

**USA**

*cited in U.S. v. Mitchell, No. 11-99003 archived on August 6, 2015*

# **CAPITAL DEFICIT**

**A SUBMISSION ON THE DEATH  
PENALTY TO THE UN HUMAN  
RIGHTS COMMITTEE**

FOR THE 109<sup>TH</sup> SESSION OF THE COMMITTEE  
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## 1. CAPITAL DEFICIT: A GAP IN THE USA'S REPORTING

*Positive change must be reinforced and strengthened over time. Where human lives hang in the balance, the US will do all it can to tilt situations toward a future of hope and dignity*  
'Human rights: A commitment to action'. Obama Administration, 2009<sup>1</sup>

From an international perspective, the death penalty is on the wane. Today 140 countries are abolitionist in law or practice. A small number of countries account for the bulk of the global judicial death toll each year. One of them is the USA.

As illustrated in Appendix 2 of this report, dozens of countries have abolished the death penalty since 1976, a period during which the USA has killed more than 1,300 people in its execution chambers and sent thousands of others to death row.

An opportunity for scrutiny of the application of the death penalty in the USA comes in October 2013, when the USA's human rights record will be reviewed by the United Nations (UN) Human Rights Committee (Human Rights Committee or Committee), the expert body established under the International Covenant on Civil and Political Rights (ICCPR) to oversee implementation of this treaty. The USA ratified the ICCPR in 1992, albeit with reservations that sought to protect its death penalty from international constraint. Amnesty International submitted this supplementary report in advance of the examination on 18 to 21 October 2013 in Geneva, where a US delegation will respond to the Committee's questions in relation to the USA's Fourth Periodic Report.<sup>2</sup>

After scrutinizing the USA's Initial Report in 1995, the Committee called on the USA to work towards abolition of the death penalty (as well as to withdraw its reservations to the treaty). It repeated this call in 2006 after reviewing the USA's combined Second and Third Periodic reports. In what might seem to be a nod of recognition that the route a country should take under the ICCPR is towards abolition, the USA's Fourth Periodic Report indicates that "the number of US states that have the death penalty and the size of the population on death row have all declined in the last decade". While a number of states have indeed recently abolished the death penalty, and death sentences in the USA have declined since peaking in the 1990s, this is no thanks to the federal government. Along with those state and local officials who have failed to work towards abolition since the USA ratified the ICCPR, the federal authorities have equally failed to do so and have indeed assisted states in their pursuit of judicial killing.

***"Treaty reporting is a way in which the Government of the United States can inform its citizens and the international community of its efforts to ensure the implementation of those obligations it has assumed... The United States hopes to use this process to improve its human rights performance"***

Obama administration, Fourth Periodic Report

As outlined in this report, the administration has been somewhat economical with what it has reported to the Human Rights Committee about the death penalty in the USA and the federal government's role in a punishment largely conducted at local and state level. It has, for example, not come clean about how the federal government has over the years supported states in litigation and legislation aimed at facilitating executions. Neither has the USA told the Committee how federal prosecutors have, on occasion, taken over state cases so that the death penalty remains an option when the state in question has run into problems with its capital law. In July 2013, the Obama administration obtained a jury vote for a federal death sentence in such a case in the recently abolitionist New York State, and this death sentence was formally imposed by the judge on 10 September 2013.

While it has noted that the death row population has "declined in the last decade", the administration has not pointed out that federal death row has grown by some 600 per cent since 1995 when the Committee first called on the USA to work for abolition. Nor does it explain why the federal government has failed to do anything about the expansionist federal

death penalty law passed in 1994 and condemned in 1995 by the Committee. The administration mentions the Department of Justice's 2000 report that revealed widespread geographic and racial disparities that mark the federal death penalty (as at state level), but is silent about how federal prosecutors continue to litigate to keep such disparities from blocking pursuit of more death sentences. The administration has also failed to inform the Committee of its ongoing efforts to obtain death sentences against six detainees at Guantánamo Bay under a military commission system that does not meet international fair trial standards.

On 3 July 2013, the USA provided written responses to the Committee's initial questions concerning the Fourth Periodic Report. Here too, while asserting that it has "provided as much information as possible", the Obama administration has painted a falsely benign picture of the death penalty.<sup>3</sup> One of the Committee's questions was whether the death penalty had been imposed on anyone with mental or intellectual disabilities since the Supreme Court's 2002 *Atkins v. Virginia* ruling banning the execution of people with "mental retardation". The administration has responded with a cursory "no one found to be mentally retarded has been executed since that time". On the very same day that the administration filed that assertion with the Committee, a court in Georgia signed an execution warrant in the case of Warren Hill, a prisoner with "mental retardation" according to all seven experts to have assessed him. In the event, the July execution was blocked on questions about Georgia's lethal injection process, and at the time of writing Warren Hill was still alive. But the Georgia parole board had, a year before the Obama administration filed its written responses to the Human Rights Committee, denied clemency for Warren Hill. The administration surely knew about this high-profile case when it wrote to the Committee.

Nor can the administration have been unaware that, for example, Texas has yet to pass 'Atkins legislation' and that a number of prisoners with compelling claims of "mental retardation" have been put to death since 2002. People with serious mental illness also continue to face the death penalty in the USA. The execution of John Ferguson, a man with a long history of paranoid schizophrenia, was carried out in Florida on 5 August 2013. Again, this is not just a state affair; the Ferguson and Hill cases were both scarred by the Antiterrorism and Effective Death Penalty Act of 1996, which curtails federal review of state court decisions in order to facilitate executions.

The US government likes to emphasise the state/federal divide on the death penalty, and the notion of judicial killing as democracy in action, as it has done in other forums.<sup>4</sup> In June 2013, for example, the Obama administration told the UN Committee on the Elimination of Racial Discrimination that:

"With respect to the Committee's comment concerning a potential moratorium on the death penalty, there is vigorous public debate in the United States on the death penalty. However, the use of the death penalty is a decision left to democratically elected governments at the federal and state levels. The US Constitution grants states broad powers to regulate their own general welfare, including enactment and enforcement of criminal laws, public safety, and correction, and a number of states currently prohibit imposition of the death penalty either by law or by executive decision of the Governor. Any further decisions concerning a moratorium would have to be made separately at the federal level and by each of the 32 states that retain the death penalty."<sup>5</sup>

Two months later, the USA told the UN Committee against Torture that: "At the federal level, the United States is not currently considering abolishing the death penalty".<sup>6</sup>

However much the USA would like to rely upon its federal structure to deflect criticism of its human rights record, under international law, an execution in Texas or Ohio or in any other US state is a US execution. Likewise a death sentence in Missouri or Florida is a US death sentence. And if the ICCPR places an onus on governments to work towards eradicating the

death penalty, then a country's federal structure cannot legitimately be invoked as justification for its government's failure to make this abolitionist effort. As the Human Rights Committee itself has said in explaining a state's obligations under the ICCPR:

"The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'."<sup>7</sup>

The USA filed an "understanding" to article 50 of the ICCPR which it claimed in its Initial Report was "not a reservation".<sup>8</sup> In any event, any attempt by the US administration, via this understanding or otherwise, to underplay its own responsibilities should be challenged. Such challenges should reference article 27 of the Vienna Convention on the Law of Treaties.

While every execution in the USA is a US execution and all authorities at federal, state and local "are in a position to engage the responsibility of the State Party", this report is aimed at the role and responsibility of the federal government, as the authority that has filed a Periodic Report that fails to adequately address the US death penalty. While it is true that the federal government has limited powers in relation to state capital justice systems, Amnesty International considers that it should be actively engaging with the individual states to move the country as a whole towards abolition of the death penalty. Movement in this direction can be achieved not only by ensuring that authorities at all levels adhere to international law and safeguards on the death penalty, but also that they are kept fully aware of the expectation under international law upon all levels of government to work towards abolition of the death penalty and to take concrete steps to turn repeated international calls for the establishment of a moratorium on executions, as a first step towards abolition, into reality. The federal government should set about ending the federal death penalty, but also desist from doing anything - whether in litigation or legislation - which facilitates the death penalty in any jurisdiction in the USA.

Reporting to the UN Human Rights Committee is conducted under Article 40 of the ICCPR, whereby the state party undertakes to report on the "measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights". By filing its Fourth Periodic Report, the Obama administration says that the USA: "has taken this opportunity to engage in a process of stock-taking and self-examination. The United States hopes to use this process to improve its human rights performance."

In this period of "stock-taking and self-examination", the federal government should commit itself to assuming a leadership role against the death penalty as expected of all authorities in the USA. It should inform the Human Rights Committee of this commitment.

## 2. BLIND TO THE ABOLITIONIST VISION OF INTERNATIONAL LAW

*The United States continues to speak out unequivocally on behalf of the fundamental dignity and equality of all persons*

US Secretary of State, Preface, annual global human rights assessment, April 2013<sup>9</sup>

In the “Core Common Document” filed with its Fourth Periodic Report to the UN Human Rights Committee, the Obama administration has said that the USA is “a nation built on the moral truths of the Universal Declaration of Human Rights”.<sup>10</sup>

It was a US national, Eleanor Roosevelt, who chaired the committee which drafted the Universal Declaration, and it was she who had suggested that reference to the death penalty be removed from the Declaration because there were moves afoot in various countries to abolish it.<sup>11</sup> In an article published in 1953, five years after adoption of the Universal Declaration, Eleanor Roosevelt wrote: “It has always seemed to me that capital punishment, the taking of human life by other human beings after a judgment passed by human beings, was quite wrong. We know that often human justice, no matter how hard we try to make it the wisest possible judgment, may be faulty”.<sup>12</sup>

Sixty years later, in its 2010 report to the UN Human Rights Council in preparation for scrutiny of the USA’s human rights record under the Universal Periodic Review (UPR) process, the Obama administration said:

“Echoing Eleanor Roosevelt, whose leadership was crucial to the adoption of the Universal Declaration of Human Rights (UDHR), Secretary of State Hillary Clinton has reaffirmed that ‘human rights are universal, but their experience is local. This is why we are committed to holding everyone to the same standard, including ourselves.’ From the UDHR to the ensuing Covenants and beyond, the United States has played a central role in the internationalization of human rights law and institutions. We associate ourselves with the many countries on all continents that are sincerely committed to advancing human rights.”<sup>13</sup>

In 1971 the UN General Assembly affirmed that “in order fully to guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries”. At that time, there had not been an execution in the USA for four years, and in June 1972, in *Furman v. Georgia*, the US Supreme Court voided the USA’s capital laws.

In *Gregg v. Georgia* in 1976 the Supreme Court approved new capital statutes enacted by various states and executions resumed in 1977. Meanwhile, the global abolitionist trend has picked up pace and the UN General Assembly has passed resolution after resolution in recent years calling on countries that still retain the death penalty to adopt a moratorium on executions with a view to abolition, including on the grounds that ending judicial killing “contributes to respect for human dignity and to the enhancement and progressive development of human rights.” Even as it pursues judicial killing, the USA continues to claim to stand “with all those who seek to advance human dignity”.<sup>14</sup>

During the UPR process in 2010, the Obama administration dismissed calls from abolitionist governments for the USA to join them. The administration asserted that such exhortations reflected “differences of policy, not differences about what the rules of international human rights law currently require”.<sup>15</sup> If nothing else, this nod to international law smacks of insincerity when set against the same administration’s pursuit of death sentences at Guantánamo under a military commission system that does not comport with international fair trial standards. Any imposition of the death penalty after such trials would flout international human rights law, including article 6 of the ICCPR.

In any event, there is no disguising the USA's long-held assertion that it is bound only by domestic constitutional standards in relation to the death penalty, including who it subjects to this punishment, how it ends their lives, and how long and under what conditions it keeps them on death row before killing them. It is the federal government that is responsible for this stance, specifically for the "reservations, understandings and declarations" attached to the USA's ratification of the ICCPR in 1992, and for the failure to withdraw them as called for by the Human Rights Committee.

Recognition under international human rights law of the existence of the death penalty should not be invoked "to delay or to prevent the abolition of capital punishment", in the words of article 6.6 of the ICCPR. According to the Committee's General Comment No. 6, Article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life".<sup>16</sup>

The Committee noted in 1982 that progress towards "abolishing or limiting the application of the death penalty" was "quite inadequate". Dozens of countries have abolished the death penalty since then, while over 1,300 men and women have been put to death across the USA. Clearly, officials in the USA are failing to do all they can to bring nationwide abolition closer within any reasonable timeframe.

On 12 August 2013, Attorney General Eric Holder made an important speech addressing law enforcement and imprisonment in the USA, including racial aspects. While he was not addressing the question of the death penalty, his words will have resonated with those seeking to break the USA's attachment to judicial killing, not least when the Attorney General said that it was necessary to "break free of a tired status quo", and that:

"It's time – in fact, it's well past time – to address persistent needs and unwarranted disparities by considering a fundamentally new approach. We must face the reality that, as it stands, our system is in too many respects broken... And it is our time – and our duty – to identify those areas we can improve in order to better advance the cause of justice for all Americans."<sup>17</sup>

On the same day, as the Attorney General made his speech, the Obama administration filed the USA's combined third, fourth and fifth periodic reports in relation to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In it, it told the UN Committee against Torture, that "At the federal level, the United States is not currently considering abolishing the death penalty".<sup>18</sup> The federal government should rethink, and "break free of the tired status quo".

"We should be willing to challenge old assumptions", President Obama has said in support of greater gun control in the USA.<sup>19</sup> Whatever the eventual outcome on that issue, he and other officials around the country should apply such thinking to one of the USA's oldest lethal activities: judicial killing. Any assumption that the death penalty can offer a constructive response to crime should be rejected as false, and abolition recognized as wholly consistent with the USA's human rights commitments.

### 3. PURSUING THE DEATH PENALTY, FAILING HUMAN RIGHTS

*But the hard work of passing the crime bill, as I said yesterday when I signed it, was only the beginning.*

*It's up to those of us who are charged with executing the laws to roll up our sleeves and put the crime bill to work as quickly as we possibly can... This crime bill gives you the ultimate punishment, capital punishment, for most heinous crimes*

President Bill Clinton to federal prosecutors, 14 September 1994<sup>20</sup>

For the past 19 years, most federal capital cases have been brought under legislation passed in 1994 that was condemned the following year by the Human Rights Committee for

expanding the death penalty. The USA has done nothing to meet the Committee's calls to narrow the scope of the death penalty with a view to its abolition. Indeed, the federal death penalty has been further expanded since then, as have a number of state capital laws.<sup>21</sup>

The post-*Furman v. Georgia* federal death penalty was re-enacted in 1988 when President Ronald Reagan signed into law the Anti-Drug Abuse Act, which provided for the execution of people convicted of murders committed in the context of drug trafficking. Six years later, on 13 September 1994, President Bill Clinton signed the Federal Death Penalty Act (FDPA) as Title VI of the Violent Crime Control and Law Enforcement Act of 1994, making more than 50 federal offences eligible for the death penalty. The Federal Death Penalty Resource Counsel states that: "As a result of the Federal Death Penalty Act of 1994, virtually every homicide occurring within federal jurisdiction is now death-eligible".

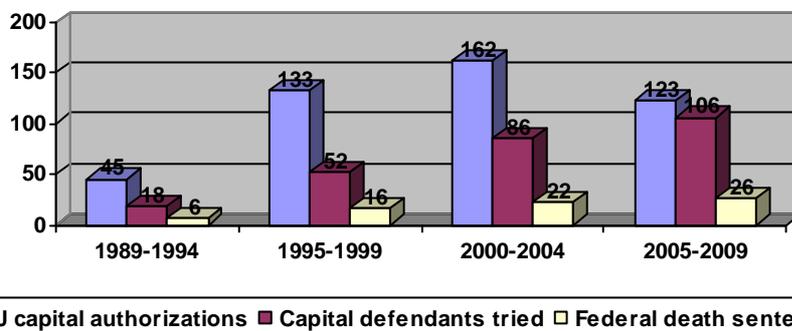
In its 1995 conclusions on US compliance with the ICCPR, the Human Rights Committee said that it "deplore[d]" the expansion of the death penalty under the FDPA and called on the USA to narrow the death penalty's scope with a view to eventual abolition, in conformity with Article 6 of the ICCPR. The US government did not heed the call.

In addition to signing the FDPA, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act of 1996 which added a further four federal capital crimes. In 2002, under President Bush, the Terrorist Bombings Convention Implementation Act added another. Further expansion came as a result of the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>22</sup> The USA PATRIOT Improvement and Reauthorization Act of 2005 enhanced the criminal penalties for certain offences, such as train wrecking or attacks on mass transport systems, including making them eligible for the death penalty when death results. The Reducing Crime and Terrorism at America's Seaports Act of 2005 established more federal offences punishable by death. It also increased the penalties for certain federal crimes, to include the death penalty.<sup>23</sup> The Military Commissions Act (both 2006 and 2009 versions) authorizes the death penalty as an option in trials by military commission.

In its 2006 conclusions on the USA's second and third periodic reports under the ICCPR, the Human Rights Committee expressed regret that "despite the Committee's previous concluding observations, the State party has extended the number of offences for which the death penalty is applicable." It called on the USA to "review federal and state legislation with a view to restricting the number of offences carrying the death penalty", and "in the meantime, the State party should place a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty."

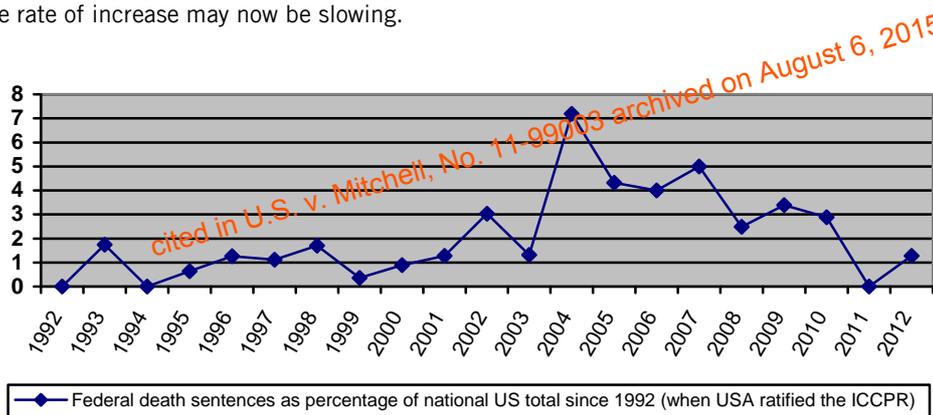
In its Fourth Periodic Report, the Obama administration notes this 2006 recommendation of the Committee, but it cannot disguise the failures of the elected branches of the federal government, two decades after the USA ratified the ICCPR, to begin to work for abolition. The Obama administration emphasises that the US Supreme Court had "recently further narrowed the categories of defendants against whom the death penalty may be applied", citing the *Roper v Simmons* and *Atkins v. Virginia* rulings that exempted children and offenders with "mental retardation" from the death penalty. But these two (long overdue) rulings preceded 2006 and had indeed been welcomed by the Committee in its observations on the second and third periodic report. The Obama administration also cited, as an example of the narrowing of the death penalty, the US Supreme Court's 2008 ruling in *Kennedy v. Louisiana* banning its use for the non-homicide rape of a child on the basis that a "national consensus" against such executions existed. The administration did not add that its predecessor had sought to have the ruling overturned arguing that, in finding the consensus, the Court had not taken into account the US government's own expansion of military law (in contravention of international standards) under a 2006 statute passed by Congress and a 2007 executive order signed by President Bush to allow the death penalty for child rape. The Bush administration argued that the fact that the Court had overlooked this new military law warranted the Court reconsidering its decision "in light of the currently prevailing moral

judgment of society – as recently expressed through the acts of the Nation’s Legislative and Executive Branches – that capital punishment is appropriate for child rapists”.<sup>24</sup> Then-Senator Barack Obama also publicly stated that he disagreed with the Court’s decision.<sup>25</sup>



The FDPA’s expansion of the federal death penalty led to a substantial increase in the number of capital prosecutions authorized by the Department of Justice, and equivalent increases in the number of capital defendants going to trial and of federal death sentences.

Since 1995, the USA’s federal death row population has grown by about 600 per cent, from eight prisoners in 1995 to nearly 60 today. While this is a small percentage of the country’s total death row population it has nevertheless been heading in the wrong direction, even if the rate of increase may now be slowing.



Some 60 per cent of the prisoners on federal death row in June 2013 (35 of 55), were sent there under the administration of President George W. Bush. President Bush had come to office with his ardent support for the death penalty well-known after his term as governor of Texas had seen 152 executions in that state, including numerous instances in which the execution violated specific international law standards. Moreover, the individuals President Bush nominated to the office of US Attorney General were also known for their death penalty support. As a US Senator, for example, John Ashcroft had opposed the appointment of a federal judge he viewed as soft on the death penalty and had been a proponent of cutting federal judicial review of state capital cases.<sup>26</sup> His successor as Attorney General, Alberto Gonzales, had been legal counsel to Governor George W. Bush in Texas where together their approach to clemency in capital cases caused serious concern.<sup>27</sup>

The federal death penalty decision-making process was further centralized under Attorney General Ashcroft to make it “less deferential” to the local federal prosecutors, and the “number of capital prosecutions increased substantially”.<sup>28</sup> Attorney General Ashcroft also implemented a policy requiring his office’s approval before a case that he had authorized for

the death penalty could be settled by a plea agreement, and “over time, proportionally fewer cases reached a negotiated resolution and a greater proportion of cases went to trial”.<sup>29</sup>

The Ashcroft policy meant that some recommendations by federal prosecutors not to pursue death sentences were overridden from Washington, DC. In 2001, for example, the US Attorney for Arizona, Paul Charlton, advised against seeking a death sentence for Lezmond Mitchell, a member of the Navajo tribe charged with carjacking murder. Among other things, Charlton cited the Navajo tribe's opposition to the death penalty. He was overruled by Ashcroft and Lezmond Mitchell was sent to federal death row, where he remains today.

