

Testimony of

The Honorable Russ Feingold

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Senate Judiciary Committee
Executive Business Meeting
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Statement of U.S. Senator Russell D. Feingold
on The Innocence Protection Act (S. 486)

Mr. Chairman, I first want to thank you for your tremendous leadership on this bill. I am proud to be an original cosponsor of the Innocence Protection Act, and I am very pleased that the Committee will consider this bill today. I believe that requiring access to post-conviction DNA testing and competent counsel in capital cases is absolutely necessary if we are to reduce the risk of executing the innocent. Mr. Chairman, this bill is long overdue, and I hope that this Committee reports it favorably today.

But this bill, as important as it is, is just one step of many steps that Congress must take in order to ensure that no innocent person is ever dealt this ultimate, irreversible punishment.

Mr. Chairman, thirty years ago this June, the Supreme Court ruled that the death penalty was unconstitutional. In *Furman v. Georgia*, the Court found then that the application of the death penalty was arbitrary and capricious and thus a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

In *Furman*, Justice Douglas, writing one of the five concurring opinions in support of the judgment, said:

It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

Four years later, the Court, of course, reinstated the death penalty in *Gregg v. Georgia*. But, Mr. Chairman, we sit here today, almost thirty years to the day after the Court ruled the death penalty unconstitutional, again wondering whether the death penalty discriminates against defendants on the basis of race, wealth, social position, or class "under a procedure that gives room for the play of such prejudices." Thirty years later, an increasing number of Americans are questioning the current system and acknowledging that it is broken. Flaws in the death penalty system are not limited to DNA testing and inadequate counsel. Racial and geographic disparities, police and prosecutorial misconduct, and wrongful convictions based solely on the testimony of a jailhouse snitch or a single eyewitness all taint our nation's use of the death penalty.

I am very pleased that the courts have also joined the growing chorus of Americans. The Supreme Court recently issued two important decisions. In *Atkins v. Virginia*, the Court decided to ban the execution of mentally retarded defendants, finding such executions a violation of the Eighth Amendment. A second decision, *Ring v. Arizona*, requires juries, not judges, to decide the facts establishing aggravating factors during the sentencing phase of a capital trial, consistent with the Sixth Amendment guarantee of a trial by jury. And just last week, Mr. Chairman, a federal judge in New York found that the federal death penalty is unconstitutional because the federal system, like the state systems, is prone to error and risks executing the innocent.

Mr. Chairman, I hope that most of our colleagues will support your bill today. In doing so, we acknowledge that there are fundamental flaws in the death penalty system. But if this Committee is prepared to admit that the current system is broken and risks executing the innocent, then this Committee should do more. This Committee should support a suspension of executions to allow, at a minimum, the Innocence Protection Act to be enacted and, more importantly, a thorough review of the death penalty system nationwide. Congress should follow the courageous lead of Illinois Governor George Ryan and now Maryland Governor Parris Glendening. I urge my colleagues to support my bill, the National Death Penalty Moratorium Act.

Mr. Chairman, again, I thank and commend you for your hard work on this bill. There is much more work to be done on this issue, but enactment of your bill is a needed step in the right direction. Thank you.