Testimony of

William Otis

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Testimony of William Otis on the Federal
Death Penalty: 06/25/07

Mr. Chairman, Ranking Member Brownback and distinguished Senators,

Thank you for inviting me to testify about issues relevant to the proposed Federal Death Penalty Abolition Act. Like the great majority of our citizens, I support keeping the death penalty for particularly gruesome and heinous murders. At the same time, Mr. Chairman, I want to thank you for your principled and forthright stand. You do not seek to disguise your views behind what some market as a death penalty "moratorium," but what is actually intended to be simply the first phase of wholesale abolition. You support abolition, and you say so. This makes an honest debate possible.

Today's discussion of the federal death penalty cannot be divorced from the broader national debate about capital punishment. Indeed, if anything, the federal government's death penalty procedures are widely recognized to be among the most careful and painstaking of any jurisdiction. So if the federal death penalty were to be abolished, it is difficult to see why capital punishment should exist anywhere in the country.

But it should, in federal law as elsewhere. The central reason for opposing abolition of the death penalty is that it is a one-size-fits-all proposition. It would intentionally turn a blind eye to the facts of any particular case, no matter how horrible the crime, how many victims, or how grotesque their fate. Yet more remarkably, it would refuse to consider the facts even where the typical objections to the death penalty, including those that inspire this hearing, have no application whatever. If the proposed legislation had been the law 10 years ago, for example, Timothy McVeigh would be with us today. Presumably he would still be seeking a national audience like the one he got on Sixty Minutes to explain why he was justified in murdering 168 of his fellow creatures, including 19 toddlers in the day care center at the Murrah Budding.

It would be wrong to prohibit our juries -- the conscience of our communities - from imposing the death penalty on a person like McVeigh. It would be especially wrong if it were the product of an a priori edict drafted in Washington. And to promulgate this edict on the basis of questions that might occur in some cases some of the time, but will often have nothing to do with the case at hand, would be incomprehensible. This was aptly explained by none other than Barry Scheck, the head of the Innocence Project, who told the Washington Post (May 2,2001, p. A3) that, "in McVeigh's case, 'there's no fairness issue ... There's no innocence issue. Millions of dollars were spent on his defense. You look at all the issues that normally raise concern about death penalty cases, and not one of them is present in this case, period."' Mr. Scheck might have added explicitly what was implicit in his remarks, namely, that there was no racial issue either, a fact no

serious person disputes. But today's proposed bill would have prevented McVeigh's execution, or the execution of others like him, notwithstanding the fact that the stated reasons for the bill, racial and otherwise, were entirely irrelevant to his case, and will be entire4 irrelevant to dozens if not hundreds of future cases.

Some will say it's unfair in the context of this hearing to use McVeigh as an example, but that is not so. There is nothing "unfair" in discussing at a hearing about the death penalty one compelling illustration of why we should keep it. Beyond that, McVeigh is fairly representative. Over the last 50 years, two-thirds of those executed by the federal government have been, like McVeigh, white. This largely mirrors the national experience: Since the death penalty was reinstated by the Supreme Court in 1976, nearly three-fifths of executed criminals have been white.

We understand all too well that al-Qaeda terrorists have butchered innocents across the globe, from Madrid to London to New York and Arlington. If today's proposed legislation becomes law, the federal government's ability even to ask a jury to consider the death penalty for terrorists will cease to exist, even if Osama bin Laden himself is in the dock. Millions of Americans would consider that an outrage, and a huge majority would consider it unjust. It is noteworthy that a majority of even those who in general oppose the death penalty thought it was appropriate for our domestic terrorist, Timothy McVeigh (USA Today/CNN/Gallup poll, published in USA Today, May 4, 2001, pp. A1 - A2). All told, slightly more than 80% of the public thought the death penalty was right in that case (Ibid). This bill would tell that 80% that, unbeknownst to them, their views are the stalking horse of racism. But that is not true, and it is not the American public I came to know in my years as a prosecutor. We are a fair-minded and conscientious people. When the moral compass of 80% of our fellow citizens says that the death penalty should be imposed, as it did for McVeigh and will for Osama and others, it is not for Congress to tell them -- as this bill would -- that their sense of justice doesn't count.

To preserve our country's heritage that justice must turn on the facts of each case individually considered, I respectfully submit that federal juries should continue to have discretion, acting out of conscience in egregious cases, to impose the death penalty.

I shall be pleased to answer any questions you may have. ###

Myth: We're executing the innocent.

Fact: There has been no demonstration that an innocent person has been executed in the United States at least since the death penalty was reinstated in 1976, and probably not for decades before then.