The FDPA does not apply to murders committed by Native Americans against Native Americans in Indian Country unless the appropriate tribe has agreed to application of FDPA in such cases.<sup>30</sup> The limitation is not a ban, according to the US Court of Appeals for the Ninth Circuit in 2007 in the Mitchell case.<sup>31</sup> The scope of the FDPA over crimes in this context appears to be open to interpretation, however. In another cases in 2010, a judge on the Ninth Circuit said that in his opinion, the FDPA “removes first degree murder committed within the boundaries of ‘Indian country’ from the realm of offenses punishable by death and delegates to the tribes the authority to determine the availability of the death penalty”.<sup>32</sup> In 2007, the Bush administration not only successfully defended its death sentence against Lezmond Mitchell, it also was successful in urging the Supreme Court not to review the case of another Native American. The latter remains on death row in Oklahoma for the murder of a fellow member of the Muscogee (Creek) Nation tribe, despite evidence that the crime was committed on land that remains part of the Creek Nation Reservation, which would mean that the State of Oklahoma should not have had jurisdiction (see Appendix 1, *Murphy v. State*).<sup>33</sup>

Meanwhile, US Attorney Charlton recommended not pursuing the federal death penalty in a drug-related murder case in Arizona, as he did not think that the government's evidence would succeed in persuading a jury to vote for the death penalty. In late May 2006, he was overruled by Attorney General Gonzales, who had succeeded John Ashcroft in 2005. Charlton obtained a stay from the federal judge in filing notice of intent to seek the death penalty while he sought to speak with the Attorney General. His efforts were rebuffed and his name then appeared on a list of federal prosecutors slated for removal. In December 2006, Charlton was told to resign, and he left office on 30 January 2007. In September 2008, an official investigation concluded that “the most significant factor” in Charlton's removal was his opposition to the death penalty in this case. The investigative report was “troubled” that it had been considered “inappropriate” for Charlton to have questioned the Attorney General's decision and the report concluded that it had not amounted to insubordination on the federal prosecutor's part and had not justified his removal.<sup>34</sup> In September 2008, a year after Attorney Gonzales resigned, his predecessor (Michael Mukasey) agreed to authorize a plea agreement in the drug-murder case in question under which the defendant pled guilty and the government withdrew its intent to seek the death penalty against him.<sup>35</sup>

As the Lezmond Mitchell case shows, a death sentence obtained by one administration may be defended in the appeals process by its successor. However, there is nothing to stop any administration, consistent with the ICCPR, supporting reversal of the death sentence in the courts. As noted above, the Bush administration successfully defended the Mitchell death sentence on direct appeal. In the 2007 Court of Appeals ruling, one of the three judges on the Ninth Circuit panel argued that Mitchell should receive a new trial on the grounds that his rights had been violated in police custody, that he had been denied his right to an impartial jury, and that the sentencing phase of the trial had been “rife with errors”. Today it is the Obama administration defending the death sentence in habeas corpus proceedings.

On 25 July 2013, the Court of Appeals for the First Circuit vacated a federal death sentence obtained under the Bush administration almost a decade earlier in December 2003. The three-judge panel held that the defendant had been denied his right to an impartial jury because one of the jurors at his federal trial in Massachusetts had told a “litany of lies”

during jury selection. Her “parlous pattern of persistent prevarication” indicated that her “ability to perform her sworn duty as an impartial juror was compromised from the start”.<sup>36</sup>

The Obama administration had taken up where the Bush administration had left off and fought to keep the death sentence, authorized in 2002 by Attorney General John Ashcroft, from being overturned – trying “to catch lightning in a bottle”, as the appeals court put it – by insisting among other things, that there had been no showing of actual prejudice to the defendant. The First Circuit panel dismissed such arguments as plain wrong.

In March 2013, there were 32 federal defendants facing trial in whose cases the Attorney General had authorized the death penalty.<sup>37</sup> In 28 of these 32 cases, the authorization had been given by the current Attorney General, Eric Holder. By late August, at least seven of those 32 cases had come to trial and been concluded, while pre-trial plea bargains had been reached in two others. Three juries in Puerto Rico and one in Virginia had rejected the Obama administration’s bid for death sentences against six defendants, while in Vermont and Rhode Island, the Obama administration dropped its pursuit of the death penalty in return for the defendant pleading guilty and accepting life imprisonment without the possibility of parole. In New York a federal jury passed a death sentence. At the time of writing, a trial was underway in New Mexico in which the federal government was seeking the death penalty.

As the above outcomes illustrate, not all authorized federal capital cases go to trial and most that do get that far end in less than a death sentence – between 1989 and 2009, only about a quarter of defendants who went to trial and against whom the government was seeking the death penalty ended up being sentenced to death by the jury (68 death sentences for 262 defendants). Rather than promoting such statistics as a sign of a system that is narrowly targeted and reliably, fairly and consistently applied, the US authorities should reflect on the notion that the relative rarity of federal death sentences “makes death by lightning strike look positively routine” (there were 424 deaths by lightning strike in the USA from 1999 to 2008) and a federal death sentence is “akin to winning (or in this instance losing) the lottery”.<sup>38</sup> The federal government should work for abolition of the federal death penalty.

### 3.1 RACIAL DISPARITIES

It is now more than two decades since the US General Accounting Office reported to the Senate and House Committees on the Judiciary in US Congress that research showed “a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty” under capital statutes passed after 1972. In 82 per cent of the 28 studies it reviewed, “race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding is remarkably consistent across data sets, states, data collection methods, and analytic techniques”.<sup>39</sup> Since then, studies have continued to show that race, particularly race of victim, plays a role in who is sentenced to death in the USA, and the disparities remain marked. Some 78 per cent of the more than 1,300 prisoners put to death in the USA between 1977 and 2013 were convicted of killing white victims. Yet blacks and whites are the victims of murder in approximately equal numbers in the USA. In its Fourth Periodic Report, the administration has told the Human Rights Committee that:

“The death penalty continues to be an issue of extensive debate and controversy in the United States. Concerns include the overrepresentation of minority persons, particularly Blacks/African Americans, in the death row population (approximately 41.5 % of the 2009 death row population was Black/African American, a much higher percentage than the general representation in the population)”.

As across the death penalty nationally, federal death row continues to display disparities by race of murder victim and race of defendant.

Of the 55 people on federal death row in June 2013, 39 (71%) were convicted of a crime involving their own race. Of those sentenced to death for inter-racial murders, 10 were blacks convicted of killing whites (18%), and one case involved two defendants – one white and one Hispanic – sentenced in 2010 for killing a fellow black inmate in federal prison in Texas.

<b>FEDERAL DEATH ROW, JUNE 2013</b>	<b>White</b>	<b>Black</b>	<b>Latino</b>	<b>Native American</b>
<b>Race of prisoner</b>	<b>38%</b>	<b>49%</b>	<b>11%</b>	<b>2%</b>
<b>Race of victim</b>	<b>55%</b>	<b>32%</b>	<b>11%</b>	<b>2%</b>

While the administration is considering carrying out further research on the racial aspect of the death penalty,<sup>40</sup> it continues to litigate against challenges brought in individual federal cases that the death penalty should be dropped as an option on the grounds of its discriminatory application. Indeed, the administration has successfully argued that the very same Department of Justice study which revealed widespread racial and geographic disparities in the federal death penalty (2000 DoJ study) and which it cites in the Fourth Periodic Report is no cause for concern in individual cases.<sup>41</sup>

The Obama administration has been accused by a federal judge of taking a “dismissive attitude” to the “disturbing statistics regarding the disproportionate number of minorities being prosecuted for capital offenses and sentenced to death”.<sup>42</sup> The judge was commenting in 2010 in the case of a federal capital defendant in Louisiana, whose lawyers had filed a motion for discovery to support a claim that the prosecution in his case had been influenced by race. The administration had responded that the motion was merely “a variant of a claim that has become perfunctory in modern federal capital cases” and should be denied.<sup>43</sup> Although he denied the motion, the judge stated that he did “not doubt that conscious or, more insidiously, unconscious racism can influence decision-making, from an initial arrest by police through a final decision by a jury”. He noted “with dismay the dismissive attitude of the government with regard to this issue”.

Lawyers for three Somali men charged in federal court with piracy and the murder of four US citizens off the coast of Somalia in 2011 filed a joint motion to have the death penalty removed as an option because of the “arbitrary, capricious, and random” application of the Federal Death Penalty Act.<sup>44</sup> Among other things, the lawyers pointed to the 2000 DoJ study, and to contemporaneous concern about the racial disparities revealed. These included comments from Attorney General Janet Reno who said that she was “sorely troubled” by the findings and that “We must do all we can in the federal government to root out bias at every step”, and a statement from then Deputy Attorney General Eric Holder who said:

“I can’t help but be personally and professionally disturbed by the numbers that we discuss today. To be sure, many factors contributed to the disproportionate representation of racial and ethnic minorities through the federal death penalty process. Nevertheless, no one reading this report can help but be disturbed, troubled, by this disparity”.<sup>45</sup>

Twelve years later in October 2012, in the Somali case, the federal prosecution, under Attorney General Holder, said that “the DoJ Report’s figures concerning disparities in capital sentencing do not justify a finding of constitutional arbitrariness absent evidence that similar[ly] situated individuals had been treated differently”. And the contemporaneous expressions of concern merely “reflect[ed] an administrative response to a perceived statistical disparity in the application of the death penalty, not an admission that discrimination caused the disparity”.<sup>46</sup>

In part, the Obama administration, as previous administrations have done, is relying upon a notorious US Supreme Court ruling from a quarter of a century ago, *McCleskey v. Kemp*.<sup>47</sup> In that case, the Court had been presented with compelling statistical evidence of systemic racial discrimination in capital cases in Georgia. A majority of the Justices, however, held that for a defendant to be successful in an appeal, he or she would have to provide “exceptionally clear proof” that the decision-makers in his or her particular case had acted with discriminatory intent. Absent such evidence of intentional discrimination, statistical evidence of racial disparities in death penalty cases could not be used to prove a violation of the constitution, the Court said. It said that the kind of evidence put forward in the *McCleskey* case was “best presented to the legislative bodies”. The North Carolina legislature passed a Racial Justice Act (RJA) in 2009, allowing prisoners to challenge their death sentences on the basis of statistical evidence of racial discrimination. Except for Kentucky which had enacted an RJA in 1998, limited to pre-trial challenges, there have been no other such laws passed in the USA in the 25 years since *McCleskey*. Moreover, in North Carolina, after a judge had found racism in a number of cases under that state’s RJA, the legislature repealed the Act and the governor signed the repeal in June 2013.<sup>48</sup>

A proposed Racial Justice Act for inclusion in the Violent Crime Control and Law Enforcement Act of 1994, of which the FDPA was a part, was dropped by Congress. And in 1996 (*US v. Armstrong*)<sup>49</sup>, the Clinton administration and then in 2002 the Bush administration (*US v. Bass*)<sup>50</sup> successfully litigated to compound the *McCleskey* ruling in relation to the federal death penalty:

“after *McCleskey*, in *United States v. Armstrong*, the United States Supreme Court effectively shut down litigation on race claims by holding that federal prosecutors had broad discretion to act, and that without specific proof of race discrimination, the defendant was not entitled to discovery. To justify an order for discovery, the Court held in *United States v. Bass* that statistical evidence of racial disparities is not enough, and that a defendant needed to show both discriminatory effect, as well as specific evidence of discriminatory intent”.<sup>51</sup>

In 2011, a federal judge wrote in a case in which the Obama administration was then seeking the death penalty:

“The statistical evidence presented... suggests that it is black defendants, defendants suspected of killing white females, and defendants from southern states who are disproportionately likely to receive death sentences... As troubling as the statistical evidence... may be, the Supreme Court’s decision in *McCleskey* precludes [the defendant] from prevailing...”<sup>52</sup>

In its brief to the court in 2010, the Obama administration had, among other things, quoted a line from the *McCleskey* ruling: “Apparent disparities in sentencing are an inevitable part of our criminal justice system”.<sup>53</sup> Again, in the capital prosecution of the three Somali defendants in 2012, the administration reminded the judge of this same line from *McCleskey*. In November 2012, the federal judge in that case denied the motion to dismiss the federal prosecution’s pursuit of the death penalty, again repeating the *McCleskey* line that “Apparent disparities... are an inevitable part of our criminal justice system”.<sup>54</sup>

In 1998, this very same line had been quoted, but out of concern about the USA’s human rights compliance, in a report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, following his mission to the USA. He concluded that the *McCleskey* opinion was likely incompatible with the USA’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, “which requires States parties to take appropriate steps to eliminate both direct and indirect discrimination”.<sup>55</sup>

Justice Powell, who authored the 5-4 *McCleskey* ruling, said after he retired from the Court that he wished he had voted differently in the 1987 decision, and that he had come to think

that the death penalty should be abolished.<sup>56</sup> It is regrettable, to say the least, that a federal government that promotes itself as committed to human rights, including ending discrimination, continues to rely upon the notorious *McCleskey* ruling in defending its pursuit of death sentences rather than working for abolition.

A recent study of the federal death penalty finds a possible link between the racial disparities on federal death row and the geography of the federal death penalty:

“While the decision to prosecute federally rather than in state court has little or no difference on the jury demographics in many jurisdictions, it is highly significant in the federal judicial districts responsible for most of the black defendants on death row. In each of these districts, the county where the offense occurs has a high minority group population, but the overall composition of the federal district is heavily white. Thus, the shift to federal court results in a far whiter jury pool.”<sup>57</sup>

A new study across six leading death penalty states of 445 US citizens who would qualify to sit on a capital jury has found that such individuals harbour “implicit racial stereotypes about Blacks and Whites generally, as well as implicit associations between race and the value of life” (specifically that whites are “more valuable” than blacks). Moreover, it has found that the “death qualified” jurors harbour “stronger racial biases” than jurors excluded from serving on capital juries because of their opposition to the death penalty (see Section 5 below).<sup>58</sup> It is nearly 30 years since the US Supreme Court wrote:

“Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected...The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.”<sup>59</sup>

President Obama recently acknowledged the “history of racial disparities in the application of our criminal laws”, including on the death penalty, and Attorney General Holder even more recently pointed to the need to “confront the reality” that “people of colour often face harsher punishments than their peers.”<sup>61</sup> The fact that race continues to play a part in the death penalty is enough to warrant abolition of this irrevocable, cruel and brutalizing policy.

### 3.2 GEOGRAPHIC DISPARITIES

Of the 55 prisoners on federal death row in June 2013, one in five was convicted in federal districts in Texas, echoing at federal level the geographic bias of the state-level death penalty. Texas, which accounts for about eight per cent of the USA’s population, accounts for approaching 40 per cent of all executions there since 1976. Nearly three quarters of those on federal death row were convicted in federal districts in southern states (Arkansas, Florida, Georgia, Louisiana, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia), similar to the state level geographic bias, under which 82 per cent of executions since 1976 were carried out in the southern states.

There are 94 federal jurisdictions, known as districts. Some districts cover whole states or other jurisdictions (for example, Rhode Island, District of Columbia and Puerto Rico), and others are subdivided (for example, Texas is divided into Northern, Southern, Eastern and Western Districts).<sup>62</sup> By 2010, of the 67 federal death sentences passed since 1988, 75 per cent had come from 16 districts; and 43 per cent had come from nine of the 94 districts -- in Texas (9), Missouri (8), Virginia (4), Louisiana (3), Oklahoma (3) and Maryland (2).

Attorney General Holder sent federal prosecutors a memorandum in July 2011 explaining changes to the Death Penalty Protocol.<sup>63</sup> The protocol states that “national consistency requires treating similar cases similarly, when the only material difference is the location of the crime” and the aim is to “reduce disparities across [federal] districts”. In fact for more than a decade, the Department has been seeking to reduce geographic disparities. One

review in 2010 found that this had resulted “in more cases being tried in jurisdictions where non federal death penalty prosecutions are rare or non-existent.”<sup>64</sup> From 1989 to 1997, 140 federal capital prosecutions were authorized in 25 states. In the following decade, 327 such prosecutions were authorized in 38 states, as illustrated in the table below.<sup>65</sup>

Number of federal defendants authorized for capital prosecution, by state, over two decades 1989-1997 and 1998-2009 (current abolitionist states marked *)					
State	1989-1997 → 1998-2009	State	1989-1997 → 1998-2009	State	1989-1997 → 1998-2009
Alaska*	1 → 2	Illinois*	4 → 8	New Mexico*	6 → 2
Alabama	3 → 3	Indiana	0 → 6	New York*	12 → 32
Arkansas	5 → 2	Kansas	3 → 4	Ohio	0 → 6
Arizona	0 → 6	Kentucky	0 → 4	Oklahoma	3 → 2
California	5 → 36	Louisiana	5 → 5	Pennsylvania	5 → 14
Colorado	2 → 4	Massachusetts*	0 → 4	Puerto Rico*	8 → 14
Connecticut*	0 → 4	Maryland*	3 → 23	S. Carolina	0 → 3
DC*	7 → 10	Michigan*	8 → 11	Tennessee	2 → 13
Florida	5 → 10	Missouri	8 → 18	Texas	11 → 17
Georgia	4 → 5	Mississippi	0 → 3	Virginia	21 → 31
Hawaii*	0 → 2	North Carolina	5 → 5	Vermont*	0 → 3
Idaho	0 → 1	North Dakota*	0 → 2	W. Virginia*	0 → 7
Iowa*	2 → 2	New Jersey*	2 → 1	Total	140 → 327

In 2006, for example, the Bush administration obtained a death sentence in North Dakota under the FDPA. What made this development unusual in the US context was that it was the first death sentence passed by a North Dakota jury for many decades in a state that had not carried out an execution for more than a century. Federal jurisdiction was based on the government’s position that the murder victim had been abducted in one state, North Dakota, and her body had been found in another, Minnesota. North Dakota has been abolitionist since 1973 and has not carried out an execution since 1905. Minnesota has been abolitionist since 1911.

The suspect, Alfonso Rodriguez, was indicted in federal court on 11 May 2004, and on 28 October 2004 the Bush administration filed notice of its intent to seek the death penalty. By then the governors of both states had indicated that they thought Alfonso Rodriguez should get the death penalty if convicted. Indeed, when Alfonso Rodriguez was arrested, five months before the body of the victim was found, Minnesota’s governor called for reintroduction of the death penalty in his state.<sup>66</sup> Alfonso Rodriguez remains on death row.

In a case in which it was intending to seek the death penalty at a 2013 federal trial in Vermont, an abolitionist state since 1964 and which last carried out an execution in 1954, the Obama administration justified its pursuit of federal death sentences in abolitionist states. To do otherwise, it said, would make imposition of the federal death penalty “a function of voter sentiment and local politics in each state”:

“This would generate a patchwork of federal death sentences rendered disproportionately in the American South and Midwest, where the electorate tends to favour capital punishment. Criminals on the Northeast and West coasts, who committed equally heinous federal crimes, would be immune from a federal death sentence because voters, state legislatures, or courts in those regions tend to disagree with the death penalty. Such a system would... maximize irrational administration of the death penalty: defendants in one state would be executed, while the lives of their equally culpable

counterparts would be spared for no other reason than the fortuity of a state boundary line.”<sup>67</sup>

In other words, the administration views geographic bias is a sign of arbitrariness. The judge overseeing this case ruled that prohibiting such use of the federal death penalty based on the abolitionist status of the state “would raise constitutional concerns far more troubling than the one it would be meant to address”. In particular, continued the judge,

“the Court would effectively be sanctioning and contributing to geographic disparities in application of the federal death penalty... Allowing geography to play a role in the determination of which defendants may face the federal death penalty would be out of step with the Supreme Court’s post-*Furman* capital punishment jurisprudence and with the statutory scheme that Congress has devised to comply with the requirements set forth in this jurisprudence.”<sup>68</sup>

While judge and administration might be in agreement that geographic disparities are a sign of arbitrariness, and a “patchwork of federal death sentences” betrays an “irrational” capital justice system, a decade of trying to eradicate such disparities at federal level has been largely unsuccessful. In any event, tackling geographic disparities by seeking more death sentences contradicts a government’s obligation to work for abolition of the death penalty.

Moreover, as outlined in the following section, what the USA has not told the Human Rights Committee is just how far the federal administration has gone to obtain a death sentence in cases where if left to state jurisdiction, the death penalty would not have been an option.

#### **4. FEDERAL BACKSTOPPING FOR STATES WITH DEATH PENALTY PROBLEMS**

*The fact that the death penalty was declared unconstitutional in New York State while the defendant’s case was pending in state court has no bearing... Accordingly, the defendant should be precluded from offering such evidence on the ground that it does not constitute mitigating evidence under the FDPA*  
Obama administration, seeking a federal death sentence in New York, May 2013<sup>69</sup>

On 24 July 2013, a federal jury in New York gave the Obama administration what it had asked for when it voted that the defendant should be sent to federal death row for the murder a decade earlier of two undercover New York City Police Department (NYPD) officers. The crime was undoubtedly serious. The prosecution has shown a tenacious pursuit of the death penalty by the federal government after the state capital law ran into trouble.

**March 2003** – Two undercover NYPD officers are shot. Twenty-year-old Ronell Wilson is indicted for first degree murder in state court and the district attorney files notice of intent to seek the death penalty under state law.

**June 2004** – The New York State Court of Appeals rules that the state’s capital law violates the state constitution.

**November 2004** – With the state now limited to seeking a sentence of life imprisonment, the administration of President George W. Bush takes over the prosecution of Ronell Wilson under the FDPA.

**August 2005** – The federal prosecutor, authorized by US Attorney General Alberto Gonzales, files notice of intent to seek the death penalty against Ronell Wilson in the US District Court for the Eastern District of New York (EDNY)

**January 2007** – The jury votes that Ronell Wilson be sentenced to death

**March 2007** – The judge formally sentences Ronell Wilson to death, in what is the first federal death sentence passed in New York State in more than half a century.

**October 2007** – The last inmate on New York State’s death row has his death sentence vacated by the New York State Court of Appeals.

**October 2008** – The New York State execution chamber formally ceases to exist with the rescission of a Department of Corrections regulation designating Green Haven Correctional Facility as the site for executions.

**January 2009** – The Obama presidency begins

**March 2009** – The death sentence regulations of the New York State Department of Corrections (Section 103.45 of 7 NYCRR) are repealed.

**February 2011** – The Second Circuit Court of Appeals overturns Ronell Wilson's federal death sentence because of improper arguments by the prosecution at the sentencing phase of his trial four years earlier

**August 2011** – US Attorney General Eric Holder “authorize[s] and direct[s]” the US Attorney for the Eastern District of New York “to seek the death penalty against Ronell Wilson”.<sup>70</sup>

**February 2013** – After a hearing, the District Court for EDNY rules that Ronell Wilson does not have “mental retardation” – four experts for the defence have concluded that he does while three experts for the government have concluded that he does not – and that the death penalty can therefore remain an option.

**May 2013** – Ronell Wilson's lawyers inform the judge that at the upcoming sentencing, they intend to introduce as mitigating evidence “the circumstances underlying the transfer of Mr Wilson's case from State to federal jurisdiction following the decision of the State Court of Appeals declaring the death penalty in New York unconstitutional” and that they would “seek to introduce evidence that Mr Wilson would not and could not have faced the death penalty if the federal government had not taken over the prosecution”. The federal prosecutor responds that the “defendant should be precluded from offering such evidence on the ground that it does not constitute mitigating evidence”.

