a mother wailing whenever she's watching her son being executed. There's no other sound like it. It is just this horrendous wail. You can't get away from it. That wail surrounds the room. It's definitely something you won't ever forget.*" Media witness to 52 executions[109]

When the Federal Death Penalty Act expanded the federal death penalty in 1994 as part of the Violent Crime and Law Enforcement Act, US Attorney General Janet Reno welcomed the new legislation, claiming that it "will mean fewer victims, fewer tragedies, fewer lost lives." As far as the death penalty was concerned, Amnesty International profoundly disagreed with her claim then, as it does now. The Attorney General has since stated that she has found no evidence that the death penalty acts as a deterrent.[110]

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107 Case Concerning Diplomatic Personnel in Iran (*United States v. Iran*) (ICJ Pleadings, p. 174).

108 For example, two Estonian nationals on death row in California were arrested by federal agents, who omitted consular rights notification before transferring them to state authorities. *Worlds Apart,* op.cit.

109 Leigh-Anne Gideon, former reporter for Texas newspaper, *The Huntsville Item*. Speaking in *Witness to an execution*, National Public Radio, 12 October 2000.

110 For example, "I have inquired for most of my adult life, about studies that might show that the death penalty is a deterrent, and I have not seen any research that would substantiate that point." Attorney General's

With claims for the deterrence effect of the death penalty widely discredited, US politicians have increasingly turned to retributive arguments to justify their country's resort to judicial killing. In many instances, a "victims rights" movement campaigning for harsh punishments for criminal offenders, has urged them on. In individual cases, officials have also faced public pressure for retaliatory executions. For example, after the murder of Tracie McBride in San Angelo, Texas, in 1995, members of her family travelled to Washington, DC, to seek Justice Department approval of the US Attorney's request to seek a death sentence against the accused, Louis Jones, now on death row. The trial venue was moved away from San Angelo, after thousands of local residents signed petitions calling for the death penalty.

The crimes for which those on death row were convicted shock the human conscience. These murders have caused immeasurable suffering, particularly to the family and friends of the victims. Their suffering deserves society's compassion and respect, and a constructive response from government. This response should not be at the expense of the human rights of the accused, however, and access to justice and redress should not slip into officially-sanctioned vengeance. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions said in his report on the USA in 1998, "courts should not become a forum for retaliation. The duty of the State to provide justice should not be privatized and brought back to victims, as it was before the emergence of modern States."[111]

Since 1991, under the Supreme Court's ruling in *Payne v Tennessee*, victim impact evidence has been admissible at the sentencing phase of US capital trials. As one expert on the death penalty has pointed out: "Inevitably, this process is raw with emotion; antagonistic to the defendant – explicitly a demand for the death penalty – and not subject to cross-examination by the defence. Hardly the ideal environment to tease fact from fiction, relevance from irrelevance, or to ensure objectivity in sentencing...".[112]

The risks inherent in this potentially inflammatory process are seen in federal capital cases, just as it is at state level. Bountaem Chanthadara is on federal death row for the murder of Barbara Sun. At the sentencing phase of his 1996 trial, Barbara Sun's husband and two children, aged seven and 10, testified to the jury about the impact of losing her. Both children were in tears at the end of their testimony. Letters written by the children to their dead mother were admitted into evidence. The government prosecutor showed photographs of Barbara Sun to the jury: "This case is about her. And more importantly this case is about this: this picture was taken about a month before she was murdered; This picture was taken at the pumpkin patch...". The defence lawyer had sought a pre-trial hearing to limit the use of excessively emotive evidence, but this was rejected.

Aquilia Marcivicci (Mark) Barnette was sentenced to death at his 1998 federal capital trial for the carjacking murder of Robin Williams and Donald Allen. At the sentencing phase, Donald Allen's father, mother, sister and brother testified about the impact on them of his death. They showed the jury family photos and a videotape made from home movies of Donald Allen's life. In turn,

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comments at weekly media briefing, US Justice Department, 20 January 2000.

111The Special Rapporteur's opinion was based on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly on 29 November 1985.

112*Beyond capital punishment: respecting the needs of victims and establishing effective alternatives to the death penalty.* Peter Hodgkinson, Director, Centre for Capital Punishment Studies, School of Law, University of Westminster, London, UK. In: *The death penalty: Condemned.* International Commission of Jurists, September 2000.

