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What Should Be the Future of the Death Penalty?

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C O N T E N T S

P R O C E E D I N G S

MR. NIVOLA: (In progress) -- state practices, and what about the strong tide of public opinion against capital punishment? Should U.S. criminal law begin to take that factor under consideration? These are among the kinds of matters that will be discussed by this distinguished panel we have today.

We are pleased to have Congressman Dan Lungren from California with us, and he will be joined by Ruth Friedman, the Director of the Federal Capital Habeas Project, Kent Scheidegger, Director of the Criminal Justice Legal Foundation, and Virginia Sloan, President of the Constitution Project. As usual, our session will be moderated by our own Stuart Taylor. Thank you all for taking the time to come here for what promises to be a really fascinating seminar.

Before I turn business over to you, Stuart, let me just mention that we have scheduled at least two other forums that should be of interest to everyone this fall. One is on the role of the courts with respect to partisan gerrymandering of House congressional districts, and that one will be on October 30th. A second is on the Supreme Court's decision in *Massachusetts v. EPA*, a case that has potentially important implications for U.S. climate change policy, and that forum will be on December 4th. So stay tuned. With that, Stuart, over to you.

MR. TAYLOR: Thank you, Pietro. I would like to thank our very distinguished panel for coming today, and the moderator's thoughts on this issue are kind of sketched in something that was handed out, so I need not detail us more.

Just a word on format before we go right to the discussion, we are going to shoot for 5-minute opening statements by each panelist in the following order, Representative Lungren, Virginia Sloan, Kent Scheidegger, Ruth Friedman, and then I will ask a round of questions that solicit 3-minute answers to get a little more depth without interruptions. After that, I will ask some more questions, soliciting 1-minute answers and inviting comments from other the panelists of about the same length. Then we will move to audience questions for about the last half-hour or more. The time limits I have found enforceable except by the still, small voice of conscience, and I only urge the panelists that if they violate the time limits, it will stress on the moderator, stress is bad for the health, and, in short, my blood on your hands.

With that introduction, Representative Lungren, who, I might add, was Attorney General of California and had a lot of experience with the death penalty in that position.

MR. LUNGREN: Thank you very much. I presume that you invited me instead of a member of the Senate because you thought we might be able to follow your time limits a little bit better than the Senate, so I will try and do that.

MR. TAYLOR: That was one of many, many reasons.

MR. LUNGREN: As both a member of Congress and as the former Attorney General of California, I have had some experience in dealing with this both from the legislative standpoint back when I was in Congress the first time around where we I remember at one time passed the death penalty on the federal level for the first time for

many, many years. Then as the Attorney General of California, and California, unlike many states, gives tremendous responsibility and authority to the Attorney General in the area of criminal justice. Not only can the Attorney General of California convene a grand jury in any of 58 counties and prosecute someone for any felony, but immediately after conviction is obtained by the District Attorney, or if it were the Attorney General's office, the case is taken over by the Attorney General's office and is their case thereafter. So all the appellate work is done by the Attorney General's office in the State of California, and we did death penalty cases. In fact, the first death penalty being carried out occurred while I was Attorney General.

One of the things I should mention at the very beginning is that when you are involved in that, it seems to me you get away from some of the cheerleading that goes on on that issue on both sides. That is, I have never found it an experience in which I exulted when I was responsible for making sure that the appellate review was taking place such that an execution could go forward. I can recall the first execution we had in California, the Robert Alton Harris case; we went up to the U.S. Supreme Court multiple times in one evening. So outrageous did the Supreme Court consider what the Ninth Circuit was doing at the time that it did something it had never done in the history of the United States and has never done since then, it took all jurisdiction away from all federal courts and gave the only remaining jurisdiction to the United States Supreme Court as a result of its response to what they considered to be the inappropriate actions by the Ninth Circuit. I can recall being at San Quentin that night, and I can recall the mother of one of

the two teenage boys murdered by Robert Alton Harris before he took their half-eaten sandwiches and finished them himself and laughed at his brother who did not have the stomach for it, laughed as he killed these two teenage boys so he could take their car for the purposes of performing an armed robbery.

I can recall talking to the mother that night after we had the second habeas petition before the U.S. Supreme Court, and I explained to her what we were going to do, that is, to respond to that and how I thought we would be ultimately be successful. She looked at me and she said, "Oh, I get it. It's a game," and that really hurt. Here you had the mother who had waited for almost as long as her child had been alive to see justice done as she thought was appropriate, and it appeared to her that the federal judicial system was playing with her and playing with her family members.

So I thought for a moment and I said to her, "No, it should not be about a game. It should be about justice." And we went forward, and at 6:00 a.m. that morning, the execution was carried out after we had gone up to the Supreme Court I think it was six times that night.