**June 2013** – The judge rules that “Wilson may not introduce evidence of the unavailability of capital punishment in New York” at the sentencing.

**July 2013** – After five hours deliberation, the federal jury votes to sentence Ronell Wilson to death.

**10 September 2013** – the judge formally sentences Ronell Wilson to death.<sup>71</sup>

As in the Ronell Wilson case in New York, the issue of whether federal capital prosecution in an abolitionist state should be presented to the jury as a mitigating factor arose in the case of Marvin Gabrion. He was sentenced to death at his federal trial in Michigan in 2002 for the 1997 murder of a woman whose body was found in the Manistee National Forest in Michigan. It was the location of the body which was deemed to give the federal government jurisdiction over the case. If the body had been located as little as 227 feet (69 metres) away, outside of the forest's boundaries, any trial would have had to taken place in state court. The death penalty would not have been an option. Michigan is the oldest abolitionist jurisdiction in the English-speaking world, having abolished the death penalty in 1846. In 1963, this ban was incorporated into Michigan's constitution.<sup>72</sup>

Four months before the USA filed its Fourth Periodic Report, the Sixth Circuit Court of Appeals decided that the trial judge had erred in preventing Gabrion from raising in mitigation Michigan's long-standing abolitionist policy. The FDPA states that “In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider *any mitigating factor...*” [emphasis added]. The Sixth Circuit panel opinion said:

“The question is whether the fact of the location of the body so close to a line that forbids the death penalty allows counsel to try to convince one or more jurors that imposing the death penalty in these circumstances would treat life or death in a random and arbitrary way based on chance. The phrase ‘any mitigating factor’ plainly includes information about Michigan's policy against the death penalty and an argument based on the absence of proportionality in punishment when life or death is made to turn on chance and the lives of other equally guilty psychopaths are spared...The jury should be given the opportunity to consider whether one or more of them would choose a life sentence rather than the death penalty when the same jury considering the same defendant's proper punishment for the same crime but prosecuted in Michigan state court could not impose the death penalty.”<sup>73</sup>

The Obama administration has told the Human Rights Committee that in capital cases in the USA “the jury must be able to consider and give effect to any mitigating evidence that a defendant proffers as a basis for a sentence less than death.” Subsequently, the administration appealed to the full Sixth Circuit to reconsider the Gabrion case, and to hold that the trial judge was correct to prevent Gabrion from putting Michigan’s abolitionist status to the jury as mitigation against a federal death sentence.

The full Sixth Circuit court agreed to reconsider the Gabrion case and on 28 May 2013, it ruled by 10 votes to 4 to reinstate the death sentence. Marvin Gabrion remains on death row. A day after the Sixth Circuit’s ruling, the Obama administration cited it in successfully arguing to have New York State’s abolitionist status precluded from the mitigation evidence that could be raised by Ronell Wilson’s lawyers at his sentencing.<sup>74</sup>

This New York case is not the only one in which, far from providing the sort of human rights leadership expected to accomplish the abolitionist goal of the ICCPR, the US administration has acted as backstop when a state has run into trouble in relation to its death penalty law.

Scott Cheever was arrested a few hours after the fatal shooting of a local Kansas county Sheriff on 19 January 2005. He was charged in state court with capital murder in violation of state law. However, a month before the crime, the Kansas Supreme Court had ruled that the state’s death penalty statute was unconstitutional because it required the jury to pass a death sentence even if the jurors found that the aggravating and mitigating circumstances in the case were of equal weight.<sup>75</sup> Although the State of Kansas could have gone ahead and pursued a life sentence against Scott Cheever, it instead turned to the US administration to prosecute him under federal law so that the death penalty could be pursued against him.

At a press conference on 25 January 2005, then Kansas Attorney General Phill Kline said that “there is a cloud over the Kansas death penalty. It is uncertain, if convicted – and if the jury would find that death is appropriate – that the death penalty would be carried out.”<sup>76</sup> Alongside him was the then federal prosecutor for Kansas who said: “We agree that the severity and the seriousness of this crime require that we jointly pursue the options that would provide the severest possible sentence – including, if possible, the death sentence”.<sup>77</sup>

In a clear example of the US administration’s failure even to begin to promote abolition in a state whose death penalty law was teetering, Scott Cheever was charged with capital murder under the FDPA and in July 2005 the Bush administration filed notice of its intention to seek the death penalty. During pre-trial proceedings over the ensuing year, the administration was successful in seeing off a defence motion against its pursuit of the death penalty.<sup>78</sup>

Meanwhile, the Kansas state Attorney General had taken the question of the constitutionality of the state death penalty law to the US Supreme Court, seeking to have it overturn the December 2004 Kansas Supreme Court ruling. The state was successful. On 26 June 2006, the Supreme Court by a vote of five to four reversed the Kansas Supreme Court’s decision. Dissenting from this reversal, four Justices pointed to the evidence of errors in capital cases in the USA and said that “in the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure”.<sup>79</sup>

In September 2006, several days after the federal death penalty trial of Scott Cheever had begun, the judge halted proceedings when the defence lawyer became unable to proceed. The state authorities then asked that the case be returned to state court given that the death penalty was now an option again under state law. On 2 November 2006, a few days after the Kansas Attorney General had re-filed the capital murder charge against Scott Cheever under state law, the US District Court judge dismissed the federal case. The state trial went ahead and Scott Cheever was convicted and sentenced to death.

The US administration’s involvement in the case did not end with the dismissal of the federal

proceedings against Scott Cheever. In 2012, the Kansas Supreme Court overturned his capital murder conviction and his death sentence, on the grounds that his right under the US Constitution's Fifth Amendment not to be compelled to incriminate himself had been violated. The state appealed to the US Supreme Court. In February 2013, the Court agreed to take the case and on 20 May 2013 the Obama administration filed a brief in support of the State of Kansas (see Appendix 1). The brief asserted that the federal government "has a significant interest in the Court's disposition of this case" because the Fifth Amendment "applies to the federal government as well as to the States". The US administration's previous involvement in the Cheever case suggests that federal "interest" goes deeper.

The United States Attorneys' Manual explains that "a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities". This judgment "may take into account any factor that reasonably bears on the relative interests of the State and Federal Governments". This can include "the relative ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction". The decision as to whether it is "appropriate to seek the death penalty", any number of factors may be considered, including "whether the defendant has accepted responsibility for his conduct as demonstrated by his willingness to plead guilty and accept a life or near-life sentence without the possibility of release".<sup>80</sup>

In the case of Jason Pleau, in abolitionist Rhode Island, the Obama administration litigated for some two years to get federal capital jurisdiction over the defendant in the face of state opposition and in a case where at state level the defendant was willing to plead guilty and be sentenced to life imprisonment without the possibility of parole.

Jason Pleau, arrested for a murder of a man shot outside a bank in Rhode Island in 2010, was initially in state custody and in May 2011 he offered to plead guilty to charges of murder and robbery under state law and accept a sentence of life imprisonment without the possibility of parole.<sup>81</sup> The following month, the Governor of Rhode Island, Lincoln Chafee, refused the federal government's request for custody of Pleau, on the grounds that the defendant could face the federal death penalty, a penalty long since abolished in Rhode Island, and where the last execution occurred in 1845. Governor Chafee noted that, given that the defendant was willing to accept the maximum sentence under state law, "exposure to the death penalty appears to be the sole motivation for the transfer" to federal custody.<sup>82</sup>

"The defendant in this case, Jason Wayne Pleau, is accused of committing a crime that traditionally is prosecuted by state authorities. Pleau, who is in Rhode Island's custody, has offered to plead guilty to state charges for this crime and to spend the rest of his life in prison. Yet the federal government went ahead and charged Pleau with death-eligible crimes and has sought his custody from Rhode Island to stand trial in federal court".

The federal courts ruled against Governor Chafee's efforts to prevent Pleau's transfer to federal custody, with the Supreme Court ending the matter when it refused to intervene in 2013.<sup>83</sup> The Obama administration successfully argued against a pre-trial motion brought by the defence seeking to remove the death penalty as a sentencing option for the federal prosecution. On the question of Rhode Island's abolitionist status, the judge simply stated that "contrary to Pleau's contentions, district courts have held that the federal death penalty may be constitutionally imposed in states that do not authorize capital punishment."<sup>84</sup>

On 31 July 2013 Jason Pleau pleaded guilty and under the plea agreement the federal government agreed to withdraw its notice of intent to seek the death penalty against him. The plea deal stated that "the Government and the Defendant recommend to the Court, as a reasonable sentence, that the defendant be sentenced to life imprisonment without parole".<sup>85</sup> The judge accepted the plea and set formal sentencing for 25 October 2013.<sup>86</sup>

Tension caused by the federal government's pursuit of the death penalty has also occurred in

Puerto Rico, whose Constitution forbids any use of this punishment. Unlike a state like Rhode Island, however, the Commonwealth of Puerto Rico,

“to a great extent, is excluded from the federal decision making process. Puerto Rico’s only representative in Congress, the Resident Commissioner, has the right to speak but not to vote on legislation before the House of Representatives. All executive powers extend to Puerto Rico, although Puerto Ricans many not vote in the presidential elections”.<sup>87</sup>

On 17 July 2000, the US District Court for the District of Puerto Rico ruled that the federal death penalty could not 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. The judge ruled 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. It is unconscionable and against the most basic notion of justice to permit that the American citizens of Puerto Rico be subjected to capital punishment for crimes committed wholly within the boundaries of the Commonwealth, while at the same time denying them a say in the political process of the government that tries them.”

The Clinton administration – which had in 1994 defended the USA’s continuing use of the death penalty to the Human Rights Committee on the basis of its “democratic” credentials – appealed to the US Court of Appeals for the First Circuit. The latter stated that “we fully accept the strength of Puerto Rico’s interest and its moral and cultural sentiment against the death penalty”, but overturned the District Court ruling and reinstated the death penalty as a sentencing option for the Bush administration, finding that the issue was “a political one, not a legal one”. In March 2002, the US Supreme Court declined to intervene. At the capital trial in 2003, the two defendants were acquitted.

The US government has continued to seek death sentences in Puerto Rico.<sup>88</sup> International law, the Obama administration has argued, is of no consequence to the matter, including because of the reservations the USA attached to its ratification of the ICCPR:

“To the extent the United States has signed any treaty attempting to prohibit or limit the imposition of the death penalty, the United States customarily objects to such provisions and reserves its right to impose the death penalty within constitutional constraints... There is no treaty or overwhelming international consensus to abolish the death penalty which imposes any obligations on the United States.”<sup>89</sup>

The administration also asserted:

“The fact that a defendant’s conduct exposes him to the possibility of the ultimate penalty does not mean the local populace does not have a voice in the actual imposition of the penalty. A federal defendant is sentenced to death only with the acquiescence of his jury. The Sixth Amendment mandates that a jury ordinarily be drawn from the community within which an offense is committed. The defendant’s ultimate sentence lies in the statutorily guided discretion of the people of Puerto Rico. Local juries help ‘to maintain a link between contemporary community values and the penal system’.”<sup>90</sup>

Here the administration is promoting a myth. As Justice John Paul Stevens, the then most senior Justice on the US Supreme Court pointed out in 2007, “millions of Americans oppose the death penalty”.<sup>91</sup> However, only “death-qualified” jurors can sit on a capital jury in the USA. Those citizens who would be “irrevocably committed” to vote against the death penalty can be excluded by the prosecution.<sup>92</sup>

It is 15 years since the UN Special Rapporteur on extrajudicial, summary or arbitrary

executions expressed concern that “while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors”.<sup>93</sup> In 2008, Justice Stevens said that the rules of capital jury selection “deprive the defendant of a trial by jurors representing a fair cross section of the community.”<sup>94</sup>

## 5. ‘PERVERSE CONSEQUENCES’ OF A FEDERAL LAW

*We all pat one another on the back for our common decency – we don’t execute the mentally retarded, we don’t execute the insane – while executing the mentally retarded and the insane. The smugness of that, the hypocrisy of it, is breathtaking*

Andrew Cohen, The Atlantic, 5 August 2013<sup>95</sup>

In 1998, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote that the Antiterrorism and Effective Death Penalty Act (AEDPA) had “further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments”.<sup>96</sup> The AEDPA, signed into law by President Clinton in 1996, placed unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted the federal courts’ ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited “successive” appeals except in very narrow circumstances. The US Supreme Court has since said that under the AEDPA federal courts must operate a “highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt”.<sup>97</sup>

The AEDPA compromises fairness in pursuit of finality. For example, when the Sixth Circuit Court of Appeals ruled in 2006 on the case of Ohio death row inmate Billy Slagle, all three judges found that at least 15 statements made by the prosecutor during Slagle’s trial had been “improper”. However, asserting that the “AEDPA’s highly deferential standard requires that this court give the state-court decision the benefit of the doubt”, two of the three judges voted to uphold the conviction and death sentence, on the grounds that “the Supreme Court of Ohio did not unreasonably apply federal law” when it determined that the prosecutorial misconduct did not render either phase of Slagle’s trial fundamentally unfair.

The third judge dissented, arguing that the misconduct – reflected in these 15 statements and more – had “so infected the trial that the misconduct violated Slagle’s due process rights”, and that even under the AEDPA, relief should have been granted. She noted that the trial transcript was “rich with evidence” that the prosecutor “repeatedly overreached the bounds of proper prosecutorial conduct when questioning witnesses and presenting closing arguments”. She described the prosecutorial misconduct as “flagrant” and that “many of the prosecutor’s improper assaults and references were likely to mislead the jury or prejudice the defendant”. In 2007, without comment, the US Supreme Court declined to take the Slagle case. Slagle committed suicide in his cell days before his execution in August 2013 after being denied executive clemency.

In June 2012, the Supreme Court reversed a Sixth Circuit decision ordering the State of Kentucky to release death row inmate David Matthews or to give him a new trial. The Court of Appeals had found “flagrant” prosecutorial misconduct at the 1982 trial. The misconduct had rendered the trial constitutionally unfair, it ruled, and citing the AEDPA standard said it had been “unreasonable” for the state Supreme Court to have decided otherwise.<sup>98</sup> However, the US Supreme Court said that the Sixth Circuit opinion was a “textbook example” of what the AEDPA prohibits – namely “using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts”, and reversed it.<sup>99</sup>

Ten weeks earlier, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions had expressed concern that “no steps have been taken concerning the

implementation of the recommendation that Congress enact legislation permitting federal courts to review the merits on all issues in post-conviction death penalty cases.”<sup>100</sup>

In the Fourth Periodic Report, the Obama administration does not mention the AEDPA or its effects. In a follow-up question, the Committee asked for information on “steps taken to guarantee access to federal review of state court death penalty convictions, in the light of the drastic limits imposed by the Antiterrorism and Effective Death Penalty Act of 1996 and the USA Patriot Improvement and Reauthorization Act of 2005 on the availability of federal habeas corpus relief for defendants sentenced to death”. The Obama administration responded in cursory fashion: “All capital defendants who have exhausted their state court appeals have the right to federal review of their convictions by filing the necessary form within one year of completing the state appellate process.”

At the same time, the administration responded perfunctorily to the Committee’s question about whether prisoners have been executed since the US Supreme Court’s 2002 *Atkins v. Virginia* ruling banning the execution of people with “mental retardation”.

On the same day that these answers were filed, 3 July 2013, a Georgia court set a seven-day window from 13 to 20 July in which the execution of Warren Hill could be carried out. All seven experts to have assessed Hill had by then concluded that he had “mental retardation”. Following the *Atkins* ruling in 2002, a Georgia judge decided that by “a preponderance of the evidence”, Hill’s impairment amounted to “mental retardation”. However, the state appealed to the Georgia Supreme Court which in 2003 ruled 4-3 that the state’s “beyond a reasonable doubt” standard was acceptable and the death sentence was upheld.

Warren Hill was facing execution in February 2013. The 11<sup>th</sup> Circuit Court of Appeals issued a stay to consider a new petition. In support of that petition, Hill’s lawyers had filed new affidavits signed by the three experts who had testified for the state in late 2000 that they did not believe Hill had “mental retardation”. In their affidavits, all three revealed that they had changed their minds and now considered that Hill did have such a disability, thereby now agreeing with the four experts presented by the defence in 2000. Two judges on the three-judge 11<sup>th</sup> Circuit panel said that they had “considered with care and caution our colleague’s dissent. We are required, however, to apply the rules of the AEDPA”.

The dissenting judge argued that there was “no question that Georgia will be executing a mentally retarded man because all seven health experts who have ever evaluated Hill, both the State’s and Hill’s, now unanimously agree that he is mentally retarded... The perverse consequences of such an application of AEDPA is that federal court must acquiesce to, even condone, a state’s insistence on carrying out the unconstitutional execution of a mentally retarded person... The idea that courts are not permitted to acknowledge that a mistake has been made which would bar an execution is quite incredible for a country that not only prides itself on having the quintessential system of justice but attempts to export it to the world as a model of fairness”.

At the time of writing, with executive clemency already denied, but Hill’s execution stayed on separate lethal injection grounds, a petition on the “mental retardation” question was still pending with the US Supreme Court. The Court had upheld the constitutionality of the AEDPA in 1996, finding that it had not repealed the Court’s power to consider “original habeas petitions” (in exceptional circumstances to take a case brought directly to it rather than on appeal from a lower court).

On 5 August 2013, the US Supreme Court refused to stop the execution of John Ferguson in Florida and review the claim that a federal appeal court’s “extreme” deference under the AEDPA to a state court was allowing the unconstitutional execution of a mentally “incompetent” prisoner. John Ferguson, a 65-year-old man with a decades-long history of serious mental illness, including repeated diagnoses of paranoid schizophrenia by prison doctors, was put to death after 35 years on death row.<sup>101</sup>

John Ferguson's history of serious mental illness predated the crimes for which he was sentenced to death in 1978. He first reported having visual hallucinations in 1965 at the age of 17 and was first diagnosed with paranoid schizophrenia in 1971, a diagnosis that would subsequently be repeated dozens of times over the years. In 1975, a court-appointed psychiatrist concluded that Ferguson's severe mental illness rendered him dangerous and meant that he "should not be released under any circumstances" from a maximum security mental hospital. However, he was discharged and within three years was on death row, convicted of eight murders. The diagnoses of serious mental illness, including by prison doctors, continued on death row. His lawyers argued that he was mentally "incompetent" for execution, as Ferguson believed his body would not remain in his grave, and that he would come back to life after execution and save the USA from a communist plot.

Many individuals with histories of serious mental illness have been put to death in the USA since 1976. In 1986, in *Ford v Wainwright*, the Court affirmed that the execution of the insane violated the US Constitution's Eighth Amendment ban on "cruel and unusual punishments". However, the *Ford* majority neither defined competence for execution (although Justice Powell's suggestion that the test should be whether the prisoner was aware of his or her impending execution and the reason for it was generally adopted by states), nor did a majority of the Court mandate specific procedures that must be followed by the individual states to determine whether an inmate was legally insane. The result was different standards in different states and minimal protection for seriously mentally ill inmates.<sup>102</sup>

In June 2007, in *Panetti v. Quarterman*, the Supreme Court moved to clarify the *Ford* ruling which it acknowledged had "not set forth a precise standard for competency".<sup>103</sup> The *Panetti* majority said that "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it...Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." The court acknowledged that "a concept like rational understanding is difficult to define". In other words, there will always be errors and inconsistencies.

On 21 May 2013, the Court of Appeals for the 11<sup>th</sup> Circuit upheld the Florida courts' finding that although Ferguson suffered from, and was not faking, serious mental illness, he "is aware that the State is intending to execute him and that he will physically die as a result of the execution". The 11<sup>th</sup> Circuit panel held that the AEDPA "precludes us from disturbing" the Florida Supreme Court's decision. That decision, it continued, "is by no means beyond any possibility for fair-minded disagreement", but the AEDPA, it said, "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice system" and "there was no extreme malfunction in this case".

One of the three judges wrote separately to assert that the Florida Supreme Court had failed to apply the *Panetti* standard correctly. Repeating in the Ferguson case what it had said in 2000 in the case of another mentally ill prisoner (Thomas Provenzano, who was subsequently executed<sup>104</sup>), the state Supreme Court had said that "the Eighth Amendment requires only that defendants be aware of the punishment they are about to receive and the reason they are to receive it". The 11<sup>th</sup> Circuit judge said: "that statement of the law is patently incorrect in the wake of *Panetti*, which explicitly held that a prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it... [I]nsofar as the Florida Supreme Court continues to believe that the Eighth Amendment requires only that defendants be aware of the punishment they are about to receive and the reason they are to receive it, it is not correct; *Panetti* requires more". Yet he still concurred in the 11<sup>th</sup> Circuit's decision to allow the execution to go forward under the AEDPA.

Ferguson's lawyers turned to the US Supreme Court, arguing that the 11<sup>th</sup> Circuit panel had "embrace[d] a vigorous new form of AEDPA deference" that amounted to "wholesale abdication of serious judicial review". The US Supreme Court refused to intervene and John

Ferguson was killed in Florida's execution chamber a few hours later. In his final statement he called himself the "Prince of God" and said he would "rise again".

The federal government facilitated this execution – an execution which contravened international safeguards – through its passage, defence and retention of the AEDPA. The Obama administration should explain to the Human Rights Committee about the state's reliance on this federal law to facilitate the death penalty, and acknowledge and respond to international concern about it.

## **6. RESERVING THE RIGHT TO BE CONSTITUTIONALLY CRUEL**

*Because the human rights and fundamental freedoms guaranteed by the International Covenant on Civil and Political Rights (other than those to which the United States has taken a reservation) have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law*  
Obama administration, Fourth Periodic Report, December 2011<sup>105</sup>

The USA's Common Core Document with its Fourth Periodic Report states that "the United States is committed to international human rights law" and, indeed, that it is a "nation built on the moral truths of the Universal Declaration of Human Rights". Its continuing use of the death penalty in an increasingly abolitionist world tells a different story. The USA's desire to keep its death penalty system from international legal constraint weighed down its ratification of the ICCPR with conditionality. In recent years that conditionality played a part in the USA's resort to torture and other crimes under international law committed against detainees held in the counter-terrorism context.