Despite numerous claims by abolitionists, there has been no showing accepted by a court or by any neutral group (that is, by any group not already opposed to the death penalty) that the United States has executed a single innocent person for more than a generation, if not for decades. Abolitionists thought they had their "poster boy" in Roger Keith Coleman, a Virginia inmate executed in 1992 for raping and murdering his sister-in-law. Coleman's case made national headlines as the model of the death penalty's supposed injustice -- a rural,

Southern community in a rush to pin the murder on the first person it could find, especially if poor or "marginalized," while ignoring evidence of the "real killer."

The abolitionists' argument had a problem, however. It was false, as was proved by the DNA testing abolitionists (also falsely) claimed the state would never allow. When Coleman was shown by DNA to have been the killer the prosecutor, judge and jury said he was, the abolitionist lobby simply moved on, while still insisting that the rest of the country was an embarrassing anachronism for propping up a system that condemns and kills "innocent people."

The most stunning and comprehensive rebuttal to the notion that we execute the innocent was given by Justice Scalia in Part I11 of his concurring opinion in Kansas v. Marsh, 548 U.S. ___ (2006) (available at http://www.supremecourtus.gov/opinions/05pdf/04-1170.pdf). Unable to improve on Justice Scalia's work, I re-produce it below:

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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.3
) It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. For that reason, I take the trouble to point out that the dissenting opinion has nothing substantial to support it.

It should be noted at the outset that the dissent does not discuss a single case-not one-in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the newfound capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has confirmed guilt.

This happened, for instance, only a few months ago in the case of Roger Coleman.
Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the poster-child for the abolitionist lobby. See Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., Washington Post, Jan. 13, 2006, p. Al; Dao, DNA Ties Man Executed in '92 to the Murder He Denied, N. Y. Times, Jan. 13, 2006, p. A14. Around the time of his eventual execution, "his picture was on the cover of Time magazine ('This Man Might Be Innocent. This Man Is Due to Die'). He was interviewed from death row on 'Larry King Live,' the 'Today' show, 'Primetime Live,' 'Good Morning America1 and 'The Phil Donahue Show.' " Frankel, Burden of Proof, Washington Post, May 14,2006, pp. W8, Wll. Even one Justice of h s Court, in an opinion filed shortly before the execution, cautioned that "Coleman has now produced substantial evidence that he may be innocent of the crime for which he was sentenced to die." Coleman v. Thompson, 504 U. S. 188 , 189 (1992) (Blackmun, J., dissenting). Coleman ultimately failed a lie-detector test offered by the Governor of Virginia as a condition of a possible stay; he was executed on May 20, 1992. Frankel, supra, at

W23; Glod & Shear, Warner Orders DNA Testing in Case of Man Executed in '92, Washington Post, Jan. 6, 2006, pp. Al, A6.

In the years since then, Coleman's case became a rallying point for abolitionists, who hoped it would offer what they consider the "Holy Grail: proof from a test tube that an innocent person had been executed." Frankel, supra, at W24. But earlier this year, a DNA test ordered by a later Governor of Virginia proved that Coleman was guilty, see, e.g., Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., supra, at Al; Dao, supra, at A14, even though his defense team had "proved" his innocence and had even identified "the real killer" (with whom they eventually settled a defamation suit). See Frankel, supra, at W23. And Coleman's case is not unique. See Truth and Consequences: The Penalty of Death, in Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case, 128-129 (H. Bedau & P. Cassell eds. 2004) (discussing the cases of supposed innocents Rick McGinn and Derek Bamabei, whose g d t was also confirmed by DNA tests).

Instead of identifying and discussing any particular case or cases of mistaken execution, the dissent simply cites a handful of studies that bemoan the alleged prevalence of wrongful death sentences. One study (by Lanier and Acker) is quoted by the dissent as claiming that " 'more than 11 0' death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and 'hundreds of additional wrongful convictions in potentially capital cases have been documented over the past century.' " Post, at 8 (opinion of Souter, J.). For the first point, Lanier and Acker cite the work of the Death Penalty Information Center (more about that below) and an article in a law review jointly authored by Radelet, Lofquist, and Bedau (two professors of sociology and a professor of philosophy). For the second point, they cite only a 1987 article by Bedau and Radelet. See Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21. In the very same paragraph which the dissent quotes, Lanier and Acker also refer to that 1987 article as "hav[ing] identified 23 individuals who, in their judgment, were convicted and executed in this country during the 20th century notwithstanding their innocence." Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psychology, Public Policy & Law 577,593 (2004). This 1987 article has been highly influential in the abolitionist world. Hundreds of academic articles, including those relied on by today's dissent, have cited it. It also makes its appearance in judicial decisions-cited recently in a six-judge dissent in House v. Bell, 386 F. 3d 668, 708 (CA6 2004) (en banc) (Merritt, J., dissenting), for the proposition that "the system is allowing some innocent defendants to be executed." The article therefore warrants some further observations.