Robin Williams' mother and two sons testified about the impact on them of her killing. Both families read poems they had composed relating to the deaths of their loved ones. In May 2000, a federal appeals court rejected the defence claim that these presentations had inflamed the passions of the jury against Barnette. It ruled that "[e]ven if the victim impact testimony went beyond the "quick glimpses of the life" of the victim mentioned in *Payne*, on the whole it did not contaminate the proceeding."[113]

Mark Barnette, who is black, was tried by an all-white jury in a region where the population is a fifth African American. Robin Williams was black and Donald Allen was white. The only three African Americans in the jury pool were removed during jury selection, one by the defence and two by the prosecution. Challenged that race discrimination lay behind the government's exclusion of one of the black jurors, the prosecutor claimed that she was removed for a race-neutral reason, namely that "her views on the death penalty are such that she could not render the government a fair hearing in this case. She indicated [on her juror questionnaire] that the death penalty does not teach the defendant, and that if you impose the death penalty, then two people are gone and who is to learn from that?" Asked about this at jury selection, the juror explained that she had spoken with people who felt that forgiveness was better than vengeance, but said that she could impose a death sentence if the circumstances warranted it. Nevertheless, the prosecutor removed her from the jury. Was her exclusion a part of a process that ensured an impartial jury, or of one that stacked the deck against the defendant?

Mark Barnette, who had turned himself in to the police and made an emotional and contrite confession, was not allowed to tell the court of his remorse until after he had been sentenced to death. After the jury had condemned him, he was allowed to speak. He addressed the victims' relatives in the courtroom: "I can only imagine what you are going through... And to think about what I've done to you, both families, and to my family, it hurts. And I'm very sorry. I can't and I will never ask you to forgive me, because I don't deserve to be forgiven."

The relatives of Barbara Sun, Donald Allen, and Robin Williams deserve compassion, respect and justice. But the government's reaction to their loss leaves questions unanswered. Does the planned killing of those found responsible for their deaths represent a humane, progressive response to these tragedies? Will executing them lessen a culture of violence and bring justice and respect for human rights any closer? Amnesty International believes that the opposite is true.

Elected officials in the USA often speak of the "closure" that an execution will bring to the family of a murder victim, despite the absence of evidence that it can guarantee any such outcome, and ignoring evidence from those murder victims' relatives who say an execution only makes matters worse. They argue that an execution is an appalling memorial for their lost family member, that it perpetuates a culture of violence, and creates more victims. Just like murder victims, death row inmates have loved ones, too. The family members of a condemned prisoner become victim to the government's calculated bid to exterminate their relative, which can lead to their stigmatization, social isolation, grief, and depression.[114]

Perhaps the most infamous crime resulting in a federal death sentence was the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, in which 168 people died. This crime hastened the enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act, in which the

113 *USA v Barnette*, US Court of Appeals for the Fourth Circuit, 2 May 2000. The court upheld the conviction, but granted Barnette a new sentencing hearing on the grounds that the defence had improperly been denied the opportunity to rebut psychiatric testimony about Barnette's future dangerousness.

114 See *Failing the future: Death penalty developments, 1998 -2000*. (AMR 51/03/00, April 2000).

federal government sought to limit federal judicial review of state court decisions and speed up executions. In other words, in the name of the victims of the Oklahoma bombing, the government responded with legislation which increased the risk of the execution of wrongfully convicted or wrongly sentenced defendants. It exacerbated the failings of an already deeply flawed system.

Bud Welch lost his only child, Julie, in the Oklahoma atrocity. She had been working as a Spanish translator for the Social Security Administration when she was killed in the bombing. At first, Welch recalls, all he wanted was for those responsible to be killed for the crime. "I didn't want a trial for them. To me juries, judges, lawyers were simply a waste of time. I wanted them fried... I think I would have taken their lives myself if I'd had the opportunity to do so." As the months passed, he slowly changed his mind. After the conviction of Timothy McVeigh and Terry Nichols, Bud Welch visited the scene of the bombing: "I realized that to execute either one of them would be an act of rage and revenge... That is what the death penalty is."[115] He now actively campaigns against the death penalty across the USA.