The Fourth Periodic Report states that "the United States has provided the text and explanations for reservations, understandings and declarations it undertook at the time it became a State Party to the Covenant in its prior reports. For purposes of brevity those descriptions and explanations will not be repeated in this report".<sup>106</sup>

Two of the reservations stemmed at least in part from the USA's intent to avoid possible international constraints on the country's use of capital punishment beyond that imposed by US constitutional law. To article 6 of the ICCPR on the right to life, the USA lodged the following reservation:

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

The stated main purpose of the USA's reservation to article 6 was to allow states in the USA to continue to use the death penalty against individuals for crimes committed when they were under 18 years old, despite the unequivocal ban on such executions contained in article 6(5). It was not until 28 years after the USA signed the ICCPR, and 13 years after it ratified it, that the US Supreme Court, in *Roper v. Simmons*, banned the death penalty against under 18-year-olds. This 2005 ruling has not led to withdrawal of the reservation to article 6, however. Reporting to the Committee in 2006, the Bush administration emphasised the breadth of the reservation:

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

So, the refusal of the USA to withdraw the reservation to article 6(5), even if the original stated motivation for the reservation was to facilitate the execution of offenders for crimes

committed when they were children, would appear to betray the USA's desire to avoid any international law curtailment of its judicial killing.

Meanwhile, the USA also filed a reservation to article 7 on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. This was the first and, until 2000, only reservation to article 7 made by any country.<sup>107</sup> The USA's motivation for this reservation, as stated in communications between the administration and the Senate Foreign Relations Committee, was also at least in part related to the death penalty. The administration of President George H.W. Bush had recommended that the Senate adopt this reservation because the European Court of Human Rights had taken the position that prolonged incarceration on death row could amount to cruel, inhuman or degrading treatment (so-called "death row phenomenon").<sup>108</sup> In the USA's initial report to the Committee in 1994, the Clinton administration also explained that the reservation stemmed from the fact that international jurisprudence and opinion indicated that prolonged imprisonment on death row could violate article 7 and the same prohibition under article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>109</sup>

Again, then, the USA wishes its judicial killing to be restrained only by constitutional limits, not international restrictions. "Because the scope of the constitutional protections differs from the provisions of article 7", said the Clinton administration, "the US conditioned its ratification upon a reservation".<sup>110</sup> Two decades later, the Fourth Periodic Report emphasises that the USA considers itself bound only by constitutional constraints on whether it is cruel to keep prisoners for years or decades on death row:

"The Supreme Court has repeatedly refused to consider the contention that a long delay between conviction and execution constitutes cruel and unusual punishment under the Eighth Amendment. Lower federal courts and state courts have also consistently rejected such claims".

In its conclusions in 1995 on the USA's Initial Report, the Human Rights Committee expressed concern at "the long stay on death row which, in specific instances, may amount to a breach of article 7 of the Covenant". Amnesty International opposes the death penalty in all circumstances and therefore does not believe that there is any "appropriate" length of time a prisoner can be held before execution. Numerous international, regional and national courts and bodies have recognized that awaiting execution on death row, particularly for extended periods, can amount to cruel, inhuman or degrading treatment. Nevertheless, the same courts and standard-setting bodies have also underlined the right of prisoners under sentence of death to make the maximum use of the judicial processes available.

While the administration is right to say that the US Supreme Court has not ruled on whether prolonged confinement on death row violates the Constitution, individual Justices have indicated that it might do so in certain circumstances. In 1995, for example, Justice Stevens wrote that executing a prisoner who had been on death row for 17 years arguably negated any deterrent or retributive justification and, if so, rendered the penalty excessive and cruel. In 1999, Justice Breyer expressed concern at the "astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures". He wrote: "It is difficult to deny the suffering inherent in a prolonged wait for execution... And death row conditions of special isolation may well aggravate that suffering."<sup>111</sup>

In just the 18 months since the USA filed its Fourth Periodic Report, a number of people have been executed after more than two or three decades on death row. They include:

- 15 February 2012 – Robert Waterhouse, aged 65, was put to death in Florida in February 2012 after spending half of his life on death row.<sup>112</sup>
- 18 April 2012 – Mark Wiles, 22 years old at the time of the crime for which he was sentenced to death, was executed in Ohio in April 2012 at the age of 49

after spending more than half of his life on death row.<sup>113</sup>

- 27 June 2012 – Sammy Lopez was executed in Arizona three days before his 50<sup>th</sup> birthday after spending half of his life on death row. The judge who sentenced him to death was not presented with the evidence of the defendant's background of extreme poverty and severe childhood abuse.<sup>114</sup>
- 8 August 2012 – Ronald Cook was executed in Arizona. Fifty years old, he had spent nearly half of his life on death row, and had come less than 24 hours from execution 15 months earlier. The lead prosecutor from the 1988 trial said that he would not have sought the death penalty if he had known about Cook's background of severe childhood abuse and mental disorders.<sup>115</sup>
- 24 October 2012, Bobby Hines was executed in Texas. He was 40 and had been sentenced to death at the age of 19. The jury that sentenced him to death heard no expert mitigation evidence about the impacts of his severely abusive childhood.<sup>116</sup>
- 12 June 2013 – William Van Poyck was executed in Florida after 25 years on death row. Claims persisted that he received inadequate legal representation at trial and that he was not the "triggerman". The alleged gunman died in custody in 1999, apparently beaten to death by guards.<sup>117</sup>
- 5 August 2013 – John Ferguson was executed in Florida despite his decades-long history of mental illness. He had been on death row for 35 years.<sup>118</sup>
- The day before John Ferguson was executed, Ohio death row inmate Billy Slagle was found hanged in his cell. Billy Slagle, who was 18 years old at the time of the crime for which he was facing execution on 7 August 2013, had been incarcerated for all but eight months of his adult life, and had spent the past quarter of a century on death row. His request to have his death sentence commuted to life imprisonment without the possibility of parole was rejected, despite the current prosecutor of the county where he was tried, and one of the Ohio Supreme Court judges who had dissented from that court's affirmation of Billy Slagle's death sentence in 1992, supporting clemency.<sup>119</sup>

The federal government should lend no support to efforts to speed up executions, but instead encourage states to turn away from judicial killing altogether. Florida, for example, has passed legislation called the Timely Justice Act, aimed in part as speeding up the pace of executions.<sup>120</sup> In August 2013, the State of Arizona initiated legal proceedings against the US Attorney General alleging "undue delay in handling Arizona's request for acceleration status in the processing of capital punishment appeals, through the federal process known as Habeas Corpus". The Arizona Attorney General claimed that such delays victimize the families of murder victims a second time by denying them an execution within a reasonable time.<sup>121</sup> Authorities in Arizona and elsewhere should reflect on the fact not only do most murders not result in a death sentence, but also that there are many relatives of murder victims who oppose the death penalty, including because it "complicates grieving and interferes with healing",<sup>122</sup> and "costs millions of dollars that could be used to help victims' family members after the murder, solve cold cases, treat people with severe mental illness, and support law enforcement. We view the death penalty as a violation of human rights, and reject the idea that justice for victims' families comes from the taking of another life."<sup>123</sup>

In addition to the USA's reservation to article 16 of the UN Convention against Torture, it lodged the following "understanding" to its ratification, making clear its view that the death penalty was a purely domestic matter:

"the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States

from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.”

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

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

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

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

Yet, on 3 July 2013, in its pre-session responses, the Obama administration told the Committee that the USA had no plan to withdraw, or even to review the reservations.<sup>124</sup>

The USA’s reservation to the prohibition of cruel, inhuman or degrading treatment or punishment, originally formulated at least in part as an execution facilitator has since been a part of the USA’s flawed legal justification given for the abuse of detainees in US custody. In a number of then secret Department of Justice memorandums issued from 2002 to 2007 giving legal approval for interrogation techniques and detention conditions that violated the international prohibition of torture or other ill-treatment against detainees held in CIA or military custody, government lawyers repeatedly cited the reservations the USA attached to article 16 of UNCAT and article 7 of the ICCPR.<sup>125</sup> This was no longer about the death penalty against convicted prisoners, but about the torture and other ill-treatment of detainees held indefinitely without charge or trial for interrogation, including at undisclosed locations where they were subject to enforced disappearance.

## 7. SINKING TO AN OLD LOW – PURSUING DEATH BY MILITARY COMMISSION

*When their capture was revealed, members of Congress and the media demanded the death penalty, even though no law authorized capital punishment for their crimes... [President] Roosevelt was determined to execute the saboteurs... [Attorney General] Biddle summarized the advantages of a military commission for Roosevelt: speed, easier standards of proof, and the availability of the death penalty... Biddle did not commit to writing another important consideration, secrecy, but he did confide it to [Secretary of War] Stimson*  
John Yoo, Deputy Assistant Attorney General (2001-2003)<sup>126</sup>

In June 1942, eight suspected Nazi saboteurs were captured in the USA. During the trial, the US Supreme Court ruled the military commission legal. A few days later, the military

commission pronounced the defendants guilty and less than a week after that, on 8 August 1942, six of them, all German nationals, were killed in the electric chair in Washington, DC.

In his memoirs published in 2010, former President George W. Bush wrote that the military commission system he authorized by executive order on 13 November 2001, was “based closely on the one created by FDR [Franklin Delano Roosevelt] in 1942 which tried and convicted eight Nazi spies who had infiltrated the United States. The Supreme Court had unanimously upheld the legality of those tribunals... I was confident the military tribunals would provide a fair trial”.<sup>127</sup>

In *Hamdan v. Rumsfeld*, the US Supreme Court overturned the Bush military commission system because its “structure and procedures” violated US and international law. Rather than abandon the military commission experiment, however, the Bush administration turned to Congress to authorize it, which it did in the Military Commissions Act (MCA) of 2006. And after taking office, again rather than abandoning this system, the Obama administration simply revised it under the MCA of 2009.

The military commissions are discriminatory – applying lower standards of justice to foreign nationals, no US citizen could be tried under the MCA. And they lack structural independence from the political branches of government, the same branches of government that have been responsible for human rights violations committed, with impunity, against those who will appear as defendants.

As of today, the US administration is intending to seek the death penalty against six of the foreign nationals currently held at the US naval base at Guantánamo Bay, Cuba, if it obtains their convictions at trials brought under the MCA.<sup>128</sup> The Human Rights Committee has emphasised that “the imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).”<sup>129</sup> Any use of the death penalty based on these military commission trials would be a violation of the right to life.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has concluded that “Military or other special jurisdictions are ill-suited to ensuring full compliance with fair trial standards as required in capital cases. They should not have the power to impose sentences of death on anyone.”<sup>130</sup>

Amnesty International considers that the creation and use of military commissions by the USA to try Guantánamo detainees is incompatible with international human rights. The UN Basic Principles on the Independence of the Judiciary state:

“everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”.<sup>131</sup>

Even the military judge overseeing current military commission proceedings at Guantánamo has acknowledged that these are lesser tribunals than a US citizen accused of the same crimes would face. At a pre-trial hearing on 9 November 2011, asked about how he saw his role in ensuring a fair trial, military commission judge US Army Colonel James Pohl noted that “one might say there may be certain gaps that are not present in other more developed systems”, and that “in that sense, it is somewhat a unique system”<sup>132</sup>

The Human Rights Committee has stated, in its General Comment interpreting the right to a fair trial under the ICCPR, that the trial of civilians by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.<sup>133</sup> The UN Special Rapporteur on the

independence of judges and lawyers has said that in the course of his mandate, he has had “the opportunity to examine situations in which restrictions imposed on the operation of the justice system have led to arbitrary detentions and unfair trials. There are situations which involve, for example, the transfer of jurisdiction to military tribunals... Detentions and trials related to terrorism raise special concerns about judicial procedure.”<sup>134</sup>

There were, briefly, indications that the Obama administration would bring five of the six men now facing death penalty trials by military commission to trial in a regular criminal court. On 13 November 2009, Attorney General Holder announced that the five detainees – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, ‘Ali ‘Abd al-‘Aziz and Mustafa al Hawsawi – would be transferred from Guantánamo for prosecution in ordinary federal court, “before an impartial jury under long-established rules and procedures”. On 4 April 2011, however, Attorney General Holder announced that the five men would be charged for trial by military commission. He had previously noted that the military commissions did not have the same “time-tested track record of civilian courts.”<sup>135</sup> Why then, would the US authorities risk prosecuting anyone, let alone in one of the highest profile cases in decades, in an essentially untested tribunal, which lacked the institutional independence of the ordinary federal judiciary, and which by any measure failed to include the full range of fair trial procedural guarantees recognized as necessary in trials before the ordinary courts? The reason is domestic politics, not legal necessity.

Asked in 2009 about the views of those offended by the prospect of the trial being conducted in federal court where the constitutional protections afforded to US citizens would apply, President Obama responded: “I don’t think it will be offensive at all when he's convicted and when the death penalty is applied to him”. This comment was disturbing on a number of levels, not least that the President is the final clemency authority in federal and military capital cases, has ultimate constitutional authority over the military commission system as Commander in Chief of the Armed Forces.

In 1942, amidst political and public support for vengeance, the trial by military commission of the eight Nazi saboteurs was conducted, in an FBI assembly room on the fifth floor of the Justice Department... in total secrecy, and the windows were covered in heavy black curtains to block all daylight.<sup>136</sup> Sixty years later, on 6 December 2012, Colonel Pohl issued a protective order to protect classified information during the capital trial and pre-trial of the five defendants charged with involvement in the 9/11 attacks. Among other things, this order aims to prevent public disclosure of which “foreign countries” the five detainees were held in for years by the CIA prior to their transfer to Guantánamo; which “enhanced interrogation techniques” were used against them, including “descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations”; the “names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation” of the detainees; and descriptions of the “conditions of confinement.” This applies, “without limitation” to the “observations and experiences” of the detainees themselves – subjected in secret US detention to crimes under international law, and facing trial proceedings that do not comply with international fair trial standards, and a government seeking to obtain death sentences against them. To prevent disclosure of such information at any trial proceedings, there will be a 40-second delay in broadcast from the courtroom to the public gallery.<sup>137</sup>

On 19 August 2013, Colonel Pohl ordered the five capital defendants from the courtroom while he held a secret hearing on a classified government motion – even the title of the motion was not publicly known, only its number AE 052.<sup>138</sup> Colonel Pohl denied defence requests not to close the hearing and for the government to explain why the information in the motion was classified, and the secret hearing went ahead.<sup>139</sup>

The USA's growing isolation on the death penalty – and the damage to human rights principles caused by its post-9/11 counter-terrorism policies – can only deepen if the government obtains death sentences after unfair military commission trials.

## **8. 'SHOULD SUCH A SENSITIVE ISSUE BE DECIDED BY MAJORITY RULE?'**

*Regardless of opinion polls, the State party should favourably consider abolishing the death penalty and inform the public, as necessary, about the desirability of abolition*  
UN Human Rights Committee, December 2008

In federal court in 2011, seeking dismissal of a defence motion arguing that state-level abolition should be a factor considered by the federal government in its decision as to whether to pursue the death penalty under federal jurisdiction, the administration noted:

"The death penalty is unavailable in sixteen states [now 18], but this is not necessarily a barometer for voter opinions about the death penalty in those states. The death penalty has been banned by certain state legislatures and courts notwithstanding contrary popular opinion."<sup>140</sup>

This contrasts with what the US authorities emphasise on the international stage, where they have repeatedly justified the death penalty as democracy in action.<sup>141</sup> This is likely to be a response to any treaty monitoring body that calls on authorities in the USA to work for a moratorium on executions and abolition of the death penalty. The Obama administration gave such a response in June 2013 to a call from the UN Committee on the Elimination of Racial Discrimination for a moratorium; "there is vigorous public debate in the United States on the death penalty", but "the use of the death penalty is a decision left to democratically elected governments at the federal and state levels", the administration asserted.<sup>142</sup>

This has now been going on for years. The Clinton administration told the Human Rights Committee in 1994 that: "The majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country."<sup>143</sup> During review of the US report, a member of the Human Rights Committee specifically raised his concern with the US delegation about this paragraph, stating that it was difficult to accept this "subjective affirmation" of the death penalty, and asking whether even if accurate "should such a sensitive issue be decided by majority rule?"<sup>144</sup> The question remains a valid one, and as the Human Rights Committee told Japan in 2008 after considering that country's Fifth Periodic Report under the ICCPR: "Regardless of opinion polls, the State party should favourably consider abolishing the death penalty and inform the public, as necessary, about the desirability of abolition".<sup>145</sup>

In many countries around the world and in several US states, abolition of the death penalty has been achieved through courageous political decisions that have gradually encouraged a shift in public opinion. While the world is moving away from the death penalty, authorities in the USA all too often appear to lack the political will to take steps towards abolition. They have utterly failed to provide a human rights framework for public debate by neglecting to stress the human rights issues central to any discussion of the death penalty.

## **9. A QUESTION OF HUMAN RIGHTS LEADERSHIP**

*My decision to grant a reprieve to Offender No. 89148 is not out of compassion or sympathy for him or any other inmate sentenced to death. The crimes are horrendous and the pain and suffering inflicted are indescribable... [But] we now have the benefit of information that exposes an inequitable system. It is a legitimate question whether we as a state should be taking lives... [The] question is about the death penalty, and not about Offender No. 89148*

Colorado Governor John Hickenlooper, Executive Order, 22 May 2013

Instead of recognizing any human rights imperative to lead the country down an abolitionist path, the US government has repeatedly taken action that protects the death penalty. As well as involving itself in litigation in state capital cases aimed at or having the effect of

facilitating executions, it passed the AEDPA so that death row prisoners would “no longer be able to use endless appeals to delay their sentences”, as President Clinton put it. The federal government has hardly been a passive observer as the cruelty and injustice of the country’s capital justice system has unfolded.

To the extent that the USA’s Fourth Periodic Report mentions federal intervention in state cases, it accentuates the positive, to say the least. It reminds the Human Rights Committee that the US administration filed *amicus curiae* (friend of the court) briefs in the US Supreme Court in support of two Mexican nationals denied their consular rights after arrest and in 2008 and 2011, respectively, facing execution in Texas in violation of international law. However, the USA has failed to mention, in any of its periodic reports under the ICCPR since 1995, the many more occasions on which the administration filed briefs in support of the executing state. Some of these interventions are listed in Appendix 1.

Numerous judges, Supreme Court Justices among them, have argued over the years that the effort to defeat arbitrariness in the system’s selection of a relatively tiny number of death penalty cases from the thousands of murders in the USA each year has failed.<sup>146</sup> Earlier this year, for example, retired Delaware Superior Court Judge Norman Barron, acknowledging that he used to be known as the “hanging judge” for his willingness to impose death sentences, referred to the “hit-or-miss reality of the death penalty”. Revealing that he had changed his mind about capital punishment, he wrote that the application of the death penalty is “quirky and capricious... In other words, it is impossible to justify why some murderers receive the death penalty while others, whose crimes are arguably worse in degree or savagery, do not.”<sup>147</sup> Then in July 2013, writing in his final capital case before retiring after three and a half decades on the US Court of Appeals for the Sixth Circuit, Judge Boyce Martin wrote that the death penalty is “an arbitrary, biased, and broken criminal justice tool”.<sup>148</sup> Even more recently, another Sixth Circuit judge asserted that there could no longer be any claim “that there is any uniformity from state to state in the administration of the death penalty”.<sup>149</sup>

The US administration, on the other hand, seems more willing to rely on the USA’s past use of the death penalty as a reason to continue it into the future rather than recognizing the evidence of its fundamental flaws and the growing international consensus against it. “Like the States”, the US administration told the Supreme Court in 2007 when intervening in a Kentucky case to advocate for an end to the national moratorium on lethal injections imposed by the Court while it considered Kentucky’s three-drug execution protocol, “the federal government has conducted executions since the Nation’s founding”.<sup>150</sup>

In May 2008 in that case, the Court upheld lethal injection and some 240 prisoners have been killed by this method since then. It was in this ruling that Justice Stevens – who in 1976 had voted with the majority in *Gregg v. Georgia* to approve new capital laws, thereby ending the moratorium on executions imposed four years earlier – took the opportunity to announce that after more than three decades on the Court he had concluded that executions amounted to the “pointless and needless extinction of life”. The USA’s continuing resort to the death penalty, he suggested, was the product of “habit and inattention” on the part of the federal and state governments rather than informed deliberation.<sup>151</sup>

Four US states have broken the habit since then and legislated to abolish the death penalty – New Mexico (2009), Illinois (2011), Connecticut (2012) and Maryland earlier this year.<sup>152</sup> Somewhat puncturing the notion that US state-level politicians operate only with an eye on domestic opinion, the USA’s growing isolation on the death penalty has been expressly recognized in these states as they have abolished this punishment. “From an international human rights perspective”, said New Mexico’s Governor Bill Richardson in 2009 when signing the abolitionist bill in his state, “there is no reason the United States should be behind the rest of the world on this issue”. Two years later, Governor Pat Quinn of Illinois asserted that “we are taking an important step forward in our history as Illinois joins the 15 other states and many nations of the world that have abolished the death penalty”. In 2012

Connecticut Governor Dannel P. Malloy promised to sign his state's abolitionist bill into law, saying that his state would be thereby joining the "16 other states and almost every other industrialized nation in moving toward what I believe is better public policy".

When he announced in January 2013 that he was sending his state's legislature an abolitionist bill, Maryland's Governor Martin O'Malley also pointed to the global picture, emphasising that abolitionist countries were "a much more expansive community than the number who still use the death penalty". He asked: "So who do we choose to be? In whose company do we choose to walk forward?" adding that "the way forward is always found through greater respect for the human dignity of all." The state legislature voted for abolition and in October 2013, Maryland will become the 18<sup>th</sup> abolitionist state in the USA when the legislation signed into law by Governor O'Malley in May takes force.<sup>153</sup>

Like the international picture, a small number of US states account for the vast majority of US executions. Nearly 75 per cent of the more than 1,000 executions since 1994 have been carried out in just seven states (Texas, Oklahoma, Virginia, Missouri, Ohio, Alabama and Florida). Maryland executed five prisoners between 1976 and 2013. Texas, in contrast, conducted its 500<sup>th</sup> post-*Gregg* execution on 26 June 2013.<sup>154</sup> Nearly one in five people executed in the USA since 1976 were convicted in just four Texas counties.<sup>155</sup> Having conducted more than one in three of the USA's executions since 1977, it is beyond denial that Texas sets a bad example on human rights and the notion of "evolving standards of decency that mark the progress of a maturing society", in US Supreme Court parlance.<sup>156</sup>

In its Fourth Periodic Report the US administration reports that it wrote to "relevant Texas authorities, including the Governor" to stay the execution in 2011 of Mexican national Humberto Leal García, but that Texas had "declined" and the execution went ahead, in violation of international law.<sup>157</sup> After the US Supreme Court had three years earlier refused to stop the execution of another Mexican national and left it to Texas to ensure that the USA met its international obligations in the case, Amnesty International suggested that leaving Texas to protect the rights of death row inmates was akin to leaving the fox in charge of the henhouse.<sup>158</sup> True to form, Texas killed José Ernesto Medellín in its death chamber, again in violation of international law.<sup>159</sup>

Prisoners with compelling claims of "mental retardation" have been executed in Texas since the US Supreme Court banned the practice but left it up to states as to how to comply with the ruling.<sup>160</sup> The state also continues to pursue the execution of individuals with serious mental illness. On 21 August 2013 it came a little closer to being able to get Scott Panetti, a man with a history of serious mental illness, into its execution chamber, something it has been trying to do for the past two decades.<sup>161</sup>

Until 2005, Texas led the USA's flouting of the international prohibition on the execution of individuals who were under 18 at the time of the crime. It was facilitated by the federal government, not only by the reservation to the ICCPR, but also by the Clinton administration's successful plea to the Supreme Court in 1999 not to review the legality of such executions. Until the Supreme Court belatedly stepped in and banned this practice in 2005, Texas accounted for 13 of the 22 such executions carried out in the USA since 1977. The Supreme Court recognized the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility associated with youth, as well as the susceptibility of young people to "outside pressures, including peer pressure". It also noted that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18". Indeed, scientific research shows that brain development continues into a person's 20s.