The 1987 article's obsolescence began at the moment of publication. The most recent executions it considered were in 1984,1964, and 1951; the rest predate the Allied victory in World War 11. (Two of the supposed innocents are Sacco and Vanzetti.) Bedau & Radelet, supra, at 73. Even if the innocence claims made in this study were true, all except (perhaps) the 1984 example would cast no light upon the functioning of our current system of capital adjudication. The legal community's general attitude toward criminal defendants, the legal protections States afford, the constitutional guarantees this Court enforces, and the scope of federal habeas review, are all vastly different from what they were in 1961. So are the scientific means of establishing guilt, and hence innocence-which are now so striking in their operation and effect that they are the subject of more than one popular TV series. (One of these new means, of course, is DNA testing-

which the dissent seems to think is primarily a way to identify defendants erroneously convicted, rather than a highly effective way to avoid conviction of the innocent.)

But their current relevance aside, this study's conclusions are unverified. And if the support for its most significant conclusion-the execution of 23 innocents in the 20th century-is any indication of its accuracy, neither it, nor any study so careless as to rely upon it, is worthy of credence. The only execution of an innocent man it alleges to have occurred after the restoration of the death penalty in 1976-the Florida execution of James Adams in 1984-is the easiest case to verify. As evidence of Adams' innocence, it describes a hair that could not have been his as being "clutched in the victim's hand," Bedau & Radelet, supra, at 91. The hair was not in the victim's hand; "[ilt was a remnant of a sweeping of the ambulance and so could have come from another source." Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121,131 (1988). The study also claims that a witness who "heard a voice inside the victim's home at the time of the crime" testified that the "voice was a woman's," Bedau & Radelet, supra, at 91. The witness's actual testimony was that the voice, which said " ' "In the name of God, don't do it" ' " (and was hence unlikely to have been the voice of anyone but the male victim), "
'sounded "kind of like a woman's voice, kind of like strangling or something U ." ' " Markman & Cassell, Protecting the Innocent, at 130. Bedau and Radelet failed to mention that upon arrest on the afternoon of the murder Adams was found with some $200 in h s pocket-one bill of which "was stained with type 0 blood. When Adams was asked about the blood on the money, he said that it came from a cut on his finger. His blood was type AB, however, while the victim's was type 0." Id., at 132. Among the other unmentioned, incriminating details: that the victim's eyeglasses were found in Adams' car, along with jewelry belonging to the victim, and clothing of Adams' stained with type 0 blood. Ibid. This is just a sample of the evidence arrayed against this "innocent." See id., at 128-133,148-
150.

Critics have questioned the study's findings with regard to all its other cases of execution of alleged innocents for which "appellate opinions U set forth the facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of the authors' conclusions." Id., at 134. (For the rest, there was not "a reasonably complete account of the facts U readily available," id., at 145.) As to those cases, the only readily verifiable ones, the authors of the 1987 study later acknowledged, "We agree with our critics that we have not 'proved' these executed defendants to be innocent; we never claimed that we had." Bedau & Radelet, The Myth of Infallibility: A Reply to Markrnan and Cassell, 41 Stan. L. Rev. 161, 164 (1988). One would have hoped that his disclaimer of the study's most striking conclusion, if not the study's dubious methodology, would have prevented it from being cited as authority in the pages of the United States Reports. But alas, it is too late for that. Although today's dissent relies on the study only indirectly, the two dissenters who were on the Court in January 1993 have already embraced it. "One impressive study," they noted (referring to the 1987 study), "has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984." Herrera v. Collins, 506 U. S. 390 , 430, n. 1 (1993)
(Blackmun, J., joined by Stevens and Souter, JJ., dissenting).4

Remarkably avoiding any claim of erroneous executions, the dissent focuses on the large numbers of non-executed "exonerees" paraded by various professors. It speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than as a consequence of the functioning of our legal system. Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

Of course even in identifying exonerees, the dissent is willing to accept anybody's say-so. It engages in no critical review, but merely parrots articles or reports that support its attack on the American criminal justice system. The dissent places significant weight, for instance, on the Illinois Report (compiled by the appointees of an Illinois Governor who had declared a moratorium upon the death penalty and who eventually commuted all death sentences in the State, see Warden, Illinois Death Penalty Reform: How It Happened, What It Promises, 95 J. Crim. L. & C. 381,406-407,410 (2006)), which it claims shows that "false verdicts" are "remarkable in number." Post, at 9 (opinion of Souter, J.). The dissent claims that this Report identifies 13 inmates released from death row after they were determined to be innocent. To take one of these cases, discussed by the dissent as an example of a judgment "as close to innocence as any judgments courts normally render," post, at 7, n. 2: In People v. Smith, 185 Ill. 2d 532,708 N. E. 2d 365 (1999) the defendant was twice convicted of murder. After h s first trial, the Supreme Court of Illinois "reversed Fs] conviction based upon certain evidentiary errors" and remanded his case for a new trial. Id., at 534,708 N. E. 2d, at 366. The second jury convicted Smith again. The Supreme Court of Illinois again reversed the conviction because it found that the evidence was insufficient to establish guilt beyond a reasonable doubt. Id., at 542-543,708 N. E. 2d, at 370-371. The court explained:

"While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. . . . A not guilty verdict expresses no view as to a defendant's innocence. Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof." Id., at 545, 708 N. E. Zd, at 371.