Juan Raul Garza is scheduled to be executed by the US Government. He has four children with whom he has maintained a relationship during his years of incarceration – two adult daughters from his first marriage; a 13-year-old boy and a 10-year old girl from his second marriage. Should it be the business of the US Government to kill their father, or is there a better way for it to confront violent crime and to work for those who suffer its tragic effects?

The scheduled federal execution: Juan Raul Garza

"*The Constitution gives you the incontestable and uncontested power to grant clemency. The European Union solemnly asks you to use that power in favor of Mr. Garza and to commute his sentence to life imprisonment. In such a decisive case, we invite you to make a decision that sets an example*."[116]

President Clinton has stopped Juan Raul Garza's execution once before. Three days before Garza was scheduled to die on 5 August 2000, the President issued a reprieve to allow the defence lawyers to file a clemency petition under new guidelines. Juan Garza is now scheduled for execution on 12 December 2000. President Clinton should stop it again, this time for good.

Juan Garza, who is Hispanic, was convicted in the 1990 and 1991 killings of Erasmo de la Fuente, Gilberto Matos and Thomas Albert Rumbo, committed in Texas in the course of a marijuana trafficking operation based in Brownsville, Texas, on the border with Mexico. According to his clemency petition, US law enforcement officials had secured his deportation from Mexico, where he had fled following a police raid on his home in Brownsville, without advising the Mexican government that he was facing a possible death sentence. Under a 1980 US-Mexico extradition treaty, the Mexican government has a long-standing policy of requiring assurances against the death penalty before allowing an extradition to the USA on a capital charge.[117]

Arguing for execution at the sentencing phase of the 1993 trial, the government introduced

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115 *All eyes on the death penalty.* Concord Monitor (New Hampshire), 25 April 2000. Juries sentenced Timothy McVeigh to death, and Terry Nichols to life imprisonment without the possibility of release.

116 European Union Presidency *démarche* on behalf of Juan Raul Garza, 27 July 2000.

117 For example, in 1999, a US national, Jose Luis Del Toro, was extradited to Florida after the Mexican Government received assurances that Del Toro was not going to be sentenced to death.

evidence that Juan Garza had committed four other murders in Mexico. The Mexican authorities had never solved these crimes, and the US government sent agents to Mexico to investigate them. The prosecution - with no physical evidence linking Garza to these crimes, for which he had never been prosecuted or convicted - relied instead on the testimony of three accomplices in the Brownsville drug ring, who were offered reduced sentences in return for their testimony. One of them, the actual gunman in two of the murders, was sentenced to life imprisonment, the other two to 10 years in prison.

At Juan Garza's trial, the jurors specifically found as a statutory mitigating factor that "another defendant or defendants, equally culpable in the crime, will not be punished by death." Garza was the only one of the four co-defendants not to benefit from a plea bargain. Yet, this arrangement, according to this jury's finding of equal culpability, cannot be justified on the grounds that Juan Garza was the most culpable.

At the sentencing phase, the government also presented testimony from a federal correctional officer that Juan Garza would very probably commit acts of violence in prison. He testified that Garza, convicted on a drug-related crime, would likely become involved in gang activity in prison. He stated that the federal Bureau of Prisons would be almost powerless to stop such an inmate committing violent crimes in prison. In an affidavit, a former warden of the US Penitentiary at Terre Haute, where federal death row is now situated, has strongly disagreed with the above testimony, saying that "[t]he Bureau of Prisons is designed to effectively control inmates of a more violent nature than Juan Raul Garza." According to the clemency petition to President Clinton, Garza's prison records "show absolutely no violent offenses during his incarceration."

On 13 October 2000, lawyers for Juan Raul Garza argued his case in front of the Inter-American Commission on Human Rights (IACHR) in Washington DC, claiming, among other things, that the US government violated his right to a fair trial by introducing the evidence of the unadjudicated Mexican murders which the defence team could not effectively challenge. It is believed to be the only case since executions resumed in the USA in 1977 in which evidence of unsolved, unadjudicated crimes in a foreign country has been used as part of securing a death sentence. The defence also argued to the IACHR that Garza's execution would be a violation of his right to life under evolving standards of justice, particularly in view of the fact that the US Government is intending to break a nearly 40-year *de facto* moratorium on executions.