Of the more than 500 people executed in Texas since 1976, at least 75 were teenagers (17, 18 or 19) at the time of the crime.<sup>162</sup> Since 2005, it has executed 26 individuals who were 18 or 19 at the time of the crime. While not a violation of any explicit provision of international law, the Texas justice system is nevertheless still displaying an unwillingness to

recognize the mitigating effects of youth. The federal government cannot be relied upon to be a positive role model either. Among those convicted in federal court in Texas and sentenced to death are Brandon Bernard and Christopher Vialva, 18 and 19 years old respectively at the time of the crime for which they were sent to federal death row in 2000.

The use of this punishment against teenaged offenders in Texas displays marked racial disparities. Twenty-seven of the 75 people executed for crimes committed when they were teenagers were African Americans convicted of killing whites.<sup>163</sup> Brandon Bernard and Christopher Vialva are black, convicted of killing a white couple in Texas in 1999.

At the same time as Texas and other executing states in the USA have failed to move towards abolition, some state officials have begun to act against the death penalty and to provide the leadership so sorely lacking elsewhere. In November 2011, declaring a moratorium on executions for the duration of his remaining time in office, Oregon's Governor John Kitzhaber noted that since his state last executed a prisoner in 1997, "a growing number of states have reconsidered their approach to capital punishment given public concern, evidence of wrongful convictions, the unequal application of the law, the expense of the process and other issues... It is time for Oregon to consider a different approach. I refuse to be a part of this compromised and inequitable system any longer; and I will not allow further executions while I am Governor."<sup>164</sup>

Without the necessary leadership at the national level, however, the USA's progress towards abolition will remain slow and vulnerable to setbacks, especially in the face of particular crimes and the publicity they receive. The bombing at the Boston Marathon in Massachusetts on 15 April 2013, for example, led to calls from state legislators for reinstatement of the death penalty in Massachusetts, abolitionist since 1984. The day after the federal government charged the surviving suspect, 19-year-old Dzhokhar A. Tsarnaev, with offences carrying the death penalty,<sup>165</sup> a member of the House Judiciary Committee argued that "we have this option on the federal side. We should have the same option on the state side for the same reasons".<sup>166</sup> On 27 June 2013, the federal prosecutor said that 17 of the 30 charges against Dzhokhar Tsarnaev authorize the death penalty as a possible punishment.<sup>167</sup>

That the federal government continues to set a negative example was also illustrated in a media article written in March 2013 by a local prosecutor in Colorado, District Attorney George Brauchler, in which he presented reasons for Colorado to keep the death penalty:

"President Obama's Department of Justice is currently seeking death in two separate prison murders in Colorado. These are not the murders of prison guards by an inmate, but rather murders of inmates by other inmates. Why should the penalty for murdering a federal prisoner dramatically exceed the penalty for killing one of Colorado's prison guards?"<sup>168</sup>

Five days earlier, an abolitionist initiative had failed in the state legislature effort. One of the legislators who voted against the bill said nevertheless that she knew "in [her] heart" that abolition "is the right thing to do" and that "we should repeal the death penalty".<sup>169</sup> Moreover, a new study has concluded that Colorado's capital justice system "fails to satisfy the constitutional imperative of creating clear statutory standards for distinguishing between the few that are executed and the many who commit murder".<sup>170</sup>

In an executive order issued earlier in 2013, the Governor of Colorado had granted an indefinite reprieve to a state prisoner who scheduled for execution in August. Governor John Hickenlooper had pointed to the question of arbitrariness, adding that "As one former Colorado judge said to us, '[The death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, perhaps the race or economic circumstance of the defendant.'" The governor referred to the national and international trends towards abolition:

“Many other states and nations have come to the conclusion that the death penalty does not work. Maryland, Connecticut, New Jersey, Illinois and New Mexico recently repealed the death penalty.... Internationally, the United States is one of only a handful of developed countries that still uses the death penalty as a form of punishment. Approximately two-thirds of countries worldwide have abolished the death penalty in law or in practice, largely due to concerns regarding human rights violations.”<sup>171</sup>

In his 25 July 2013 opinion mentioned above, Sixth Circuit Judge Boyce Martin recalled the stance taken by the now retired Supreme Court Justice John Paul Stevens:

“I have been on this bench since 1979, and for twenty-three of my thirty-four years as a judge on this Court this case [of a Tennessee death row inmate convicted in 1990] has been moving through our justice system, consuming countless judicial hours, money, legal resources, and providing no closure for the families of the victims. Retired Supreme Court Justice John Paul Stevens has called for a dispassionate and impartial comparison of the enormous cost that death penalty litigation imposes on society with the benefits it produces. The time, money, and energy spent trying to secure the death of this defendant would have been better spent improving this country’s mental-health and educational institutions, which may help prevent crimes such as the ones we are presented with today.”<sup>172</sup>

The reasons for recent abolitionist moves in various states have been multi-faceted – with legislators and governors pointing to arbitrariness, discrimination, costs, the failure of deterrence, and the risk of irrevocable error among their reasons for getting rid of the death penalty. In contrast, the federal government has failed to provide human rights leadership. In 2006, for example, a few months after the Bush administration filed the USA’s combined Second and Third Periodic Reports under the ICCPR, federal prosecutors successfully saw off a defence challenge to the government’s pursuit of the death penalty in a federal trial in New York. The defence challenge included the marked geographic and racial disparities in the application of the federal death penalty, as well as the risk of irrevocable error. On this latter point, the Bush administration responded:

“The historical record...shows that opponents of the death penalty have fecklessly raised the spectre of executing an innocent person for as long as the death penalty debate has raged... The existence of a federal death penalty for most of the country’s history... show[s] that the opportunity of a criminal defendant to exonerate himself in perpetuity has simply never been of a constitutional dimension... Any doubt about the constitutionality of the death penalty despite the possibility of error in the criminal justice system was put to rest in *Gregg*...”<sup>173</sup>

Accusing death penalty opponents of “fecklessness” hardly seems a suitable response to the more than 100 prisoners (now over 140) who had by then been released from death rows around the country since 1973 on grounds of innocence, most of them having spent many years under sentence of death. In his 2008 opinion revealing his conclusions on the death penalty, Justice Stevens wrote:

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

The Obama administration has said that it “is committed to promoting, supporting and defending human rights”. In its “commitment to action”, it asserts that “positive change must be reinforced and strengthened over time” and “where human lives hang in the

balance, the US will do all it can to tilt situations toward a future of hope and dignity".<sup>174</sup>

Since 2007, six states in the USA have become abolitionist, while 32 retain the death penalty. The US government has failed to act to build on this positive change. In the same period, the UN General Assembly has adopted four resolutions calling for the establishment of a moratorium on executions with a view to abolition. In these resolutions, the international community has said that the death penalty undermines human dignity and that ending it contributes to the enhancement and progressive development of human rights. The US government has failed to act to tilt the situation toward a future of greater respect for human dignity and human rights.

During the coming examination by the UN Human Rights Committee, the US administration should reflect on its failure to provide the Committee with the real picture of the death penalty in the USA, including the extent of the federal government's role in it. And in addition to answering the Committee's questions, the administration should answer the question posed by Maryland's Governor earlier this year. Whose company does the USA choose to keep – the majority of countries that have turned their backs on judicial killing, or the minority that continues to choose a public policy that is incompatible with human dignity and fraught with arbitrariness, discrimination and error in its application?

## 10. RECOMMENDATIONS FOR A FUNDAMENTAL CHANGE IN DIRECTION

*It is fairly well proven, I think, that capital punishment is ineffective in preventing crime; and since our whole system of law is based on trying to bring about justice, capital punishment has always seemed to me a very ineffectual way of achieving that goal*

Eleanor Roosevelt, February 1960<sup>175</sup>

Amnesty International opposes the death penalty unconditionally, in all cases and all countries. It seeks global abolition of this cruel and brutalizing punishment and a moratorium on executions pending abolition.

While the existence of the death penalty is recognized under international human rights law, the desirability of a future without capital punishment is contained within Article 6 of the ICCPR. The Inter-American Court of Human Rights has described such an approach to abolition, which it found under the American Convention on Human Rights, as "incremental in character."<sup>176</sup> An incremental approach to abolition requires government action consistent with this goal. Three dozen years after the USA signed the ICCPR and 21 years after it ratified it, the US government continues to fail in this regard.

When the US Senate Committee on Foreign Relations recommended ratification of the ICCPR 21 years ago, it asserted that:

"Ratification will enable the United States to participate in the work of the Human Rights Committee established by the Covenant to monitor compliance. Since its creation in 1977, the Human Rights Committee has established an impressive record and has become an important element in the UN human rights system... [T]he United States will not only further enhance the effectiveness of the Human Rights Committee but also have an opportunity to play a more aggressive role in the process of enforcing compliance with the Covenant".<sup>177</sup>

Since reviewing the USA's first report to it 1995, the Human Rights Committee has called on the USA to work towards abolition. In 1998, following a mission to the USA, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions also called for a moratorium. He noted that "the desirability of [the death penalty's] 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."<sup>178</sup>

Pending full abolition of the death penalty in the USA, Amnesty International calls upon the US administration to:

- ☑ Publicly acknowledge the abolitionist outlook of Article 6 of the International Covenant on Civil and Political Rights and commit to meeting that goal;
- ☑ Follow its 2010 memorandum to state governors on treaty reporting<sup>179</sup> by calling on US death penalty states to act upon the Human Rights Committee's 1982 General Comment 6 on the desirability of abolition under ICCPR and ensuring that the states are aware of the Committee's recommendation to the USA in 1995 and 2006 for a moratorium on executions pending abolition;
- ☑ Impose a moratorium on federal and military executions, consistent with recommendations from the Human Rights Committee, the Committee for the Elimination of Discrimination, the Inter-American Commission on Human Rights, and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and the four UN General Assembly resolutions on a moratorium on the use of the death penalty;
- ☑ Commute the death sentences of those on federal death row. 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", and US Supreme Court precedent provides for a broad interpretation of this power.<sup>180</sup>
- ☑ Work with Congress to withdraw all reservations and other limiting conditions made upon ratification of the ICCPR and the UN Convention against Torture;
- ☑ Work with Congress to repeal all federal death penalty legislation;
- ☑ Immediately withdraw any existing authorization for federal prosecutors to seek death sentences and to cease any further such approvals;
- ☑ Abandon military commission trials, and drop pursuit of the death penalty against any detainee currently held at Guantánamo;
- ☑ Cease filing *amicus curiae* briefs in support of states seeking to have death sentences upheld and executions facilitated;
- ☑ If invited by the US Supreme Court to give the administration's view on a question arising in a capital case, ensure that the response makes clear that the US administration is working for abolition of the death penalty in line with the recommendations from international treaty monitoring bodies and others;
- ☑ Cease assisting states in their efforts to obtain drugs for lethal injections and do all possible to block states acquiring such drugs for use in judicial executions;
- ☑ Do nothing in support of any efforts by any state to expedite or facilitate executions of prisoners on death row;
- ☑ Work with state authorities to develop concrete plans to abolish the death penalty;
- ☑ Develop a public information programme on the death penalty aimed at raising public awareness of the death penalty as a human rights issue.

## APPENDIX 1: FEDERAL LITIGATION IN STATE DEATH PENALTY CASES

*[U]nless reversed, that decision is likely to interfere with state enforcement of capital punishment... The judgment of the court of appeals should be reversed*  
Reagan administration brief, US Supreme Court, August 1984<sup>181</sup>

The following chronology lists some federal interventions in state capital cases. Most were in the form of *amicus curiae* briefs filed in the Supreme Court by the US Solicitor General at the Department of Justice, sometimes in response to the Court's request for the view of US government on the question before it. Amnesty International takes no position here on the domestic law arguments made in the administration's various briefs. The organization only seeks to illustrate how successive administrations have promoted judicial killing rather than human rights principles. It is this approach that should change.

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**1983 – *Strickland v. Washington*.** The Reagan administration urged the Supreme Court to reverse a Court of Appeals ruling that a Florida death row prisoner's legal representation at trial had been inadequate. In its brief, the administration asserted that it had an interest in the outcome because "claims of ineffective assistance of counsel are raised with increasing frequency in federal criminal cases". It argued that for a successful appeal on this issue, not only should the performance of the lawyer have fallen "measurably below the range of competence demanded of defense counsel", but it would also have to be shown that "substantial prejudice resulted". The administration urged the Court to resist "any temptation to deal broadly and abstractly with the general subject of ineffective assistance of counsel".<sup>182</sup> The Supreme Court reversed the Court of Appeals, holding that to be successful on such a claim, the defendant "must show that counsel's representation fell below an objective standard of reasonableness", and "judicial scrutiny of counsel's performance must be highly deferential" and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". In addition, "the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>183</sup> The prisoner in question was executed three months later, and the 1984 *Strickland v. Washington* ruling has allowed many other condemned prisoners with compelling claims of inadequate legal representation to go to their deaths in state execution chambers since.

**1984 – *Heckler v. Chaney*.** The US Supreme Court decided to review the lower court decision in a case brought on behalf of death row prisoners in Oklahoma and Texas arguing that the federal Food and Drug Administration (FDA) should block their execution by lethal injection because the drugs used in such executions were not approved for this use and would be administered by untrained personnel. The US Court of Appeals had held that FDA refusal to act had been "irrational", its reasoning "arbitrary and capricious", and that evidence that the lethal injection drugs "could lead to a cruel and protracted death was entitled to more searching consideration". The Reagan administration argued that the FDA actions were not subject to judicial review and that the Supreme Court should reverse the Court of Appeals. It warned that if the ruling was allowed to stand, it would likely "interfere with state enforcement of capital punishment statutes that satisfy the Eighth Amendment standards" and could end up "prevent[ing] executions by lethal injection altogether".<sup>184</sup> In 1985 the Supreme Court held that the FDA's refusal to take various investigatory and enforcement actions on lethal injection drugs was not subject to judicial review.<sup>185</sup> More than 1,000 executions by lethal injection have been carried out in the USA since the ruling, and in recent years evidence was uncovered that state three-drug lethal injection protocols had put prisoners at risk of serious pain during executions, with any such pain normally hidden from observers by a chemical veil. One of the prisoners on the lawsuit brought against the FDA was Robyn Lee Parks, who was subsequently executed on 10 March 1992 in Oklahoma. According to a media observer's report of the execution, Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the lethal injection began, the muscles in his jaw, neck, and abdomen went into spasms for about 45 seconds. Parks continued to gasp and violently gag until death came, some 11 minutes after the drugs were first administered. Three of the other plaintiffs in the *Heckler* lawsuit were also executed.

**1991 – *Payne v. Tennessee*.** The administration of President George H.W. Bush filed a brief in the US Supreme Court in support of the State of Tennessee's efforts to have the Court overturn *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989), prohibiting the introduction of "victim impact" testimony at capital trials.<sup>186</sup> In *Booth*,

the Supreme Court had said that “One can understand the grief and anger of the family... [b]ut the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.” In 1991, in *Payne v. Tennessee*, the Court (with some new Justices) reversed itself and ruled that victim impact testimony was admissible. Two dissenting Justices argued that “Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.” A third dissenting Justice argued that “Our cases provide no support whatsoever for the majority’s conclusion that the prosecutor may introduce evidence that sheds no light on the defendant’s guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.” Pervis Payne remains on death row in Tennessee, where he was sent in 1987. As has been pointed out, “not surprisingly, the overwhelming number of death penalty jurisdictions in the United States seized on *Payne* to permit victim impact testimony in capital penalty trials. A 1999 survey of practice in those jurisdictions found that trial judges exercise virtually no control over what came in through victim testimony and that prosecutors were coming increasingly to rely on the ‘emotionally potent’ testimony of family and friends of the murder victim, as if ‘victim impact’ itself were some kind of nonstatutory, catch-all aggravating factor sufficient to justify the death penalty”.<sup>187</sup>

**1996 – *Felker v. Turpin*.** After President Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA) into law in April 1996, the administration was invited by the US Supreme Court to file the government’s views after Georgia death row inmate Ellis Felker challenged the Act’s constitutionality. The Court stopped Felker’s execution hours before it was due to be carried out in May. In its brief to the Court, the Clinton administration argued that the AEDPA was constitutional, and the US Supreme Court agreed on 28 June and lifted Felker’s stay of execution. The state of Georgia waited until after the Olympic Games, which were taking place in Georgia that summer, before setting a new execution date in September. Immediately prior to Felker’s scheduled execution on 10 September 1996 the prosecution admitted that it had withheld evidence from the defence and handed over five crates of materials. The courts granted Felker two 48-hour stays of execution, followed by a 40-day stay to allow his lawyers defence to examine the new evidence. Felker was within minutes of execution when the first stay was issued. His leg and head had been shaved in preparation for his electrocution. After the stays expired, a new execution date of 14 November 1996 was set, with Felker’s attorneys protesting that they had had inadequate time. The US Supreme Court issued a stay of execution on 14 November, minutes before the execution, again with Felker having had his leg and head shaved for his execution. A few hours later, the Supreme Court lifted the stay and Felker was executed.

**1999 – *Domingues v. Nevada*.** Invited by the US Supreme Court to express its views on whether executing individuals for crimes committed when they were under 18 years old violated international law (Michael Domingues was 16 at the time of the crime) the Clinton administration urged the Court not to review the question.<sup>188</sup> The Court agreed and dismissed the case. Nine more offenders were executed in the USA for crimes committed when they were children – in clear violation of international law – before the Court finally agreed to review the matter and ruled in 2005 that such executions were unconstitutional.

**2001 – *Mickens v. Taylor*.** On the grounds that “claims of ineffective assistance of counsel are frequently asserted” on appeal in federal cases, the administration of President George W. Bush declared an interest in the outcome of the appeal brought to the US Supreme Court by Walter Mickens, an inmate on state death row in Virginia.<sup>189</sup> Walter Mickens had been sentenced to death in 1993 for the murder of Timothy Hall. At the time Hall died, he was facing weapons and assault charges. The judge dismissed the charges because of Hall’s death. On the next working day, the same judge appointed the lawyer who had been representing Hall to represent Mickens. Neither the judge nor the lawyer disclosed to Mickens that he was being defended by the lawyer of the murder victim. The matter remained undisclosed until it was discovered years later by Walter Mickens’s appeal lawyer. The US Supreme Court agreed to review the case and the Bush administration filed an amicus curiae brief in support of Virginia urging the Court to uphold the death sentence.<sup>190</sup> The Court did so. Four of the nine Justices dissented, arguing that Mickens should get a new trial. Justice Stevens wrote “Mickens had a constitutional right to the services of an attorney devoted solely to his interests... A rule that allows the State to foist a murder victim’s lawyer onto his accused is not only capricious; it poisons the integrity of our adversary system of justice.” Walter Mickens was executed, in violation of the ICCPR.<sup>191</sup>

**2002 – *Bell v. Cone*.** Declaring the federal government’s interest in the outcome of a case in Tennessee in which the defendant had been sentenced to death after his trial lawyer had presented no witnesses and made no closing argument at the sentencing phase, the Bush administration filed a brief in the US Supreme Court urging it to reverse

the lower court finding that the defendant had been denied constitutionally adequate legal representation.<sup>192</sup> Applying standards under the 1984 *Strickland v. Washington* ruling and the AEDPA, the Supreme Court reversed the Court of Appeals. Gary Cone remains on Tennessee's death row, where he was first sent over 30 years ago.<sup>193</sup>

**2002 – *In re Taylor + In re Wischkaemper*.** Invited by the US Supreme Court to express its views on whether federal law provided state death row prisoners with the right for federally appointed and funded legal representation in state clemency proceedings, the US administration urged the Court not to review the matter. The Court agreed not to. The question was brought by lawyers who had represented a number of Texas death row inmates executed after the state authorities had denied clemency. One was Odell Barnes, executed despite doubts about his guilt;<sup>194</sup> another was Juan Soria, executed despite evidence that he was mentally “incompetent”.<sup>195</sup>

**2003 – *Wiggins v. Smith*.** Once again asserting an interest in a state case involving a strong claim of inadequate legal representation of a capital defendant – on the grounds that “claims of ineffective assistance of counsel are frequently asserted on collateral review in federal criminal cases” – the Bush administration supported Maryland's efforts to have a decision by the US Court of Appeals for the Fourth Circuit upheld by the US Supreme Court.<sup>196</sup> In contrast to the Bush administration's argument that the performance of the lawyer in question had been adequate, including the lawyer's lack of investigation into his client's background, and that the death sentence should be upheld under the *Strickland v. Washington* deferential standard, the Supreme Court found that the “mitigation evidence counsel failed to discover and present in this case” was “powerful” – including the “severe privation and abuse” he suffered as a young child when in the custody of his alcoholic mother, and the “physical torment, sexual molestation, and repeated rape during his subsequent years in foster care”. Added to this was the evidence of homelessness and of his diminished mental capacities. If such evidence had been presented at trial, the jury might well have returned a sentence less than death, the Supreme Court ruled in its 7-2 decision.<sup>197</sup>

**2004 – *Rompilla v. Beard*.** Once again asserting an interest in state case involving a strong claim of inadequate legal representation of a capital defendant, the Bush administration support the State of Pennsylvania's efforts to have the death sentence in question survive the appeals process. *Strickland v. Washington* demanded a high degree of deference to counsel's performance” by the reviewing courts, and Ronald Rompilla's legal representation had been good enough, the Bush administration argued in its *amicus curiae* brief filed in the Supreme Court.<sup>198</sup> Yet despite knowing that the prosecution intended to emphasize past crimes of the defendant in order to obtain a death sentence, defence counsel at trial had not examined that file. In 2005, by five votes to four, the Supreme Court overturned the death sentence, noting that in addition to a number of “avenues the trial lawyers could fruitfully have followed in building a mitigation case”, but failed to go down, “it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond” to the prosecution's case for a death sentence.<sup>199</sup>

**2005 – *Oregon v. Guzek*.** The Bush administration supported the State of Oregon's efforts to reinstate Randy Lee Guzek's death sentence, overturned by the state Supreme Court (for the third time). The case raised the question of whether a capital defendant has the right at the sentencing phase to present new evidence or argument of “residual doubt” about his guilt in mitigation against a death sentence. The Oregon Supreme Court had ruled that the defendant did have this right, but the state appealed and was supported by the federal government's *amicus curiae* brief. The Bush administration argued that once a capital defendant had been convicted beyond a reasonable doubt, “residual doubt” did not qualify as a mitigating factor that the defendant was constitutionally entitled to present as evidence against a death sentence. It urged the Supreme Court to overturn the Oregon Supreme Court ruling.<sup>200</sup> The Court did so.<sup>201</sup> Today Randy Guzek remains on death row in Oregon, where there is currently a moratorium on executions announced by the Governor in November 2011. In the USA's Fourth Periodic report to the Human Rights Committee, the Obama administration has emphasized Oregon's moratorium. In this or previous reports, it did not inform the Committee of the US administration's support for Oregon's efforts to return Randy Guzek to death row.