This case alone suffices to refute the dissent's claim that the Illinois Report distinguishes between "exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact," post, at 7, n. 2. The broader point, however, is that it is utterly impossible to regard "exoneration"-however casually defined-as a failure of the capital justice system, rather than as a vindication of its effectiveness in releasing not only defendants who are innocent, but those whose g d t has not been established beyond a reasonable doubt.

Another of the dissent's leading authorities on exoneration of the innocent is Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95J. Crim. L. & C. 523 (2006) (hereinafter Gross). The dissent quotes that study's self-congratulatory "criteria" of exoneration-seemingly so rigorous that no one could doubt the study's reliability. See post, at 8, n. 3 (opinion of Souter, J.). But in fact that article, like the others cited, is notable not for its rigorous investigation and analysis, but for the fervor of its belief that the American

justice system is condemning the innocent "in numbers," as the dissent puts it, "never imagined before the development of DNA tests." Post, at 6 (opinion of Souter, J.). Among the article's list of 74 "exonerees," Gross 529, is Jay Smith of Pennsylvania. Smith-a school principal-earned three death sentences for slaying one of his teachers and her two young children. See Smith v. Holtz, 210 F. 3d 186,188 (CA3 2000).
His retrial for triple murder was barred on double jeopardy grounds because of prosecutorial misconduct during the first trial. Id., at 194. But Smith could not leave well enough alone. He had the gall to sue, under 42 U. S. C. §1983 , for false imprisonment. The Court of Appeals for the Third Circuit affirmed the jury verdict for the defendants, observing along the way that "our confidence in
Smith's convictions is not diminished in the least. We remain firmly unconvinced of the integrity of those guilty verdicts." 210 F. 3d, at 198.

Another "exonerated" murderer in the Gross study is Jeremy Sheets, convicted in
Nebraska. His accomplice in the rape and murder of a girl had been secretly tape recorded; he "admitted that he drove the car used in the murder U , and implicated Sheets in the murder." Sheets v. Butera, 389 F. 3d 772,775 (CA8 2004). The accomplice was arrested and eventually described the murder in greater detail, after which a plea agreement was arranged, conditioned on the accomplice's full cooperation. Ibid. The resulting taped confession, which implicated Sheets, was "[t]he crucial portion of the State's case," State v. Sheets, 260 Neb. 325,327,618 N. W. 2d 117, 122 (2000). But the accomplice committed suicide in jail, depriving Sheets of the opportunity to cross-examine him. This, the Nebraska Supreme
Court held, rendered the evidence inadmissible under the Sixth Amendment
. Id., at 328, 335-351, 618 N. W. 2d, at 123,127-136. After the central evidence was excluded, the State did not retry Sheets. Sheets v. Butera, 389 F. 3d, at 776. Sheets brought a §1983 claim; the U. S. Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment against him. Id., at 780. Sheets also sought the $1,000 he had been required to pay to the Nebraska Victim's Compensation Fund; the State Attorney General-far from concluding that Sheets had been "exonerated" and was entitled to the money-refused to return it. The court action left open the possibility that Sheets could be retried, and the
Attorney General did "not believe the reversal on the ground of improper admission of evidence U is a favorable disposition of charges," Neb. Op. Atty. Gen. No. 01036 (Nov. 9),
2001 WL 1503144, *3.

In its inflation of the word "exoneration," the Gross article hardly stands alone;
mischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of "innocence" in the death-penalty context suffer from the same defect. Perhaps the best-known of them is the List of Those Freed From Death Row, maintained by the Death Penalty Information Center. See http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 includes the cases from the Gross article described above, but also enters some dubious candidates of its own. Delbert Tibbs is one of them. We considered his case in Tibbs v. Florida, 457 U. S. 31 (1982), concluding that the Double Jeopardy Clause does not bar a retrial when a conviction is "revers[ed] based on the weight, rather than the sufficiency, of the evidence," id., at 32. The case involved a man and a woman hitchhiking together in Florida. A driver who picked them up sodomized and raped the woman, and killed her boyfriend. She eventually escaped and positively identified Tibbs. See id., at 32-33. The Florida Supreme Court