But I did not take a lot of glee in the fact that that gentleman was executed. I do recall her former husband, Steve Baker, the father of one of the two boys, who was a deputy sheriff for San Diego County. He had responded to the call of an armed robbery, not knowing that his son had been killed by this individual just 2-1/2 hours before and had a shotgun leveled at the head of Robert Alton Harris, obviously did not discharge it, and

then later found out that his 15-year-old son or 16-year-old son had been murdered by the man, and waited for justice for 15 more years.

He was in the observation room at the time and set himself up so that when Robert Alton Harris came into the room to sit in the chair, he had to look at him through the glass. Robert Alton Harris had never, ever indicated one bit of remorse for his actions. He had, as a matter fact, made fun of people who had suggested he ought to have remorse. As he was getting into the chair and staring at the father of the one boy, he mouthed these words, he said, "I'm sorry." That was the first time he ever showed any remorse in the whole thing, and sat down and was executed.

I happen to think that it is the most solemn thing that a government can do to take the life of one of its members, and so you ought not to have glee about it. You ought to look at it seriously, and you ought to reflect on whether the death penalty does anything, and I think it does. I think you can look at it from the standpoint of retribution, I think you can look at it from the standpoint of deterrence, and I think you can look at it from the standpoint of incapacitation.

I happen to be Roman Catholic. Some of my church leaders have taken positions against the death penalty, although the Catholic Catechism still allows it. The Catholic Catechism suggests that society has the right and in some cases the obligation to use force to defend innocents among it, but has suggested that the death penalty ought to be very, very limited. I believe it ought to be very limited. When I became Attorney General, we were experiencing about 3,500 a year in California. I think the number of people

condemned to death at the time I was Attorney General was about 32 per year. That seems to me that we were using it very, very selectively.

There are those who suggest, and even Pope John Paul II before he died suggested that maybe the death penalty did not need to be used because we had bloodless alternatives to the death penalty, and then I am confronted with a case in California in which a man who was in for murder who was serving a life sentence, directed the murder of three people from his jail cell, and was just recently executed in California after 25 years. So it seems to me that we have a serious obligation to face this issue, to see what it means in terms of the protection of innocent life, to see what it means in terms of a state's ability to determine what the appropriate penalty is in its state, and for us to make some serious decisions as to how far the federal court system ought to go, and whether or not reference to international "standards" are appropriate in these circumstances, and I await our opportunity to answer those questions with the other panelists.

MR. TAYLOR: Thank you very much, Congressman. Ginny Sloan will go next. She has been thinking and writing and working on death penalty issues for a very long time as an aide to former Congressman Don Edwards, at the Constitution Project which she founded which has done some very distinguished studies on this and other issues. Ginny?

MS. SLOAN: Thanks, Stuart, and thanks to Brookings for hosting this forum. I am really delighted to be participating on this panel with these panelists and especially with Congressman Lungren when during his first stint in Congress he was

serving on the House Judiciary Committee and I was a staff lawyer with the committee. At the time we were on opposite sides of this issue, and it appears we still are.

MR. LUNGREN: I have not given up on you.

MS. SLOAN: Nor I on you. At the time, the death penalty was a very controversial issue, and it still is, but I think that the nature of the controversy has changed dramatically since that time, and I would like to talk about how.

In recent years, Americans have witnessed a parade of exonerated individuals, including 123 who were sentenced to death. The number of death sentences is down, as is the number of actual executions. Support for the death penalty has decreased as Americans grow increasingly aware that the criminal justice system makes mistakes and that not only have innocent people been convicted of crimes, but in a continuing tragedy, the true perpetrators have remained free to commit more crimes.

A May 2006 Gallup Poll shows that 65 percent support capital punishment, and that is down from 80 in 1994. And 48 percent chose life without parole as the better penalty for murder, with 47 percent choosing the death penalty. Obviously, those numbers are very close, but it is significant because this is the first time that life without parole is supported by more people than the death penalty. In my view, these changes have come about principally because of the number of exonerations, but also because of the kinds of people who are not speaking out about the death penalty.

For a long time, the stereotype was that opponents of the death penalty were liberals and that their opposition meant that they were soft of crime, and, conversely,

supporters were conservatives who were tough on crime. I think these have been stereotypes for a long time, and they were false when they were first created, and they are false now. They did seem to work in that they created more support for capital punishment. But now what we are seeing is many conservative death penalty supporters have become opponents, and others who continue to support it are expressing reservations, some very strong reservations, and they now support the kinds of reforms that they once rejected as unnecessary.

The Constitution Project's work demonstrates this dramatic shift. Our Death Penalty Initiative, one of our bipartisan committees of distinguished and expert Americans, has issued strong consensus recommendations for reform. Committee members are both supporters and opponents of capital punishment who joined our committee because they all believe that the system is badly broken and that the risk of executing an innocent person, or the wrong people, is too great. Members of our committee and others like them are speaking out about the profound problems with the system, and it is making a huge difference in the debate and in the thinking of Americans on the issue.