**2007 – *Uttecht v. Brown*.** The Bush administration filed a brief in the US Supreme Court that effectively supported the State of Washington's efforts to carry out its first “non-consensual” execution since 1994. In 2006, the US Court of Appeals for the Ninth Circuit overturned state death row inmate Cal Brown's 1994 death sentence on the grounds that a prospective juror had been unlawfully excluded at jury selection. The man in question had said that he believed the death penalty was “appropriate in severe cases” and that he would take into account mitigating and aggravating factors. “Most importantly,” the Ninth Circuit noted, “he promised he would ‘follow the law’ without reservation.” However, the state had objected to the juror on the grounds that he was too reluctant to impose the

death penalty and the trial judge allowed the prosecution to exclude him. His exclusion, the Ninth Circuit court said, meant that “Brown’s death sentence cannot stand.” The State of Washington appealed to the US Supreme Court which agreed to review the case. The Bush administration filed a brief in support of the state, asserting an interest in the outcome to federal cases, and arguing that the Court of Appeals had not given substantial enough deference to the trial court.<sup>202</sup> In June 2007, the Supreme Court reinstated the death sentence, finding that “deference to the trial court is appropriate” and that “by not according the required deference, the Court of Appeals failed to respect the limited role of federal habeas relief in this area prescribed by Congress [under the AEDPA] and by our cases.”<sup>203</sup> Four of the nine Justices dissented, accusing the majority of choosing to “defer blindly” to a state court’s mistake, and of upholding “the disqualification of a juror whose only failing was to harbour some slight reservation in imposing the most severe of sanctions.” Cal Brown was executed in September 2008.

**2007 – *Murphy v. Oklahoma*.** An Oklahoma death row prisoner asked the US Supreme Court to review his claim that Oklahoma should not have had jurisdiction to try him, and that if the federal government had tried him, the death penalty would not have been an option. The prisoner and the murder victim were both Native Americans. If the crime occurred in “Indian Country” as defined under US law, then the State of Oklahoma would have had no jurisdiction over the crime. Under federal jurisdiction, the federal government could not have pursued the death penalty without the consent of the defendant’s tribe. The US Supreme Court asked the administration for its views. In an *amicus curiae* brief, the administration urged the Court not to take the case.<sup>204</sup> The Supreme Court declined to take the case. Patrick Murphy remains on death row.

**2007 – *Baze v. Rees*.** The Bush administration sided with the states in seeking to have the courts reject a challenge to the constitutionality of lethal injection. In a brief filed in the US Supreme Court to a challenge to Kentucky’s lethal injection protocol, the administration argued that “the use of capital punishment in America dates virtually from the foundation of the first colony... In *Gregg* [1976], this Court reaffirmed that capital punishment is constitutional... It necessarily follows that there must be some feasible method by which a sentence of death may be executed... Any risk of pain inherent in lethal injection is manifestly one that today’s society chooses to tolerate”. The US Supreme Court upheld Kentucky’s injection protocol and ended a six-month de facto moratorium on lethal injections. Some 240 prisoners have been put to death by lethal injection since the Court’s decision in April 2008.

**2008 – *Kennedy v. Louisiana*.** In June 2008, the US Supreme Court outlawed the death penalty for non-homicidal sexual crimes against children.<sup>205</sup> Senator Barack Obama, soon-to-be Democratic presidential nominee, gave a public statement that he disagreed with the Court’s decision.<sup>206</sup> The following month, the Bush administration filed a brief with the Supreme Court urging it to reconsider on the grounds that the decision was “incorrect” and the Court had not included consideration of a recent Act passed by US Congress and an Executive Order of President Bush authorizing the death penalty for this crime under US military law.<sup>207</sup> The Supreme Court stood by its original ruling.

**2008 – *Harbison v. Bell*.** After Tennessee death row prisoner Edward Harbison had lost his federal appeals, he had sought appointment of a lawyer for state clemency proceedings. Because the state of Tennessee no longer authorized the appointment of state public defenders as clemency counsel, his federal appeal lawyer had moved to have her representation expanded to cover state clemency. The District Court denied the motion, and the Sixth Circuit Court of Appeals affirmed that ruling. The case went to the US Supreme Court, where the Bush administration argued that the Terrorist Death Penalty Enhancement Act of 2005 (18 U.S.C. 3599) did “not authorize federal funds for indigent state capital defendants seeking state clemency” but “funds for counsel for federal defendants facing a capital charge or prisoners actually sentenced to death and seeking post-conviction relief in federal court”.<sup>208</sup> The US Supreme Court disagreed, and held that state prisoners were included within its wording.<sup>209</sup>

**2011 – Lethal injection drugs.** With the sole US manufacturer of sodium thiopental suspending production and in early 2011 withdrawing from the market altogether, the USA’s death penalty states have turned to each other, to sources overseas, and to the federal government, to seek solutions. A letter sent in January 2011 by the Attorneys General of 13 of the USA’s death penalty states to the federal Attorney General explained the problem: “The protocol used by most of the jurisdictions employing lethal injection includes the drug sodium thiopental, an ultra-short-acting barbiturate. Sodium thiopental is in very short supply worldwide and, for various reasons, essentially unavailable on the open market. For those jurisdictions that have the drug available, their supplies are very small – measured in a handful of doses. The result is that many jurisdictions shortly will be unable to perform executions in cases where appeals have been exhausted and Governors have signed death warrants. Therefore, we solicit your assistance in either identifying an appropriate source for sodium thiopental or making supplies held by the Federal

Government available to the States.”<sup>210</sup> The US Attorney General responded that he was “optimistic” that solutions could be found to allow lethal injections to proceed.<sup>211</sup>

**2012 – Cook v. FDA.** In a letter, of 21 May 2012, the Attorneys General of Alabama, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, South Dakota, Virginia and Washington urged the US Attorney General to ensure that the federal Food and Drug Administration appealed against a District Court ruling that the FDA had acted “arbitrarily and capriciously” when allowing imports of a “misbranded” and “unapproved” drug used in lethal injections. The lawsuit brought by a number of state death row inmates in Arizona, California and Tennessee had accused the FDA of violating federal law by having improperly allowed imports of sodium thiopental. Among other things, the plaintiffs argued that thiopental might fail to properly anesthetize them properly, with the result that they might be conscious or partially conscious when the next drugs were administered, which would cause them severe pain. Amnesty International wrote to the US Attorney General urging him to respond to the states that the federal government would not appeal the District Court ruling.<sup>212</sup> The organization did not receive a reply, but the administration did appeal to the Court of Appeals.<sup>213</sup> Here the Obama administration returned to the *Heckler v. Chaney* decision (see 1984, above) and argued that at issue was “the FDA’s exercise of enforcement discretion with regard to sodium thiopental, which state Department of Corrections import for use in carrying out death sentences by lethal injection”: “As in *Heckler*, individuals who have been sentenced to death have demanded that FDA take enforcement action against what they consider to be violations of [federal law] in connection with their planned executions. In this case, the challenged actions are shipments of thiopental from overseas to States for the purposes of lethal injection... As in *Heckler*, FDA has declined to take enforcement action in these circumstances... The Supreme Court rejected the plaintiffs’ challenge to FDA’s enforcement discretion in *Heckler*. The same result is warranted here”. On 23 July 2013, however, the Court of Appeals upheld the District Court ruling, stating: “The FDA acted in derogation of [its] duties by permitting the importation of thiopental, a concededly misbranded and unapproved new drug, and by declaring that it would not in the future sample and examine shipments of the drug despite knowing that they may have been prepared in an unregistered establishment”.

**2012 – Ryan v. Gonzales and Tibbals v Carter.** Invited by the US Supreme Court to give its views on whether federal law providing the assistance of counsel gave the right to an indigent state death row prisoner to have federal appeal proceedings stayed if mental illness rendered him or her unable to assist their lawyer, the Obama administration urged the Court not to review the question.<sup>214</sup> After the Supreme Court did take the case, the administration filed another brief urging the Court to rule against the prisoners (by now the case involved Ernest Valencia Gonzales, a mentally ill inmate on Arizona’s death row and Sean Carter, a diagnosed schizophrenic on death row in Ohio). The administration argued that there was no constitutional right to counsel during “collateral review of a conviction or sentence”, and that the Court of Appeals had been wrong in the Gonzales case to find that, when Congress “created” such a right under statutory law in 2008, it had also created an “additional right to competence to assist counsel – and a right for capital prisoners who are unable to meet that standard to stay their post-conviction proceedings”.<sup>215</sup> The Supreme Court agreed and in January 2013 it ruled that both the Sixth Circuit and the Ninth Circuit had erred in holding that district courts must stay federal habeas proceedings when the prisoner has been adjudged incompetent. The Supreme Court ruled that an incompetent state prisoner has no right under federal law to keep federal appeal proceedings on hold until he or she had a mental understanding of what was going on.<sup>216</sup>

**2013 – Kansas v. Cheever.** In 2012 the Kansas Supreme Court overturned the conviction and death sentence of Scott Cheever on the grounds that his right under the US Constitution’s Fifth Amendment not to be compelled to incriminate himself had been violated. The state appealed to the US Supreme Court. The Court agreed to take the case and on 20 May 2013 the Obama administration filed a brief in support of the State of Kansas. The administration’s brief asserted that the federal government “has a significant interest in the Court’s disposition of this case” because the Fifth Amendment “applies to the federal government as well as to the States”. Cheever argued that his own drug use made it impossible for him to have killed with premeditation, a factor necessary for a capital murder conviction. At the state trial, to rebut this, the prosecution had used statements made by Cheever during a court-ordered mental evaluation that had been conducted when his case was being prosecuted in federal court. The Kansas Supreme Court held that to be a Fifth Amendment violation. The case was pending before the US Supreme Court at the time of writing. On 30 August 2013, the US Supreme Court granted the US Solicitor General’s request to be allowed to participate in oral arguments along with the state, scheduled for 16 October 2013.

## APPENDIX 2: INCREASING US ISOLATION, A CHRONOLOGY

*Capital punishment dates back to the days when decapitations, hangings, and brandings were also the norm. Surely, our society has evolved since those barbaric days... It is clear that the death penalty is becoming increasingly rare both around the world and in America...*

Ohio Supreme Court Justice William O'Neill, 25 January 2013<sup>217</sup>

- 1863 – Venezuela abolishes the death penalty for all crimes
- 1865 – San Marino abolishes the death penalty for all crimes
- 1877 – Costa Rica abolishes the death penalty for all crimes
- 1906 – Ecuador abolishes the death penalty for all crimes
- 1907 – Uruguay abolishes the death penalty for all crimes
- 1910 – Colombia abolishes the death penalty for all crimes
- 1922 – Panama abolishes the death penalty for all crimes
- 1928 – Iceland abolishes the death penalty for all crimes
- 1948 – Universal Declaration of Human Rights (UDHR) is adopted. Article 3 states: “Everyone has the right to life”
- 1962 – Monaco abolishes the death penalty for all crimes
- 1966 – International Covenant on Civil and Political Rights (ICCPR) opens for signature.
- 1966 – Dominican Republic abolishes the death penalty for all crimes
- 1968 – Austria abolishes the death penalty for all crimes
- 1969 – The Holy See abolishes the death penalty for all crimes
- 1971 – UN General Assembly resolution 2857 (XXVI): “to fully guarantee the right to life, provided for in article 3 of the [UDHR], the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries”
- 1972 – In *Furman v. Georgia* the US Supreme Court voids the USA’s capital laws because of the arbitrary manner in which the death penalty being applied. Only two Justices find the death penalty per se unconstitutional
- 1972 – Finland and Sweden abolish the death penalty for all crimes
- 1976 – ICCPR enters into force, three months after 35<sup>th</sup> country becomes party to it
- 1976 – In *Gregg v. Georgia*, US Supreme Court rules that executions can resume under new capital laws
- 1976 – Portugal abolishes death penalty for all crimes
- 1977 – First execution in USA since 1967. USA signs ICCPR
- 1977 – 1,000<sup>th</sup> death sentence in the USA since *Furman*
- 1978 – Denmark abolishes death penalty for all crimes
- 1979 – Luxembourg, Nicaragua and Norway abolish death penalty for all crimes. Brazil, Fiji and Peru abolish for ordinary crimes
- 1981 – France and Cape Verde abolish death penalty for all crimes
- 1982 – The Netherlands abolishes death penalty for all crimes
- 1982 – UN Human Rights Committee issues General Comment 6 on the right to life under article 6 of ICCPR, the wording of which “strongly” indicates the desirability of abolition. The HRC concludes “all measures of abolition should be considered as progress in the enjoyment of the right to life”
- 1983 – Cyprus and El Salvador abolish death penalty for ordinary crimes
- 1983 – 2,000<sup>th</sup> death sentence in the USA since *Furman*
- 1984 – Argentina abolishes death penalty for ordinary crimes
- 1985 – Australia abolishes death penalty for all crimes
- 1987 – 3,000<sup>th</sup> death sentence in the USA since *Furman*
- 1987 – Haiti, Liechtenstein and the German Democratic Republic abolish death penalty for all crimes
- 1988 – 100<sup>th</sup> post-Gregg execution in the USA
- 1989 – Cambodia, New Zealand, Romania and Slovenia abolish the death penalty for all crimes
- 1990 – Andorra, Croatia, the Czech and Slovak Federal Republic, Hungary, Ireland, Mozambique, Namibia and Sao Tomé and Príncipe abolished death penalty for all crimes
- 1990 – 4,000<sup>th</sup> death sentence in the USA since *Furman*
- 1992 – Angola, Paraguay and Switzerland abolish death penalty for all crimes
- 1992 – USA ratifies ICCPR, becoming the 109<sup>th</sup> state party to the treaty

- 1993 – 200<sup>th</sup> post-Gregg execution in the USA
- 1993 – Guinea-Bissau, Hong Kong and Seychelles abolish death penalty for all crimes
- 1994 – Italy abolishes death penalty for all crimes
- 1994 – 5,000<sup>th</sup> death sentence in the USA since *Furman*
- 1995 – UN Human Rights Committee, in its conclusions on the USA's initial report under the ICCPR, calls on the USA to restrict the number of offences carrying the death penalty "with a view eventually to abolishing it"
- 1995 – 300<sup>th</sup> post-Gregg execution in the USA
- 1995 – Djibouti, Mauritius, Moldova and Spain abolish death penalty for all crimes
- 1996 – US Congress passes and President Clinton signs the Antiterrorism and Effective Death Penalty Act (AEDPA)
- 1996 – Belgium abolishes death penalty for all crimes
- 1997 – 400<sup>th</sup> post-Gregg execution in the USA
- 1997 – Georgia, Nepal, Poland and South Africa abolish death penalty for all crimes, and Bolivia for ordinary crimes
- 1997 – 6,000<sup>th</sup> death sentence in the USA since *Furman*
- 1998 – 500<sup>th</sup> post-Gregg execution in the USA
- 1998 – Azerbaijan, Bulgaria, Canada, Estonia, Lithuania and United Kingdom abolish death penalty for all crimes
- 1999 – East Timor, Turkmenistan and Ukraine abolish death penalty for all crimes, and Latvia for ordinary crimes
- 2000 – 600<sup>th</sup> post-Gregg execution in the USA
- 2000 – Cote d'Ivoire and Malta abolish the death penalty for all crimes. Albania abolishes for ordinary crimes
- 2001 – 700<sup>th</sup> post-Gregg execution in the USA. First federal execution since 1963.
- 2001 – Bosnia-Herzegovina abolishes the death penalty for all crimes. Chile abolishes for ordinary crimes
- 2001 – 7,000<sup>th</sup> death sentence in the USA since *Furman*
- 2002 – 800<sup>th</sup> post-Gregg execution in the USA
- 2002 – The Rome Statute of the International Criminal Court comes into force following the 60<sup>th</sup> ratification. The ICC, which will prosecute the most serious crimes under international law, including war crimes, crimes against humanity and torture, will not have the death penalty as a sentencing option.
- 2002 – Cyprus and Yugoslavia (now two states Serbia and Montenegro) abolish the death penalty for all crimes
- 2003 – Armenia abolishes the death penalty for all crimes
- 2004 – 900<sup>th</sup> post-Gregg execution in the USA
- 2004 – Bhutan, Greece, Samoa, Senegal and Turkey abolish the death penalty for all crimes
- 2005 – 1000<sup>th</sup> post-Gregg execution in the USA
- 2005 – Liberia and Mexico abolish the death penalty for all crimes
- 2006 – UN Human Rights Committee reviews USA's Second and Third Periodic Reports under the ICCPR and calls on the USA to impose "a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty"
- 2006 – Philippines abolishes the death penalty for all crimes
- 2007 – Albania, Cook Islands, Kyrgyzstan and Rwanda abolish the death penalty for all crimes; Kazakhstan abolishes for ordinary crimes
- 2007 – UN General Assembly adopts its first resolution calling for the establishment of a moratorium on executions with a view to abolishing the death penalty, with 104 countries voting in favour
- 2008 – 1100<sup>th</sup> post-Gregg execution in the USA
- 2008 – Uzbekistan and Argentina abolish the death penalty for all crimes
- 2009 – 8,000<sup>th</sup> death sentence in the USA since *Furman*
- 2009 – Burundi and Togo abolish the death penalty for all crimes
- 2008 – UN General Assembly adopts its second resolution calling for the establishment of a moratorium on executions with a view to abolishing the death penalty, with 106 countries voting in favour
- 2010 – 1200<sup>th</sup> post-Gregg execution in the USA
- 2010 – Gabon abolishes the death penalty for all crimes
- 2011 – UN General Assembly adopts its third resolution calling for the establishment of a moratorium on executions with a view to abolishing the death penalty, with 109 countries voting in favour
- 2012 – 1300<sup>th</sup> post-Gregg execution in the USA
- 2012 – Latvia abolishes the death penalty for all crimes
- 2012 – UN General Assembly adopts its fourth resolution calling for the establishment of a moratorium on executions with a view to abolishing the death penalty, with 111 countries voting in favour
- 2013 – UN Human Rights Committee reviews USA's Fourth Periodic Report

## ENDNOTES

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<sup>1</sup> Human rights: A commitment to action, 22 December 2009,

<http://www.state.gov/documents/organization/134134.pdf>

<sup>2</sup> The other countries due to be reviewed by the Committee during its October 2013 session are Bolivia, Djibouti, Mauritania, Mozambique and Uruguay. All five are abolitionist in law or practice. Amnesty International's main submission to the UN Human Rights Committee on the USA's Fourth Periodic Report is available at <http://www.amnesty.org/en/library/info/AMR51/061/2013/en>

<sup>3</sup> United States written responses to questions from the United Nations Human Rights Committee concerning the Fourth Periodic Report, 3 July 2013, para. 1, <http://www.state.gov/j/drl/rls/212393.htm>

<sup>4</sup> In 2010, for example, the Obama administration emphasised to the UN Human Rights Council that "state governments retain primary responsibility for establishing procedures and policies that govern state capital prosecutions". UN Doc.: A/HRC/WG.6/9/USA/1, August 2010, National report to the UN Human Rights Council, for Universal Periodic Review, para. 63. In its Fourth Periodic Report it has stressed that since 2005, when the USA submitted its previous report, "there have been no federal executions" (compared to over 300 that have occurred in state cases during that period).

<sup>5</sup> Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination, June 2013, [http://www.state.gov/j/drl/rls/cerd\\_report/210605.htm](http://www.state.gov/j/drl/rls/cerd_report/210605.htm), para. 70.

<sup>6</sup> Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports), 12 August 2013, op. cit., para 161.

<sup>7</sup> UN Doc.: CCPR/C/21/Rev.1/Add. 13, 26 May 2004. UN Human Rights Committee, General Comment 31: The nature and general legal obligation imposed on States Parties to the Covenant, ¶4.

<sup>8</sup> "[B]ecause article 50 expressly extends the provisions of the Covenant to all parts of federal states, the United States included in its instrument of ratification an understanding to the effect that the US will carry out its obligations thereunder in a manner consistent with the federal nature of its form of government. More precisely, the understanding states: 'That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant.' Meanwhile, the USA's ratification of the UN Convention on the Rights of Persons with Disabilities, signed in 2009, would be similarly conditioned, according to the Senate Committee on Foreign Relations. This time, it is called a "reservation".

<sup>9</sup> Secretary's Preface; Country Reports on Human Rights Practices in 2012, US Department of State, 19 April 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>

<sup>10</sup> Common Core Document of the United States of America: Submitted with the Fourth Periodic Report of the USA to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights, 30 December 2011, para. 104, <http://www.state.gov/j/drl/rls/179780.htm>

<sup>11</sup> See William A. Schabas, *The abolition of the death penalty in international law*. Cambridge University Press, Second Edition (1997).

<sup>12</sup> My Day, 16 October 1953. From the Eleanor Roosevelt Papers Project, at [http://www.gwu.edu/~erpapers/myday/displaydoc.cfm?\\_y=1953&\\_f=md002674](http://www.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1953&_f=md002674)

<sup>13</sup> UN Doc.: A/HRC/WG.6/9/USA/1, August 2012, USA National report for UPR, para. 5.