reversed the conviction on a 4-to-3 vote. 337 So. 2d 788 (1976). The Florida courts then grappled with whether Tibbs could be retried without violating the Double Jeopardy Clause. The Florida Supreme Court determined not only that there was no double-jeopardy problem, 397 So. 2d 1120, 1127 (1981) (per curiam), but that the very basis on which it had reversed the conviction was no longer valid law, id., at 1125, and that its action in "reweigh[ingl the evidence" in Tibbs' case had been "clearly improper," id., at 1126. After we affirmed the Florida Supreme Court, however, the State felt compelled to drop the charges. The State Attorney explained this to the Florida Commission on Capital Cases: " 'By the time of the retrial, [the] witness/victim U had progressed from a marijuana smoker to a crack user and I could not put her up on the stand, so I declined to prosecute. Tibbs, in my opinion, was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free. His 1974 conviction was not a miscarriage of justice.' " Florida Commission on Capital Cases, Case Histories: A Review of 24 Individuals Released From Death Row 136-137 (rev. Sept. 10, 2002) http://www.floridacapitalcases.state.fl.us/Publications/innocentsproiect.pdf. Other state officials involved made similar points. Id., at 137.

Of course, even with its distorted concept of what constitutes "exoneration," the claims of the Gross article are fairly modest: Between 1989 and 2003, the authors identify 340 "exonerations" nationwide-not just for capital cases, mind you, nor even just for murder convictions, but for various felonies. Gross 529. Joshua Marquis, a district attorney in Oregon, recently responded to this article as follows:

"[L]et's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate 027 percent-or, to put it another way, a success rate of 99.973 percent." The Innocent and the Shammed, N. Y. Times, Jan. 26, 2006, p. A23.

The dissent's suggestion that capital defendants are especially liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle. The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), none of cases included in the .027% error rate for American verdicts involved a capital defendant erroneously executed.

Since 1976 there have been approximately a half million murders in the United States. In that time, 7,000 murderers have been sentenced to death; about 950 of them have been executed; and about 3,700 inmates are currently on death row. See Marquis, The Myth of Innocence, 95J. Crim. L. & C. 501,518 (2006). As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost two-thirds of all death sentences are overturned. See ibid. "Virtually none" of these reversals, however, are attributable to a

defendant's" 'actual innocence.' " Ibid. Most are based on legal errors that have little or nothing to do with guilt. See id., at 519-520. The studies cited by the dissent demonstrate nothing more.

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment-in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes-outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.

Notes

1 The dissent observes that Congress did not initially grant us the full jurisdiction that the Constitution authorizes, but only allowed us to review cases rejecting the assertion of governing federal law. See post, at 3-4, n. (opinion of Stevens, J.). That is unsurprising and immaterial. The original Constitution contained few guarantees of individual rights against the States, and in clashes of governmental authority there was small risk that the state courts would erroneously side with the new Federal Government. (In 1789, when the first Judiciary Act was passed, the Bill of Rights had not yet been adopted, and once it was, it did not apply against the States, see Barron ex rel. Tiernan v. Mayor of Baltimore, 7Pet. 243 (1 833)) Congress would have been most unlikely to contemplate that state courts would erroneously invalidate state actions on federal grounds. The early history of our jurisdiction assuredly does not support the dissent's awarding of special preference to the constitutional rights of criminal defendants. Even with respect to federal defendants (who did enjoy the protections of the Bill of Rights), "during the first 100 years of the Court's existence there was no provision made by Congress for Supreme Court review of federal criminal convictions, an omission that Congress did not remedy until 1889 and beyond." R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 66 (8th ed. 2002). In any case, present law is plain. The 1988 statute cited by the dissent and forming the basis of our current certiorari jurisdiction places States and defendants in precisely the same position. They are both entitled to petition for our review.

2 Not only are the dissent's views on the erroneous imposition of the death penalty irrelevant to the present case, but the dissent's proposed holding on the equipoise issue will not necessarily work to defendants' advantage. The equipoise provision of the Kansas statute imposes the death penalty only when the State proves beyond a reasonable doubt that mitigating factors do not outweigh the aggravators. See ante, at 2. If we were to disallow Kansas's scheme, the State could, as Marsh freely admits, replace it with a scheme requiring the State to prove by a mere preponderance of the evidence that the aggravators outweigh the mitigators. See Tr. of Oral Rearg. 36. I doubt that any defense counsel would accept this trade. The "preponderance" rule,

while it sounds better, would almost surely produce more death sentences than an "equipoise beyond a reasonable doubt" requirement.

3 It is commonly recognized that "[m]any European countries U abolished the death penalty in spite of public opinion rather than because of it." Bibas, Transparency and Participation in Criminal Procedure, 81 N. Y. U. L. Rev. 911, 931-932 (2006). See also id., at 932, n. 88. Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union. See Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L. J. 487, 525 (2005); Demleitner, Is There a Future for Leniency in the U. S. Criminal Justice System? 103 Mich. L. Rev. 1231, 1256, and n. 88 (2005).The European Union advocates against the death-penalty even in America; there is a separate death-penalty page on the website of the Delegation of the European Commission to the U. S. A. See http://www.eurunion.org/legislat/deathpenalty/deathpenhome.htm (as visited June 17, 2006, and available in Clerk of Court's case file). The views of the European Union have been relied upon by Justices of this Court (including all four dissenters today) in narrowing the power of the American people to impose capital punishment. See, e.g., Atkins v. Virginia, 536 U. S. 304 , 317, n. 21 (2002) (citing, for the views of "the world community," the Brief for the European Union as Amicus Curiae).