Conclusion

"*There are times when I'm standing there watching those fluids start to flow and wonder whether what we're doing is right.*" Jim Willett, Warden of Huntsville Prison, Texas, who has overseen some 75 executions by lethal injection[118]

President Clinton is faced with a choice. He can allow his country to diverge yet further from the growing global consensus against the death penalty, or he can take a historic step towards leading it into line with the human rights aspirations of the international community.

Those on federal death row, like their state-level counterparts, have been convicted of terrible crimes against their fellow human beings, crimes that have had devastating consequences for the relatives and friends of the victims. But the similarly heinous crimes of others who received sentences of less than death caused equivalent suffering for another set of victims. Why is one crime

118 Speaking in *Witness to an execution*, op. cit.

deserving of a retributive death, and not another? The Justice Department's own statistics indicate that the answer may lie in where the offence was committed, or possibly on the colour of the defendant's skin. Even those most attached to the death penalty must surely agree that such inequities cannot be tolerated. As President Clinton himself said in June, "those of us who support the death penalty have an extra heavy responsibility to assure both that the result is accurate and that the process was fair".[119]

Twenty-three years ago, individual states of the USA resumed judicial killing at state level after a 10-year moratorium. Thousands of death sentences and nearly 700 executions later, it is clear that the process used to select defendants for execution is horribly flawed and profoundly unfair. Notwithstanding federal complicity in this human rights scandal, the US Government is on the verge of allowing history to repeat itself by resuming federal executions after a 37-year moratorium. To allow this to happen in the knowledge that the system is tainted by widespread racial and geographic disparities would be an unconscionable act. It would also deepen the stain on the international reputation of the USA being caused by its continuing use of a punishment abandoned by more than half the countries of the world.

The US Government continues to justify the death penalty on the grounds that the public support it, and victims and their families are owed it. Yet it makes little or no effort to educate people about alternatives or international standards. History shows that leaders have not passively waited for public opinion to turn against judicial killing before guiding their countries down the abolitionist path. In the USA, such a way has begun to be paved by a long-term supporter of the death penalty, Governor Ryan, who suspended executions in Illinois because of the injustices plaguing its capital justice system. President Clinton has responded by saying that if he were still a governor, he would look at the death penalty in his state to see what the situation was. As far as the federal death penalty is concerned he need look no further.

In the same year that Supreme Court Justice Blackmun said that he was " morally and intellectually obligated simply to conclude that the death penalty experiment has failed", President Clinton signed into law a massive expansion of the federal death penalty. He must now decide whether to become the first US President in nearly four decades to allow a federal execution to proceed. Amnesty International urges him not to do so. He must send a clear message to his country that this cruel, brutalizing and lethally flawed experiment has failed, and that the death penalty tide in the USA has turned.

Recommendations

Amnesty International opposes the death penalty in all cases, and campaigns worldwide for the total abolition of this ultimate cruel, inhuman and degrading punishment wherever it is retained. Pending abolition, Amnesty International seeks full adherence to the internationally-agreed safeguards and restrictions that govern the use of the death penalty. The organization believes that all political leaders should take every opportunity to use their power and influence to further the goal of worldwide abolition, as envisioned in the Universal Declaration of Human Rights and subsequent international human rights instruments, and in keeping with the stated goals of the United Nations General Assembly.

On 24 October 2000, President Clinton issued a Proclamation: "Fifty-five years ago, the

119Press conference, White House, 28 June 2000.

United States played a leading role in founding the United Nations, and the treaty creating the UN was signed in San Francisco... For 55 years, the United Nations has led the world in addressing international security problems and promoting human rights and human dignity. Today we reaffirm our commitment to this vital institution...".

On 10 December 1998 – the 50th anniversary of the adoption of the Universal Declaration of Human Rights – President Clinton issued Executive Order 13107, entitled The Implementation of Human Rights Treaties. The order stated that "[i]t shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations, under the international human rights treaties to which it is a party". The order also established an Interagency Working Group on Human Rights Treaties "for the purpose of providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters."

Amnesty International welcomes President Clinton's stated commitment to international human rights standards, but urges him to translate this into action in the area of the death penalty.