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- <sup>14</sup> Secretary of State preface to the Human Rights report 2011, US Department of State, 2012, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>
- <sup>15</sup> Harold Hongju Koh, Legal Adviser, US Department of State, Statement upon adoption of Universal Periodic Review Report, United Nations Human Rights Council, Geneva, 18 March 2011, <http://geneva.usmission.gov/2011/03/18/us-upr-adoption/>
- <sup>16</sup> CCPR General Comment No. 6, The right to life (Article 6), 1982, finding that
- <sup>17</sup> Attorney General Eric Holder, Annual Meeting of American Bar Association's House of Delegates, 12 August 2013, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>. (“As a nation, we are coldly efficient in our incarceration efforts... Even though this country comprises just 5 percent of the world's population, we incarcerate almost a quarter of the world's prisoners... We also must confront the reality that – once they're in that system – people of colour often face harsher punishments than their peers. One deeply troubling report, released in February, indicates that – in recent years – black male offenders have received sentences nearly 20 percent longer than those imposed on white males convicted of similar crimes. This isn't just unacceptable – it is shameful.”)
- <sup>18</sup> Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports), 12 August 2013, ¶161, <http://www.state.gov/j/drl/rls/213055.htm>
- <sup>19</sup> Among the questions which the Human Rights Committee has asked of the US administration prior to the October 2013 session is to provide it with more information about gun violence in the USA and “steps taken to better protect people against the risks associated with proliferation of firearms” in the USA. United States written responses to questions from the United Nation Human Rights Committee concerning the Fourth Periodic Report, 3 July 2013, *op. cit.*, ¶¶ 31-32. See also, for example, Smith & Wesson gun sales hit an all-time high in year after mass shootings, The Guardian, 14 June 2013, <http://www.guardian.co.uk/world/2013/jun/14/smith-wesson-gun-sales-newtown>
- <sup>20</sup> Remarks to United States Attorneys on the Violent Crime Control and Law Enforcement Act of 1994, President Bill Clinton, 14 September 1994.
- <sup>21</sup> For example, in 2010, the Texas capital statute was revised to make the murder of a child under the age of 10 punishable by death (revising from murder of a child under 6 years old), and New Hampshire added murder during the commission of a burglary to its list of crimes punishable by death. In 2010, South Carolina added murder committed while trafficking in persons to its list of aggravating factors making murder punishable by death; Tennessee added the intentional murder of a pregnant woman to its list of aggravating factors; Virginia revised the definition of capital murder to include fire marshals, auxiliary police officers, and auxiliary deputy sheriffs among the law enforcement officers killed while performing their official duties. In 2009, Tennessee added murder committed in the course of aggravated child abuse, aggravated child neglect, and rape of a child, to its list of aggravating factors; Utah revised its definition of aggravated murder to included murder committed by someone previously convicted of the criminal discharge of a firearm. US Department of Justice, Bureau of Justice Statistics.
- <sup>22</sup> See Congressional Research Service: Capital punishment: An overview of federal death penalty statutes, CRS Report for Congress, Updated 5 January 2005.
- <sup>23</sup> An overview published by the Congressional Research Service in 2011 lists federal crimes punishable by death. See Federal Capital Offenses: An Overview of Substantive and Procedural Law, 17 November 2011, Congressional Research Service, <http://www.hsdl.org/?view&did=718235>
- <sup>24</sup> *Kennedy v. Louisiana*, Motion for leave to file brief and brief for the United States as amicus curiae supporting petition for rehearing, In the US Supreme Court, July 2008.
- <sup>25</sup> Obama disagrees with high court on child rape case. Associated Press, 25 June 2008.
- <sup>26</sup> See page 13 of USA: Failing the future, March 2000,

<http://www.amnesty.org/en/library/info/AMR51/003/2000/en>

<sup>27</sup> The Texas clemency memos. By Alan Berlow. Atlantic Monthly, July/August 2003. See also USA: Open letter to US Senators as they prepare to vote on the nomination of Alberto Gonzales for Attorney General, 1 February 2005, <http://www.amnesty.org/en/library/info/AMR51/031/2005/en>, and USA: Death and the President, 22 December 2003, <http://www.amnesty.org/en/library/info/AMR51/158/2003/en>

<sup>28</sup> Update on Cost and Quality of Defense Representation in Federal Death Penalty Cases, Sept 2010. <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx>

<sup>29</sup> *Ibid.*

<sup>30</sup> 18 U.S.C. 3598 (“Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction”)

<sup>31</sup> “We recognize that the Navajo Nation opposes the death penalty on cultural and religious grounds. Indeed, the Attorney General of the Navajo Nation expressed the Nation’s opposition to the possibility of the United States seeking capital punishment in this case in a letter sent January 22, 2002 to the United States Attorney for the District of Arizona. We cannot say, however, that ideological opposition to the death penalty by its own force exempts tribal members from the reach of federal criminal laws, or overrides the presumption that federal criminal laws of nationwide applicability apply to Indian tribes... [T]he FDPA unambiguously requires opt-in only where jurisdiction is based on Indian country... [T]he opt-in provision appears to afford Indian tribes as much authority as states in determining whether capital punishment may be imposed in circumstances not involving federal crimes of general application. The federal government seeks and obtains FDPA death sentences in states that have long since abandoned the death penalty themselves”. *US v. Mitchell*, US Court of Appeals, Ninth Circuit, 2007.

<sup>32</sup> *United States v. Gallaher*, US Court of Appeals for the Ninth Circuit, amended 26 October 2010, Judge Tashima dissenting.

<sup>33</sup> See also Geography and the machinery of death, New York Times, 5 February 2007; and Philip H. Tinker, Is Oklahoma still Indian Country? The Dartmouth Law Journal, Vol. IX: 3, Fall 2011.

<sup>34</sup> An investigation into the removal of nine US Attorneys in 2006. Office of Inspector General and Office of Professional Responsibility, September 2008, page 335, <http://www.justice.gov/opr/us-att-firings-rpt092308.pdf>

<sup>35</sup> *USA v. Jose Rios Rico*, Plea agreement, US District Court, District of Arizona, 23 September 2008.

<sup>36</sup> *Sampson v. USA*, US Court of Appeals for the First Circuit, 25 July 2013.

<sup>37</sup> Source: Federal Death Penalty Resource Counsel.

<sup>38</sup> G. Ben Cohen and Robert J. Smith, The racial geography of the federal death penalty, Washington Law Review, Vol. 85:425 (2010), page 431 (recalling Justice Stewart’s concurrence in *Furman* (1972) that “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual”).

<sup>39</sup> Death penalty sentencing: Research indicates pattern of racial disparities. Report to Senate and House Committees on the Judiciary, United States General Accounting Office, February 1990.

<sup>40</sup> Racial disparity was the one area of the death penalty during the Universal Periodic Review process in 2010 and 2011 on which the Obama administration responded positively to recommendations from

other governments, while at the same time making clear that calls for the USA to work for abolition did “not enjoy our support”. Thus what did “enjoy our support” was a recommendation from another government that the USA “undertake studies to determine the factors of racial disparity in the application of the death penalty, [and] to prepare effective strategies aimed at ending possible discriminatory practices”. In Amnesty International’s opinion, for the federal government to conduct further studies into racial disparities in the application of the death penalty, while at the same time refusing to countenance abolition, is another example of what two decades ago Justice Blackmun in 1994 called “tinkering with the machinery of death”. He considered that the death penalty was “fraught with arbitrariness, discrimination, caprice, and mistake”, and should be abolished. *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting from the denial of certiorari.

<sup>41</sup> “Attorney General Eric Holder authorized a study of racial disparities in the federal death penalty during his tenure as Deputy Attorney General during the Clinton Administration. That study found wide racial and geographic disparities in the federal government’s requests for death sentences. [The study is available at <http://www.justice.gov/dag/pubdoc/dpsurvey.html>]. The study was done in connection with a new system requiring all US Attorneys to obtain the Attorney General’s approval before requesting death sentences. In July 2011, DOJ implemented a new capital case review protocol based on comments received from the judiciary, prosecutors, and the defense bar regarding ways to improve DOJ’s decision-making process for death penalty cases.”

<sup>42</sup> *United States v. Johnson*, Order and Reasons, US District Court, Eastern District of Louisiana, 10 March 2010.

<sup>43</sup> *United States v. Johnson*, Government’s response and memorandum in opposition to defendant’s motion for additional discovery concerning race-based decision-making. In the US District Court for the Eastern District of Louisiana, 1 February 2010.

<sup>44</sup> *USA v Salad et al.* Defendants’ joint motion to strike the notice of intent to seek death penalty because of the arbitrary, capricious, and random application of the Federal Death Penalty Act. In the US District Court for the Eastern District of Virginia, 17 September 2012.

<sup>45</sup> Reno troubled by death penalty statistics, New York Times, 12 September 2000. See also, Open letter to the US Attorney General concerning the imminent execution of Juan Raul Garza, 14 June 2001, <http://www.amnesty.org/en/library/info/AMR51/088/2001/en>

<sup>46</sup> *USA v. Salad et al.*, Government’s consolidated response in opposition. In the US District Court for the Eastern District of Virginia, 17 October 2012.

<sup>47</sup> Dissenting from the *McCleskey* ruling, Justice William Brennan had characterized the majority decision as “a fear of too much justice” – specifically a fear that to rule in *McCleskey*’s favour would be to “open the door to widespread challenges”.

<sup>48</sup> USA: Judge finds racism in three more death penalty cases: Death sentences overturned under North Carolina’s Racial Justice Act, 20 December 2012, <http://www.amnesty.org/en/library/info/AMR51/100/2012/en>; See also USA: Another brick from the wall, 27 April 2012, <http://www.amnesty.org/en/library/info/AMR51/028/2012/en>

<sup>49</sup> A number of black co-defendants charged with drugs offences alleged that the federal prosecutor had determined to prosecute them because of their race. They sought discovery from the government to obtain information that they asserted would support that claim. The district court judge granted the motion for discovery. When the government indicated that it would not comply with the discovery order, the judge dismissed the indictment. The Ninth Circuit Court of Appeals, 7-4, affirmed the dismissal of the indictment. The Clinton administration appealed and the US Supreme Court reversed.

<sup>50</sup> A black federal death row prisoner brought a claim that the government had pursued the death penalty in his case because of his race. He moved for dismissal of the death penalty, or alternatively,

discovery relating to the government's capital charging practices. The District Court judge granted his discovery motion and dismissed the death penalty notice after the government said that it would not comply with the discovery order. The US Court of Appeals for the Sixth Circuit affirmed the District Court's order. In the US Supreme Court, the Bush administration successfully argued that the Sixth Circuit's decision "flout[ed]" *US v. Armstrong* "by affirming the discovery order despite [Bass's] failure to present any evidence that 'similarly situated individuals of a different race were not prosecuted.' The decision below also overrides *McCleskey v. Kemp* by relying on aggregate, national statistics as evidence of discrimination rather than requiring facts that bear on the individualized decisions of the prosecutors in this case." *USA v. Bass*, Reply brief for the United States. In the US Supreme Court, June 2002.

<sup>51</sup> G. Ben Cohen and Robert J. Smith, The racial geography of the federal death penalty, *Washington Law Review*, Vol. 85:425 (2010), page 486.

<sup>52</sup> *USA v. Jacques*, Opinion and order re: defendant's motion to strike or modify notice of intent to seek the death penalty. US District Court for the District of Vermont, 4 May 2011.

<sup>53</sup> *USA v. Jacques*. Opposition of the United States to defendant's motion to strike or modify the notice of intent to seek the death penalty. US District Court for the District of Vermont, 17 May 2010.

<sup>54</sup> *USA v. Salad et al*, Memorandum order. US District Court, Eastern District of Virginia, 21 November 2012. On 2 August 2013, the jury rejected the death penalty. See Three Somali Pirates Sentenced To Life-In-Prison For Murder Of Four Americans Aboard SV Quest. News release, US Attorney, Eastern District of Virginia, <http://www.justice.gov/usao/vae/news/2013/08/20130802saladnr.html>

<sup>55</sup> UN Doc.: E/CN.4/1998/68/Add.3, ¶¶. 64-65. In 2001, after considering the USA's combined first, second and third periodic reports under this treaty, the Committee for the Elimination of Racial Discrimination noted the "disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty" and urged the USA, to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers or as a result of the economically, socially and educationally disadvantaged position of the convicted persons". It has repeated this concern since.

<sup>56</sup> John C. Jeffries, Justice Lewis F. Powell, Jr.: A biography. (1994).

<sup>57</sup> G. Ben Cohen and Robert J. Smith, The racial geography of the federal death penalty, *Washington Law Review*, Vol. 85:425 (2010), page 445.

<sup>58</sup> Justin D. Levinson, Robert J. Smith and Danielle M. Young, Devaluing death: An empirical study of implicit racial bias on jury-eligible citizens in six death penalty states. 19 February 2013, forthcoming in the *New York University Law Review*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2307719](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307719)

<sup>59</sup> *Turner v. Murray*, 1986.

<sup>60</sup> "The African American community is also knowledgeable that there is a history of racial disparities in the application of our criminal laws – everything from the death penalty to enforcement of our drug laws". Remarks by the President on Trayvon Martin, 19 July 2013, <http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>;

<sup>61</sup> Attorney General Eric Holder to American Bar Association, 12 August 2013, *op. cit.*

<sup>62</sup> A map is available at <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf>

<sup>63</sup> The memorandum is available at <http://www.justice.gov/oip/docs/death-penalty-protocol.pdf>

<sup>64</sup> Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases (September 2010), Section II (D), *op. cit.*

<sup>65</sup> *Ibid.*, Figures 6 and 7.

- <sup>66</sup> For example, see Rapist's case renews calls for death penalty, Fox News, 4 December 2003 <http://www.foxnews.com/story/2003/12/04/rapist-case-renews-calls-for-death-penalty/>, and Sjodin case spurs Pawlenty to push for death penalty, 2 December 2003, [http://news.minnesota.publicradio.org/features/2003/12/02\\_khoom\\_deathpenalty/](http://news.minnesota.publicradio.org/features/2003/12/02_khoom_deathpenalty/)
- <sup>67</sup> *USA v. Jacques*. Opposition of the United States to defendant's motion to strike or modify the notice of intent to seek the death penalty. US District Court for the District of Vermont, 17 May 2010.
- <sup>68</sup> *USA v. Jacques*, Opinion and order re: Defendant's motion to reconsider point eight in favor of striking the notice of intent to seek the death penalty. US District Court for the District of Vermont, 2 September 2011. In the event, on 9 August 2013, the federal prosecutor announced that the US Attorney General had directed that the notice of intent to seek the death penalty be withdrawn in return for a guilty plea and life imprisonment without parole. *US v. Michael Jacques*, News release, US Attorney for the District of Vermont, 9 August 2013, [http://www.justice.gov/usao/vt/news/2013/20130809\\_jacques.html](http://www.justice.gov/usao/vt/news/2013/20130809_jacques.html)
- <sup>69</sup> *USA v. Wilson*, Letter to the Honorable Nicholas G. Garaufis, District Judge, US District Court for the Eastern District of New York, from Loretta Lynch, US Attorney for the Eastern District of New York, US Department of Justice, 29 May 2013 (misdated 29 March).
- <sup>70</sup> Letter from US Attorney General Eric Holder to US Attorney Loretta Lynch, 3 August 2011. The letters to prosecutors used to read "you are authorized to seek the death penalty", but after 2006 when a federal prosecutor in Arizona questioned the Attorney General's authorization, this was changed to "you are authorized and directed to seek the death penalty" (see US Attorney Charlton case in Section 3). See: An investigation into the removal of nine US Attorneys in 2006. Office of Inspector General and Office of Professional Responsibility, September 2008, *op.cit.*, pages 232-233, including note 150
- <sup>71</sup> On 19 August, Wilson's lawyers moved for a new penalty phase on grounds of prosecutorial misconduct and other claims. The judge rejected the motion on 3 September 2013.
- <sup>72</sup> Michigan Constitution, Article IV, §46: "No law shall be enacted providing for the penalty of death".
- <sup>73</sup> *USA v. Gabrion*, US Court of Appeals for the Sixth Circuit, 3 August 2011.
- <sup>74</sup> *USA v. Wilson*, Letter to the Honorable Nicholas G. Garaufis, District Judge, US District Court for the Eastern District of New York, from Loretta Lynch, US Attorney for the Eastern District of New York, US Department of Justice, 29 May 2013 (misdated 29 March).
- <sup>75</sup> *Kansas v. Marsh*, Supreme Court of the State of Kansas, 17 December 2004.
- <sup>76</sup> Kline pursuing federal charges in sheriff's death. CJOonline, 25 January 2005, [http://cjonline.com/stories/012505/bre\\_sheriff.shtml](http://cjonline.com/stories/012505/bre_sheriff.shtml)
- <sup>77</sup> *Ibid.*
- <sup>78</sup> *USA v Cheever*. Memorandum and order. In the US District Court, District of Kansas, 29 March 2006.
- <sup>79</sup> *Kansas v. Marsh*, Justice Souter dissenting (joined by Justice Stevens, Ginsburg and Breyer).
- <sup>80</sup> Memorandum to all federal prosecutors, on Changes to Death Penalty Protocol, 27 July 2011, available at <http://www.justice.gov/oip/docs/death-penalty-protocol.pdf>
- <sup>81</sup> Letter, Rhode Island Public Defender to Assistant Attorney General of Rhode Island, 17 May 2011.
- <sup>82</sup> Statement from the Office of Governor Lincoln D. Chafee, 23 June 2011. Also Statement from Governor Chafee regarding the US District Court decision, 30 June 2011, [http://www.rigovmedia.com/2011/06/statement-from-governor-chafee\\_30.html](http://www.rigovmedia.com/2011/06/statement-from-governor-chafee_30.html)

<sup>83</sup> Statement from Governor Lincoln D. Chafee regarding the US Supreme Court's denial of certiorari in the matter of Jason Wayne Pleau, 14 January 2013, <http://www.rigovmedia.com/2013/01/statement-from-governor-lincoln-d.html>

<sup>84</sup> *USA v. Pleau*. Opinion and Order. US District Court for the District of Rhode Island, 17 April 2013.

<sup>85</sup> See Jason Pleau to plead guilty as charged in federal indictment, News release, US Attorney for Rhode Island, 15 July 2013, <http://www.justice.gov/usao/ri/news/2013/july2013/pleau.html>

<sup>86</sup> "A life sentence is the appropriate punishment for this brutal crime and respects Rhode Island's long-standing opposition to the death penalty." Statement from the Office of Governor Lincoln D. Chafee Regarding Jason Pleau Plea Agreement, 26 July 2013, <http://rhodeislandgovernor.blogspot.co.uk/2013/07/statement-from-office-of-governor.html>

<sup>87</sup> Elizabeth Vicens, Application of the Federal Death Penalty Act to Puerto Rico: a new test for the locally inapplicable standard. *New York University Law Review*, Vol. 80:350, April 2005.

<sup>88</sup> To date, the federal government has been unsuccessful in its numerous attempts to obtain a death sentence in Puerto Rico. In March 2013, a jury voted for life imprisonment for the defendant having convicted him of eight murders. Mitigating factors that the jury unanimously agreed upon were that the defendant "is a human being whose life has value", that "lifetime imprisonment is a severe punishment" and that he had grown up in an environment of "violence, death, narcotics trafficking, and other forms of illegal activity". In April 2013, a Puerto Rico jury voted for life imprisonment rather than the death penalty in a case of murder of an undercover police officer during a carjacking. The jurors, in differing numbers, found a range of mitigating factors: seven of them, for example, found that from a young age the defendant had been exposed to violence and bad influences and seven of them also found that if he were to be executed his family and loved ones would "suffer grief and loss". Eight of the jurors found that a mitigating factor was that, if spared the death penalty, the defendant would be imprisoned for the rest of his life in a federal prison with no possibility of release. In May 2013, a Puerto Rico jury rejected the Obama administration's result of the death penalty in a 2010 murder. Among the mitigating factors that the jury unanimously agreed upon was the defendant's childhood of deprivation, poverty and parental abuse, and its effects on him, and the "inadequate action from the Department of Education regarding [the defendant's] educational needs, including social workers and related services, and lack of proper legal action against both abusive parents".

<sup>89</sup> *USA v. Casey*. United States of America's response in opposition to defendant's motion to declare the Federal Death Penalty Act inapplicable in the Commonwealth of Puerto Rico. In the US District Court for the District Court of Puerto Rico, 14 November 2011.

<sup>90</sup> Here the administration was quoting from *Gregg* (1976) – "one of the most important functions any jury can perform in making a selection between life imprisonment and death for a defendant convicted in a capital case is to maintain a link between contemporary community values and the penal system."

<sup>91</sup> *Uttecht v. Brown*, 2007, Justice Stevens dissenting.

<sup>92</sup> *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In 1985, the Supreme Court relaxed this standard, thereby expanding the class of potential jurors who could be dismissed for cause during jury selection. *Wainwright v. Witt*, 469 U.S. 412 (1985). Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". In 1992, in *Morgan v. Illinois*, the Court explicitly extended the *Witt* standard to include proponents of the death penalty. In other words, anyone whose support for the death penalty would "prevent or substantially impair" them from performing his or her duties as a juror can be dismissed for cause.

<sup>93</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum: Mission to the United States of America, UN Doc. E/CN.4/198/68/Add.3, ¶147. 22 January 1998.

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<sup>94</sup> “Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a ‘death qualified jury’ is really a procedure that has the purpose and effect of obtaining a jury that is biased in favour of conviction”. *Baze v. Rees*, Justice Stevens, concurring.

<sup>95</sup> On the death of John Ferguson. The Atlantic, 5 August 2013, <http://www.theatlantic.com/national/archive/2013/08/on-the-death-of-john-ferguson/278382/>

<sup>96</sup> UN Doc.: E/CN.4/1998/68/Add.3, 22 January 1998. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61. Addendum, Mission to the United States of America.

<sup>97</sup> *Woodford v. Visciotti*, 537 U.S. 19 (2002).

<sup>98</sup> *Matthews v. Parker*, US Court of Appeals for the Sixth Circuit, 27 June 2011.

<sup>99</sup> *Parker v. Matthews*, 11 June 2012.

<sup>100</sup> UN Doc.: A/HRC/20/22/Add. 3. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, addendum: Follow-up to country recommendations – USA, 30 March 2012.

<sup>101</sup> In two separate trials in 1978 presided over by the same judge, John Ferguson was convicted of eight murders committed near Miami – six which took place in July 1977 in Carol City and two in Hialeah in January 1978. He received eight death sentences. The Florida Supreme Court remanded the case for re-sentencing after it found judicial error in the sentencing phases of both trials. As the original trial judge had retired, a different judge, without holding a hearing, re-imposed the eight death sentences.