4 See also Callins v.
Collins, 510 U. S. 1141 ,n. 8 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Innocent persons have been executed, see Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan.
L. Rev. 21, 36, 173-179 (1987), perhaps recently, see Herrera v. Collins, 506 U. S. 390 (1993) , and will continue to be executed under our death penalty scheme").

Myth: The death penalty does not deter murder.

Fact: Anecdotal evidence, the historical relationship between executions and the murder rate, and numerous recent studies all show that the death penalty deters murder. The studies quantify this effect, demonstrating that between three and eighteen murders are deterred for every execution, thus saving innocent lives.

Few sensible people doubt that the more severe the penalty, the more deterrent value it has. A great deal of our criminal justice system is built upon this fact. There is only one place where this commonsense proposition is routinely discounted -- the death penalty debate. For years, abolitionists have maintained that not only does the death penalty fail to deter murder, it stimulates murder by its "brutalizing effect" and by showing that "society approves of killing."

The abolitionist argument has never stacked up well against experience. Now several recent, independent studies ratify the commonsense conclusion that the death penalty does indeed deter murder. What h s means is that it is the imposition of the death penalty, not its abolition, that will save innocent life.

That the prospect of getting executed deters at least some would-be killers should hardly come as a surprise. As Senator Dianne Feinstein explained to the California District Attorneys Association, "I remember well in the 1960's when I was sentencing a woman convicted of robbery in the first degree and I remember looking at her commitment sheet and I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: 'Why was your gun unloaded?' She said to me: 'So I would not panic, kill somebody, and get the death penalty.' That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent."

Senator Feinstein is not alone in this observation. New York Law School Professor Robert Blecker found something similar in a recorded interview he had with a convicted murderer. The convict had robbed and killed drug dealers in Washington, DC, where he knew there was no death penalty. He specifically did not murder a drug dealer in Virginia because, and only because, he envisioned himself strapped in Virginia's electric chair, which he had seen while imprisoned in that state.

The deterrent effect of the death penalty is supported by a great deal more than these and similar anecdotes. The historical relationship between the death penalty and the murder rate is stark, and it can be stated briefly: When the number of executions goes up, the number of murders goes down. When the number of executions goes down, the number of murders goes up.

Our citizens sometimes forget that we have already had what amounted to a death penalty moratorium. In the 15 years from the end of 1965 through 1980, there were only six executions in this country -- a virtual suspension of capital punishment. At the beginning of that period, the murder rate was 5.1 murder victims for every 100,000 people. At the end, it was 10.2 victims -- an exact doubling. In other words, the murder rate doubled during our death penalty "moratorium." But in the 15 years from the end of 1990 through 2005, when there were hundreds of executions (891, to be exact), the murder rate fell from 9.8 to 5.5, a decline of 44%. Moreover, the correlation between an increasing number of executions over that period and a decreasing murder rate is impressive. By far most of the executions during that time were in its second half, and it was during that time that the murder rate dropped to levels that had not been seen since the 1950's (another era in which executions were carried out rather than halted).

It is undoubtedly true that the increase in executions over the last 15 years is not alone responsible for the decreasing murder rate. But the idea that it played no role is at best undocumented and at worst preposterous. To repeat: For 40 years, in good times and bad, when we have had more executions we have had less murder, and when we have had fewer executions we have had more murder. There are inevitably attempts to explain away this fact, but a fact it is nonetheless.

Now, several independent studies confirm what history illustrates, namely, that the death penalty saves innocent life. A little more than two weeks ago, on June 11, 2007, MSNBC.com reported an Associated Press story detailing the evidence. I repeat verbatim several relevant portions of that story:

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The steady drumbeat of DNA exonerations - pointing out flaws in the justice system - has weighed against capital punishment. The moral opposition is loud, too, echoed in Europe and the rest of the industrialized world, where all but a few countries banned executions years ago.

What gets little notice, however, is a series of academic studies over the last half-dozen years that claim to settle a once hotly debated argument - whether the death penalty acts as a deterrent to murder. The analyses say yes. They count between three and 18 lives that would be saved by the execution of each convicted killer.

The reports have horrified death penalty opponents and several scientists, who vigorously question the data and its implications.

So far, the studies have had little impact on public policy. New Jersey's commission on the death penalty this year dismissed the body of knowledge on deterrence as "inconclusive."

But the ferocious argument in academic circles could eventually spread to a wider audience, as it has in the past.