Amnesty International is not calling for more studies to examine the disparities that the Justice Department review revealed, because it believes that there is already overwhelming evidence of the fatal flaws inherent in the use of the death penalty which renders its total abolition as the only solution. However, the organization acknowledges that the US Attorney General has called for such studies. Amnesty International believes that the US Government cannot, therefore, in good conscience, allow any federal executions to proceed while the findings of any such studies are still pending.

With this in mind, Amnesty International makes a series of recommendations to President Clinton.

Amnesty International urges President Clinton to, at a minimum:

- grant clemency to Juan Raul Garza by commuting his death sentence;
- issue a Proclamation declaring a moratorium on federal executions, under the power of reprieve vested in him by Article II, Section 2, Clause 1, of the US Constitution. The Proclamation should state that the Justice Department's findings of widespread racial and geographic disparities in the federal death penalty have made it unacceptable for any federal execution to proceed.

Amnesty International further urges President Clinton to:

- instruct the US Attorney General to issue a directive that, in light of the Justice Department's findings, she will not authorize US Attorneys to pursue death sentences against defendants accused of capital crimes;
- instruct the US Attorney General to de-authorize the death penalty in those cases in which she has approved pursuit of a death sentence, and where the defendant is yet to come to trial.

Amnesty International believes, however, that the President can and should go further. It therefore calls on him to:

- commute the death sentences of all other prisoners currently under federal sentence of death. Article II, Section 2, Clause 1, of the US Constitution gives the President the "Power to Grant Reprieves and Pardons for Offenses against the United States". Supreme Court precedent provides for a broad interpretation of this power.[120]
- issue an Executive Order reminding federal authorities of their consular rights obligations and insisting that those requirements be met for all federal detainees who hold foreign nationality;
- urge the President-elect and US Congress to review existing federal legislation, with a view to repealing those provisions that provide for the death penalty.

In relation to the death penalty at state level in the USA, Amnesty International calls upon President Clinton to:

- acknowledge that violations of international standards are occurring in the state-level use of the death penalty, including against the mentally retarded, children, and those without adequate access to legal representation;
- urge the President-elect and US Congress to give serious consideration to the removal of all reservations, declarations, and understandings that the USA has attached to its ratification of human rights treaties and which contravene the object and purpose of the treaty in question. Particular and immediate attention should be paid to those reservations that treaty monitoring bodies such as the Human Rights Committee and the Committee Against Torture have called on the USA to withdraw;
- request the US Attorney General to inform all federal appellate judges that the imposition of the death penalty against those who were under 18 at the time of the crime is a violation of international law, as recommended by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2000;
- urge the relevant federal authorities to ensure that training programs for members of the judiciary include education in the international norms and human rights standards on the death penalty;
- request the Interagency Working Group on Human Rights Treaties to expedite and report back on its plans for public outreach and education concerning the provisions of international treaties, and to ensure that this includes full information on international standards on the death penalty.

Finally, Amnesty International appeals to President Clinton to:

- endorse the concern expressed by the US ambassador to France in May 2000 that the use of the death penalty in the United States is damaging the international human rights reputation of the country as a whole;
- appeal to each of the 38 governors of the states whose laws currently provide for the death penalty to give serious consideration to establishing a moratorium on executions in their state, in accordance with the recommendations made by the American Bar Association as

120 For example, "...the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress. Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution." *Schick v Reed*, 1974.

well as the UN Commission on Human Rights.

Stop Press

On 26 October 2000, a Maryland federal jury sentenced Dustin John Higgs to death for ordering the murder of three women. In arguing for execution, the government prosecutor said that the emotional burden suffered by the victims' relatives would be lightened if Higgs were put to death.

On 1 November 2000, a three-judge panel of the US Court of Appeals for the 10th Circuit vacated the federal death sentence of Bountaem Chanthadara. The case was remanded for resentencing because at the prosecution had erroneously removed at least one juror during jury selection, and because of prejudicial pre-trial publicity in which a local newspaper article, seen by at least six of the 12 jurors, reported the trial judge's description of the defence theory (that another man had committed the crime) as a "smoke screen". However, the 10th Circuit Court ruled that "we cannot conclude that the victim impact evidence was so prejudicial as to render the proceeding fundamentally unfair" (see page 36). On the government's failure to inform Chanthadara of his consular rights as a Laotian national (see page 33), the Court ruled that he "has not demonstrated that denial of such rights caused him prejudice."