<sup>102</sup> See *USA: The execution of mentally ill offenders*, January 2006, <http://www.amnesty.org/en/library/info/AMR51/003/2006/en>

<sup>103</sup> See USA: Supreme Court tightens standard on 'competence' for execution, 29 June 2007 <http://www.amnesty.org/en/library/info/AMR51/114/2007/en>

<sup>104</sup> See Amnesty International Urgent Action, *USA v. Mitchell*, No. 11/99003, <http://www.amnesty.org/en/library/info/AMR51/137/1999/en>

<sup>105</sup> Common Core Document of the United States of America: Submitted with the Fourth Periodic Report of the USA to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights, 30 December 2011, *op. cit.*, para. 121,

<sup>106</sup> ¶13 of US report, report available at <http://www.state.gov/j/drl/rls/179781.htm>

<sup>107</sup> In September 2000, Botswana signed and ratified the ICCPR, with effectively the same reservation to article 7 as made eight years earlier by the USA. The USA and Botswana remain the only countries to have made reservations to article 7 (“The Government of the Republic of Botswana considers itself bound by: a) Article 7 of the Covenant to the extent that “torture, cruel, inhuman or degrading treatment” means torture inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana”).

<sup>108</sup> See *Soering v. United Kingdom*, European Court of Human Rights, 7 July 1989 (“having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 [of the ECHR], prohibiting torture an inhuman or degrading treatment or punishment”).

<sup>109</sup> “For example, the Human Rights Committee adopted the view that prolonged judicial proceedings in cases involving capital punishment might constitute cruel, inhuman or degrading treatment or punishment in contravention of this standard. The Committee has also indicated that the prohibition may extend to such other practices as corporal punishment and solitary confinement.” Initial report,

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<http://www.state.gov/documents/organization/133836.pdf>, ¶¶176-177

<sup>110</sup> *Ibid.*, ¶150.

<sup>111</sup> *Knight v. Florida* (1999). In the 1972 *Furman* ruling Justice Brennan wrote: “When we consider why [cruel punishments] have been condemned,...we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.” Two years after the 1976 *Gregg* ruling that ended the moratorium on the death penalty, David Powell was sent to death row in Texas for the murder of a police officer in May 1978. The state “toyed” with his life for 11,575 days before ending it on 15 June 2010. As the execution approached, the clemency authorities rejected compelling evidence of Powell’s rehabilitation and good conduct on death row since he was first convicted 32 years earlier and labelled by a jury as too dangerous to be allowed to live, even in prison. He was permanently “discarded” – like the 459 others who had been executed since David Powell was first sent to death row. Between his original conviction and his execution, more than 70 countries had legislated to abolish the death penalty. Amnesty International, *People can change. Will Texas?* May 2010, <http://www.amnesty.org/en/library/info/AMR51/048/2010/en>

<sup>112</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/009/2012/en> and update <http://www.amnesty.org/en/library/info/AMR51/014/2012/en>

<sup>113</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/024/2012/en>, and update <http://www.amnesty.org/en/library/info/AMR51/027/2012/en>

<sup>114</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/048/2012/en> and update, <http://www.amnesty.org/en/library/info/AMR51/051/2012/en>

<sup>115</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/059/2012/en> and update, <http://www.amnesty.org/en/library/info/AMR51/072/2012/en>

<sup>116</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/088/2012/en> and update, <http://www.amnesty.org/en/library/info/AMR51/090/2012/en>

<sup>117</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/035/2013/en> and update, <http://www.amnesty.org/en/library/info/AMR51/037/2013/en>

<sup>118</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/055/2013/en> and update <http://www.amnesty.org/en/library/info/AMR51/057/2013/en>

<sup>119</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/052/2013/en> and updates <http://www.amnesty.org/en/library/info/AMR51/054/2013/en> and <http://www.amnesty.org/en/library/info/AMR51/056/2013/en>

<sup>120</sup> See Amnesty International Urgent Action, 4 June 2013, <http://www.amnesty.org/en/library/info/AMR51/034/2013/en> and update 17 June 2013, <http://www.amnesty.org/en/library/info/AMR51/038/2013/en>

<sup>121</sup> Arizona Attorney General Tom Horne Sues Feds over Delays in Capital Cases, News release, 12 August 2013, <https://www.azag.gov/press-release/arizona-attorney-general-tom-horne-sues-feds-over-delays-capital-cases>

<sup>122</sup> Murder Victims’ Families for Reconciliation, <http://www.mvfr.org/why-we-oppose-it/> (“Some Reasons many Murder Victims Family Members Oppose the Death penalty: Violates ethical, moral, and/or religious beliefs. Complicates grieving and interferes with healing. Costs too much. Fails as a deterrent to violence. Risks executing an innocent person ‘in our names.’ Tainted by racial bias in its application. Applied with geographical arbitrariness. Applied disproportionately to people who are economically disadvantaged. Applied to people with severe mental illness”).

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<sup>123</sup> Murder Victims' Families for Human Rights,

<http://www.mvfhr.org/sites/default/files/MVFHRbrochure2012.pdf>

<sup>124</sup> "At the time it became a Party to the ICCPR, the United States carefully evaluated the treaty to ensure that it could fully implement all of the obligations it would assume. The reservations taken by the United States to a few provisions of the ICCPR were crafted in close collaboration with the US Senate to ensure that the United States could fulfil its international obligations under the ICCPR. We have no current plans to review or withdraw these reservations." United States written responses to questions from the UN Human Rights Committee concerning the Fourth Periodic Report, 3 July 2013, *op. cit.*, ¶16.

<sup>125</sup> See Amnesty International's main submission to the UN Human Rights Committee on the USA's Fourth Periodic Report, September 2013, at <http://www.amnesty.org/en/library/info/AMR51/061/2013/en>

<sup>126</sup> John Yoo, *War by other means: An insider's account of the war on terror*. Atlantic Monthly Press, New York, 2006, pages 222-223.

<sup>127</sup> George W. Bush. *Decision points*. Virgin Books, 2010, page 167.

<sup>128</sup> The prosecution has told the defence that it intends to prove a number of "aggravating factors" at the trial in pursuit of death sentences, including that the crime resulted in the death of more than one person, that it was committed in such a way that multiple lives were endangered, and was preceded by the "intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering" to the victims. Memorandum from Office of the Trial Prosecutor, 20 April 2012.

<sup>129</sup> Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 2007, ¶59.

<sup>130</sup> UN Doc.: A/67/275, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, August 2012.

<sup>131</sup> UN Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly 1985.

<sup>132</sup> *USA v. al Nashiri*, transcript of arraignment, 11 November 2011.

<sup>133</sup> General Comment 32 (2007), *op. cit.*, ¶ 22.

<sup>134</sup> UN Doc.: A/63/271. Report to the UN General Assembly of the Special Rapporteur on the independence of judges and lawyers, 12 August 2008.

<sup>135</sup> Attorney General Eric Holder speaks at the US Constitution Project Awards Dinner, 15 April 2010, <http://www.justice.gov/ag/speeches/2010/ag-speech-1004152.html>

<sup>136</sup> Jack Goldsmith, *The Terror Presidency: Law and judgment inside the Bush administration*, W.W. Norton and Company, New York, 2007, paged 50-51.

<sup>137</sup> *USA v. Khalid Sheikh Mohammad et al.*, Protective Order #1 to protect against disclosure of national security information, Military Commission Trial Judiciary, Guantánamo Bay, Cuba, 6 December 2012.

<sup>138</sup> See Guantánamo judge holds first secret hearing of 9/11 trial, *The Miami Herald*, 20 August 2013, <http://www.miamiherald.com/2013/08/19/3573180/guantanamo-judge-holds-first-secret.html>

<sup>139</sup> Also, Guantánamo judge makes secret ruling on secret motion in secret hearing. *Miami Herald*, 11 September 2013, <http://www.miamiherald.com/2013/09/10/3618700/guantanamo-judge-makes-secret.html>

<sup>140</sup> *USA v. Jacques*. Opposition to motion to reconsider point eight in favour of striking the death penalty. US District Court for the District of Vermont, 1 July 2011.

<sup>141</sup> See also US Supreme Court Justice Antonin Scalia's concurrence in *Kansas v. Marsh*, 26 June 2006: "It is commonly recognized that many European countries...abolished the death penalty in spite of

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

<sup>142</sup> Periodic Report of the USA to the UN Committee on the Elimination of Racial Discrimination re: the International Convention on the Elimination of All Forms of Racial Discrimination, 12 June 2013. In similar vein, in June 2012, the US Embassy in Austria wrote to an Amnesty International activist in response to his concern about a death penalty case in Mississippi: "At present, 33 of 50 states in the United States, representing a majority of our nation, have chosen to retain the option of imposing the death penalty for the most serious crimes... The issue of the imposition of the death penalty continues to be the subject of vigorous and open discussion both among the American people and on an international basis." Email reply from Public Affairs Office, US Embassy, Vienna, Austria, 15 June 2012.

<sup>143</sup> Initial report of the USA to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/81/Add.4 (24 August 1994).

<sup>144</sup> UN Doc: CCPR/C/SR.1406, 24 April 1995.

<sup>145</sup> UN Doc: CCPR/C/JPN/CO/5, 18 December 2008.

<sup>146</sup> Perhaps most famously by in 1994, when US Supreme Court Justice Harry Blackmun said: "The basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative." *Callins v. Collins*, *op. cit.*

<sup>147</sup> Costs of imposing death penalty outweigh benefits, Delaware Online, 23 April 2013, [http://www.delawareonline.com/article/20130424/OPINION/304240011?nclck\\_check=1](http://www.delawareonline.com/article/20130424/OPINION/304240011?nclck_check=1)

<sup>148</sup> *Nichols v. Heidle*, US Court of Appeals for the Sixth Circuit, 25 July 2013, Judge Martin concurring.

<sup>149</sup> *Dixon v. Houk*, US Court of Appeals. Sixth Circuit, 10 September 2013, Judge Merritt dissenting.

<sup>150</sup> *Baze v. Rees*, Brief for the United States as amicus curiae supporting respondents. In the US Supreme Court, December 2007.

<sup>151</sup> *Baze v. Rees*, 16 April 2008, Justice Stevens concurring in judgment

<sup>152</sup> Also, in 2007 New Jersey abolished the death penalty and the last death sentence in New York State was commuted, following a 2004 court ruling that its capital law violated the state's constitution.

<sup>153</sup> Amnesty International welcomes Governor O'Malley's leadership on this issue and urges commutation of the death sentences of five men in Maryland to whom the abolitionist bill will not apply.

<sup>154</sup> See USA: A deadly distinction: 500th execution in Texas looms, 25 June 2013, *op. cit.*

<sup>155</sup> Of 1,344 executions in the USA from 1976 to 12 September 2013, 18 per cent were of people convicted in (Texas) Harris County (118), Bexar County (37), Tarrant County (37) and Dallas County (52). See also, Frank R. Baumgartner, *The Geography of the Death Penalty*, October 2010, <http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf>

<sup>156</sup> *Trop v. Dulles* (1958). See, for example, USA: Too much cruelty, too little clemency, 30 April 2009, <http://www.amnesty.org/en/library/info/AMR51/057/2009/en> and See USA: A deadly distinction: 500th execution in Texas looms, 25 June 2013, <http://www.amnesty.org/en/library/info/AMR51/041/2013/en>

<sup>157</sup> See AI Urgent Action 14 June 2011, <http://www.amnesty.org/en/library/info/AMR51/052/2011/en> and update, 8 July 2011, <http://www.amnesty.org/en/library/info/AMR51/063/2011/en>

<sup>158</sup> USA: Government must ensure meaningful judicial review of Mexican death row cases, 27 March

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2008, <http://www.amnesty.org/en/library/info/AMR51/025/2008/en>

<sup>159</sup> See Amnesty International Urgent Action, 17 July 2008

<http://www.amnesty.org/en/library/info/AMR51/081/2008/en>

<sup>160</sup> See for example, Amnesty International Urgent Action, 1 August 2012,

<http://www.amnesty.org/en/library/info/AMR51/071/2012/en> and update 8 August 2012,

<http://www.amnesty.org/en/library/info/AMR51/073/2012/en>; and Urgent Action of 5 April 2007,

<http://www.amnesty.org/en/library/info/AMR51/064/2007/en> and update 12 April 2007,

<http://www.amnesty.org/en/library/info/AMR51/068/2007/en>

<sup>161</sup> See USA: 'Where is the compassion?' The imminent execution of Scott Panetti, mentally ill offender,

16 January 2004, <http://www.amnesty.org/en/library/info/AMR51/011/2004/en>; USA: Supreme Court

tightens standard on 'competence' for execution, 29 June 2007,

<http://www.amnesty.org/en/library/info/AMR51/114/2007/en>; and *Panetti v. Quarterman*, US Court of

Appeals for the Fifth Circuit, 21 August 2013 (affirming the District Court ruling denying relief).

<sup>162</sup> Florida, Oklahoma, Virginia.

<sup>163</sup> See USA: A deadly distinction: 500th execution in Texas looms, 25 June 2013, *op. cit.*

<sup>164</sup> Governor Kitzhaber issues reprieve - calls for action on capital punishment, 22 November 2011,

[http://www.oregon.gov/gov/media\\_room/pages/press\\_releasesp2011/press\\_112211.aspx](http://www.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx)

<sup>165</sup> Suspect in Boston Marathon Attack Charged with Using a Weapon of Mass Destruction, News release,

US Attorney for the District of Massachusetts, 22 April 2013,

<http://www.justice.gov/usao/ma/news/2013/April/TsarnaevComplaint.html>

<sup>166</sup> Massachusetts Reconsiders Death Penalty Following Boston Marathon Bombings, International

Business Times, 23 April 2013, [http://www.ibtimes.com/massachusetts-reconsiders-death-penalty-](http://www.ibtimes.com/massachusetts-reconsiders-death-penalty-following-boston-marathon-bombings-1211863#)

[following-boston-marathon-bombings-1211863#](http://www.ibtimes.com/massachusetts-reconsiders-death-penalty-following-boston-marathon-bombings-1211863#) See also, Mass. House defeats proposal to restore death

penalty, Boston Globe, 23 April 2013, [http://www.bostonglobe.com/metro/2013/04/23/lawmakers-citing-](http://www.bostonglobe.com/metro/2013/04/23/lawmakers-citing-marathon-bombings-propose-restoring-death-penalty-massachusetts/2013/04/23/SHrscd9pSFRv1YsN/story.html?s_campaign=sm_tw)

[marathon-bombings-propose-restoring-death-penalty-](http://www.bostonglobe.com/metro/2013/04/23/lawmakers-citing-marathon-bombings-propose-restoring-death-penalty-massachusetts/2013/04/23/SHrscd9pSFRv1YsN/story.html?s_campaign=sm_tw)

[massachusetts/2013/04/23/SHrscd9pSFRv1YsN/story.html?s\\_campaign=sm\\_tw](http://www.bostonglobe.com/metro/2013/04/23/lawmakers-citing-marathon-bombings-propose-restoring-death-penalty-massachusetts/2013/04/23/SHrscd9pSFRv1YsN/story.html?s_campaign=sm_tw)

<sup>167</sup> Federal Grand Jury Returns 30-Count Indictment Related to Boston Marathon Explosions and Murder

of MIT Police Officer Sean Collier, US Attorney for the District of Massachusetts, News Release, 27 June

2013, <http://www.justice.gov/usao/ma/news/2013/June/TsarnaevPressRelease.html> By 9 September

2013, the federal prosecutor had not filed a notice of intent to seek the death penalty.

<sup>168</sup> George H. Brauchler, District Attorney, 18<sup>th</sup> Judicial District, Colorado. 'Death penalty is a tool of

justice', 31 March 2013, Guest Commentary, Denver Post,

[http://www.denverpost.com/opinion/ci\\_22895409/death-penalty-is-tool-justice](http://www.denverpost.com/opinion/ci_22895409/death-penalty-is-tool-justice)

<sup>169</sup> Death penalty repeal effort blocked by two Democrats. Fox 31 News, 26 March 2013,

<http://kdvr.com/2013/03/26/death-penalty-repeal-measure-in-sponsors-hands/>

<sup>170</sup> Justin Marceau, Sam Kamin and Wanda Foglia. Death eligibility in Colorado: Many are called, few are

chosen. University of Colorado Law Review Fall 2013, 84 U.Colo.L.Rev. 1069.

<sup>171</sup> Death Sentence Reprieve. Executive Order D-2013-006, 22 May 2013, available at

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content->

[Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22D+2013-](http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-)

[006.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1](http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-)

[251855360980&ssbinary=true](http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-)

<sup>172</sup> *Nichols v. Heidle*, US Court of Appeals for the Sixth Circuit, 25 July 2013, Judge Martin concurring.

<sup>173</sup> *USA v. Wilson*, The Government's omnibus response in opposition to defendant's substantive and

death penalty related motions. In the US District Court, Eastern District of New York, 22 March 2006.

<sup>174</sup> Human rights: A commitment to action, 22 December 2009, <http://www.state.gov/documents/organization/134134.pdf>

<sup>175</sup> My Day, 22 February 1960. From the Eleanor Roosevelt Papers Project, at [http://www.gwu.edu/~erpapers/myday/displaydoc.cfm?\\_y=1960&\\_f=md004674](http://www.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1960&_f=md004674)

<sup>176</sup> In an advisory opinion on the American Convention on Human Rights 30 years ago, the Court said that that treaty “adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.” Inter American Court of Human Rights Court, Restrictions To the Death Penalty (Arts. 4(2) And 4(4) American Convention On Human Rights). Advisory Opinion OC23/83 of 8 September 1983. Series A No. 3, para. 57. The USA has yet to ratify the American Convention, which it signed in 1977, the same year that it signed the ICCPR, and resumed executions.

<sup>177</sup> US Senate Executive Report (102-23 (102<sup>nd</sup> Congress, 2d session), 24 March 1992.

<sup>178</sup> UN Doc.: E/CN.4/1998/68/Add.3, 22 January 1998, para. 13.

<sup>179</sup> See US Human Rights Treaty Reports. Memorandum for State Governors. From Legal Adviser, US Department of State, 20 January 2010, <http://www.state.gov/documents/organization/137292.pdf>

<sup>180</sup> 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

<sup>181</sup> *Heckler v. Chaney*, Brief for the petitioner, In the Supreme Court of the United States, August 1984.

<sup>182</sup> *Strickland v. Washington*. Brief for the United States as amicus curiae supporting petitioners. In the US Supreme Court, August 1983.

<sup>183</sup> *Strickland v. Washington*, 14 May 1984.

<sup>184</sup> *Heckler v. Chaney*, Reply brief for the petitioner, In the US Supreme Court, November 1984.

<sup>185</sup> *Heckler v. Chaney*, 20 March 1985.

<sup>186</sup> *Payne v. Tennessee*, In the US Supreme Court, Brief For The United States As Amicus Curiae supporting respondent, April 1991.

<sup>187</sup> Jeffrey Abramson, Death-is-different jurisprudence and the role of the capital jury, *Ohio State Journal of Criminal Law*, Vol. 2: 117, 2004, pages 133-134.

<sup>188</sup> *Domingues v. Nevada*, Brief for US as amicus curiae. US Supreme Court, October 1999. See also Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/102/1999/en> and updates, <http://www.amnesty.org/en/library/info/AMR51/171/1999/en> and <http://www.amnesty.org/en/library/info/AMR51/148/1999/en>

<sup>189</sup> *Mickens v. Taylor*, Brief for the United States as amicus curiae supporting respondent. In the US Supreme Court, September 2001.

<sup>190</sup> *Mickens v. Taylor*. Brief for the United States as amicus curiae supporting respondent. In the US Supreme Court, September 2001.

<sup>191</sup> See AI Urgent Action, 28 May 2002, <http://www.amnesty.org/en/library/info/AMR51/081/2002/en>, and update 12 June 2002, <http://www.amnesty.org/en/library/info/AMR51/097/2002/en>

- <sup>192</sup> *Bell v. Cone*, Brief for US as amicus curiae supporting petitioner, US Supreme Court, January 2002.
- <sup>193</sup> *Bell v. Cone*, 28 May 2002.
- <sup>194</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/014/2000/en>
- <sup>195</sup> Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/117/2000/en>
- <sup>196</sup> *Wiggins v. Smith*, Brief for the United States as amicus curiae supporting respondents. In the US Supreme Court, February 2003.
- <sup>197</sup> *Wiggins v. Smith*, 26 June 2003.
- <sup>198</sup> *Rompilla v. Beard*, Brief for the United States as amicus curiae supporting respondent. In the Supreme Court of the United States, December 2004.
- <sup>199</sup> *Rompilla v. Beard*, US Supreme Court, 20 June 2005.
- <sup>200</sup> *Oregon v. Guzek*, Brief for US as amicus curiae supporting petitioner, US Supreme Court, July 2005.
- <sup>201</sup> *Oregon v. Guzek*, 22 February 2006.
- <sup>202</sup> *Uttecht v. Brown*, Brief for the United States as amicus curiae supporting petitioner. In the US Supreme Court, February 2007.
- <sup>203</sup> *Uttecht v. Brown*, 4 June 2007.
- <sup>204</sup> *Patrick Dwayne Murphy v. State of Oklahoma*, On petition for a writ of certiorari to the Oklahoma Court of Criminal Appeals, Brief for the United States as amicus curiae. US Supreme Court, May 2005.
- <sup>205</sup> *Kennedy v. Louisiana*, US Supreme Court, 25 June 2008 (modified 1 October 2008).
- <sup>206</sup> Obama disagrees with high court on child rape case. Associated Press, 25 June 2008.
- <sup>207</sup> *Kennedy v. Louisiana*, Motion for leave to file brief and brief for the United States as amicus curiae supporting petition for rehearing. In the US Supreme Court, July 2008.
- <sup>208</sup> *Harbison v. Bell*, Brief for the United States as amicus curiae supporting the judgement below. In the US Supreme Court, October 2008.
- <sup>209</sup> *Harbison v. Bell*, 1 April 2009.
- <sup>210</sup> Letter to US Attorney General from Attorneys General of Alabama, Colorado, Delaware, Florida, Idaho, Mississippi, Missouri, Nevada, Oregon, Tennessee, Utah, Washington, and Wyoming. 25 January 2011.
- <sup>211</sup> Letter from Attorney General Eric Holder to James McPherson, Executive Director, National Association of Attorneys General, 4 March 2011.
- <sup>212</sup> Letter to US Attorney General Eric Holder from Amnesty International, 24 May 2012.
- <sup>213</sup> *Beatty et al v. FDA et al*, Defendants' notice of appeal. US District Court for DC, 25 May 2012.
- <sup>214</sup> *Ryan v. Gonzales*, Brief for United States as amicus curiae, In the Supreme Court, February 2012.
- <sup>215</sup> *Ryan v. Gonzales, Tibbals v. Carter*. Brief for the United States as amicus curiae supporting petitioners, In the US Supreme Court, June 2012.
- <sup>216</sup> *Ryan v. Gonzales*, 8 January 2013.
- <sup>217</sup> *State v. Wogenstahl*, 1/25/2013, Case Announcements #2, 2013-Ohio-164, O'Neill, J., dissenting.