"Science does really draw a conclusion. It did. There is no question about it," said Naci Mocan, an economics professor at the University of Colorado at Denver. "The conclusion is there is a deterrent effect." (emphasis added).

'The results are robust'

A 2003 study he co-authored, and a 2006 study that re-examined the data, found that each execution results in five fewer homicides, and commuting a death sentence means five more homicides. "The results are robust, they don't really go away," , he said. "I oppose the death penalty. But my results show that the death penalty (deters) - what am I going to do, hide them?" (emphasis added).

Statistical studies like his are among a dozen papers since 2001 that suggest capital punishment has deterrent effects. They all explore the same basic theory - if the cost of something (be it the purchase of an apple or the act of killing someone) becomes too high, people will change their behavior (forgo apples or shy from murder).

To explore the question, they look at executions and homicides, by year and by state or county, trying to tease out the impact of the death penalty on homicides by accounting for other factors, such as unemployment data and per capita income, the probabilities of arrest and conviction, and more.

Among the conclusions:
-Each execution deters an average of 18 murders, according to a 2003 nationwide study by professors at Emory University. (Other studies have estimated the deterred murders per execution at three, five and 14).
-The Illinois moratorium on executions in 2000 led to 150 additional homicides over four years following, according to a 2006 study by professors at the University of Houston.
-Speeding up executions would strengthen the deterrent effect. For every 2.75 years cut from

time spent on death row, one murder would be prevented, according to a 2004 study by an Emory University professor.

In 2005, there were 16,692 cases of murder and non-negligent manslaughter nationally. There were 60 executions.

The studies' conclusions drew a philosophical response from a well-known liberal law professor, University of Chicago's Cass Sunstein. A critic of the death penalty, in 2005 he coauthored a paper tided "Is capital punishment morally required?"

"If it's the case that executing murderers prevents the execution of innocents by murderers, then the moral evaluation is not simple," he told The Associated Press. "Abolitionists or others, like me, who are skeptical about the death penalty haven't given adequate consideration to the possibility that innocent life is saved by the death penalty." (emphasis added).

Sunstein said that moral questions aside, the data needs more study.

Critics of the findings have been vociferous.

Some claim that the pro-deterrent studies made profound mistakes in their methodology, so their results are untrustworthy. Another critic argues that the studies wrongly count all homicides, rather than just those homicides where a conviction could bring the death penalty. And several argue that there are simply too few executions each year in the United States to make a judgment.

'Flimsy' studies?

"We just don't have enough data to say anything," said Justin Wolfers, an economist at the Wharton School of Business who last year co-authored a sweeping critique of several studies, and said they were "flimsy" and appeared in "second-tier journals."

"This isn't left vs. right. This is a nerdy statistician saying it's too hard to tell," Wolfers said. "Within the advocacy community and legal scholars who are not as statistically adept, they will tell you it's still an open question ...."

Several authors of the pro-deterrent reports said they welcome criticism in the interests of science, but said their work is being attacked by opponents of capital punishment for their findings, not their flaws.

"Instead of people sitting down and saying 'let's see what the data shows,' it's people sitting down and saying 'let's show this is wrong,"' said Paul Rubin, an economist and co-author of an Emory University study. "Some scientists are out seeking the truth, and some of them have a position they would like to defend."

Myth: The death penalty is losing public support.

Fact: "According to Gallup's 2007 Values and Beliefs survey, conducted May 10-13, the death penalty ranks as one of the most widely agreed upon issues on the roster of moral issues facing

the country. Nearly two-thirds of Americans say it is morally acceptable (66%), while less than half that number (27%) consider it morally wrong. Support for the death penalty is fairly uniform across different age groups, political parties, and between men and women." (Gallup organization news release, June 3, 2007)

It has been a staple of the abolitionist movement that the death penalty is losing support among Americans. And it is true that approval of capital punishment for persons convicted of murder has dropped from 77% in May 1995 (in the immediate aftermath the mass murder of 168 people in the Murrah Building in Oklahoma City on April 19,1995) to 67% in October 2006 (the most recent date the question was asked by Gallup). But 67% is two-thirds
-- a remarkable showing for an issue sparking so much emotion -- and the overall story is one of strong and steady support for the death penalty.

This is true in both the long and short runs. Over the long run, support for the death penalty has surged. In May 1966, about 40 years ago, only 42% approved of the death penalty, while 47% disapproved. By October 2006, 67% approved and 28% disapproved --making it, as noted, "one of the most widely agreed upon issues on the roster of moral issues facing the country." And since the beginning of the 21st Century, support for the death penalty has held steady in a range between 65 and 72 percent, according to Gallup. (The Washington M/ABC poll has slightly lower figures, showing that the approval range from 2000 forward has been between 63 and 66 percent). Meanwhile, opposition to the death penalty has yet to reach 33% in either the Gallup, ABC/Washington Post or Pew Center polls. (Source: http://www.pollingreport.com/crime.htm).

The abolitionist movement maintains that there is growing support for a "moratorium" on the death penalty. A centerpiece of this argument is a recent poll commissioned by the Death Penalty Information Center (DPIC) which purports to find that 58% of the public would support a moratorium. What that finding neglects to mention is that the DPIC is not simply, or even primarily, a mere source of death penalty "information." It is one of the leading, if not the leading, abolitionist organization in the country. That by itself would not debunk the results of its poll. What does, however, is the fact that the interview questions did not constitute a "poll" as ordinarily understood. Instead, it was a classic "push poll" -- that is, one in which a series of leading questions is asked beforehand, intending (and in this instance succeeding) in producing a pre-determined outcome. This was made clear by Gallup's unusually blunt commentary on the DPIC poll (Source: http://blogs.usatoday.com/gallup/):

"A survey commissioned by the Death Penalty Information Center in Washington showed, according to its report, that ". . .58% of the American population believes it is time for a moratorium on the death penalty.. ." Actually, what the study shows is that 58% of Americans can be persuaded by the use of data and evidence and one-sided arguments to support a death-penalty moratorium. But the survey doesn't tell us where the public stands if asked neutrally about a moratorium, and it doesn't tell us how far the public could be pushed to oppose a moratorium if presented with arguments against it ....

"The moratorium question itself was number 13 within the survey. It was phrased as follows: 'Would you support a national halt to all death penalty executions while the problems that lead to wrongful convictions and wrongful death sentences are thoroughly investigated by a blue-ribbon commission?'

"Study this question wording carefully. Note that the writers of the question reminded respondents as the question was being asked that there have been wrongful convictions and wrongful death sentences. In courtrooms, this is called 'leading the witness'. What if the respondent had been led the other way, with a question phrased like this: 'Would you support a national halt to all death penalty executions even if this meant that convicted murderers of women and children who have had their sentences upheld by numerous courts through years of appeals would sit in jail at taxpayer expense and not have the wishes of juries and the court carried out? ....'

"Furthermore, and this is the more serious issue with the DFIC survey, [Question] 13 on the moratorium was asked only after the respondents had been subjected to 12 previous questions. And a number of those questions - in essence - presented arguments in favor of a moratorium. There were virtually no arguments or reasons presented in the 1st 12 questions about why a moratorium might not be a good idea." ###

In fact, there is substantial evidence that our citizens would not favor a moratorium -- much less abolition -- if the issue were framed neutrally. First, when a asked straightforwardly whether the death penalty was imposed too often, about the right amount, or not often enough, a majority -- 51% -- said "not often enough." (May 2006 Gallup poll; a poll one year earlier had found the "not often enough" view to be slightly higher, at 53'0). Of course it can scarcely be the case both that a majority wants a halt to death sentences and believes that death sentences are not imposed often enough.

Second, the roughly two-thirds support for the death penalty persists notwithstanding the fact that a majority believes (incorrectly, as Justice Scalia has shown in the Kansas v. Marsh concurrence) that an innocent person has been executed in the past five years. When support for capital punishment remains that strong in the face of such a belief, it is difficult to conceive that a moratorium what the public demands.

Third, although a very few states -- notably Illinois, under (now-incarcerated) Governor George Ryan -- adopted moratoriums, many more have declined to do so, most recently Maryland, where a proposed moratorium bill died in the state legislature. And in Wisconsin, a state with a strong progressive tradition and which has not had capital punishment for more than 150 years, voters just eight months ago approved a proposal advising the legislature to enact the death penalty for first degree murder where the conviction was supported by DNA evidence.

Indeed, authentic legislative action suggests that a moratorium is the opposite of what voters want -- and this is especially true at the federal level. It was a Democratic Congress that adopted the Omnibus Crime Bill in the 1990's, which not only declined to impose a moratorium on the federal death penalty but vastly expanded the number of offenses for which it could be imposed. That bill was signed by President Clinton, who had overseen executions as Governor of Arkansas. More recently, in 2004, one of the country's leading liberals, Senator Barbara Boxer, joined Senator Feinstein in calling upon the Justice Department to to prosecute the killer of a San Francisco police officer under the very death penalty provision today's proposed legislation would abolish. As David Sandretti, Senator Boxer's spokesman, put it to the San Francisco Chronicle (http://sfgate.com, May 5,2004), "'Sen. Boxer is contacting the U.S. Attorney this afternoon ... She believes the vicious murder of Officer Espinoza is a heinous crime and ... when

a police officer is murdered, those responsible should be punished to the fullest extent of the law .... Her position on the death penalty has been clear for her entire career in the Senate."

Thus, abolitionists to the contrary, the truth is that public support for the death penalty is, and for many years has been, steady and consistent, and today is as strong or stronger than for virtually any contentious issue in public life.