Let me just give you some examples. Sam Milsap, who is a member of our committee, describes himself as a life-long and full-throated supporter of capital punishment until the year 2000, because in that he concluded that the capital punishment system "is driven by human beings and decisions that are made by human beings, and that the system makes mistakes that cannot be fixed." Mr. Milsap was the D.A. in Bexar County, Texas, when he prosecuted Ruben Cantu who was executed in 1992. Here is what

he says about the Cantu case, "It can be argued that Ruben Cantu received the perfect trial, and yet at the same time, 21 years later, the thing that is abundantly clear is that he may well have been innocent. When the system works the way it is supposed to and it still produces unfortunate results, abolition is the only appropriate response from civilized people."

There are others speaking out that many in this room might be surprised to hear about, such as Beth Wilkinson who prosecuted Timothy McVeigh, the Oklahoma City Bomber, who secured a death sentence for him, and, of course, he was executed in 2001, and Ms. Wilkinson co-chairs the Constitution Project's Committee. There is Ken Starr, the widely admired and conservative former Solicitor General and federal judge. He is a death penalty supporter, and he has represented two people on death row. In his Virginia case he describes a grievous misconduct in the destruction of DNA evidence which he also believes was used questionably at the trial, and he says that in his California case, a jail house informant's perjured testimony at sentencing is the only reason that the sentencing judge imposed the death penalty, and it is the reason why the judge is now asking Governor Schwarzenegger for clemency. Ken Starr urges that this country give greater attention to structural devices to protect against the pathologies, his words, that infect the system. He says we should no longer pay abject deference to the judicial system with its inevitable flaws, and he says that we should eliminate the threshold procedural questions that overly complicate post-conviction review and give rise to a real cottage industry of litigation.

This I think goes to what Congressman Lungren said about the mother of the murder victim in Robert Alton Harris's case. Ken Starr says it may appear that the courts have exhaustively analyzed the merits in these cases, but in fact, these procedural obstacles prevent the courts from ever addressing the merits, contributing, I think, greatly to the impression that we are playing a game here. We all want to get the merits, we all want these cases to proceed expeditiously, and this is not the way to do it.

Scott Turow is another member of our committee. He used to be a death penalty supporter, but his experiences representing two innocent people on Illinois' death row and on the Illinois Capital Punishment Commission convinced him that the system does not work and never can work, not for victims, not for defendants, and not for society. He says retaining the death penalty seems to be a road to breeding disrespect for the law because it exposes so many of its shortcomings.

Some capital punishment advocates say that to prevail, those who oppose it must show that every execution is wrong. They say that calls for reform and for a moratorium are really just a front for their true goal, which is abolition. I think this argument is wrong, I think it is a red herring, and I think it will be increasingly be considered irrelevant, and here is why. Several years ago, George Will, the distinguished conservative commentator, wrote about the "hair-curling stories about the careless or corrupt administration of capital punishment." Speaking specifically to conservatives he said, "Capital punishment is a government program, so skepticism is in order." A more cynical way of describing that skepticism is something that I think those of us in

Washington are pretty familiar with, close enough for government work, and I would add that this cynicism is shared by liberals as well. Who among us believes that the government will pick up our trash on time, or make sure we have power during a rainstorm, or protect the confidentiality of the records of our country's veterans? These are important issues, but they are obviously not life-and-death decisions, the way the death penalty is. So it seems to clear to me that the more that people like Ken Starr, Sam Milsap, Beth Wilkinson, Scott Turow, speak out about their experiences with our capital punishment system, the sooner Americans are going to conclude that when it comes to the death penalty, close enough for government work just is not close enough. Thank you.

MR. TAYLOR: Thanks, Ginny. Next we hear from Kent Scheidegger who has written more than a hundred Supreme Court briefs on criminal law issues, especially the death penalty, in the U.S. Supreme Court, for the Criminal Justice Legal Foundation, in San Diego, and Kent did us the great favor of coming all the way across the continent to give his views on the subject. Thank you.

MR. SCHEIDEGGER: The basic moral question that often arises in debates about the death penalty is whether it is moral to do to the criminal substantially the same thing he did to the victim. When you really stop and think about that, almost everybody would have to answer that question, sometimes. Hardly anybody has a problem with forcibly taking away a kidnapper and holding him prisoner for a number of years. That is what we did to Kenneth Parnell who kidnapped Steven Stayner and did that to him, and nobody has a problem with that.

On the other hand, very few people believe we should really torture torturers. So the moral question really is whether the death penalty is on one side or the other, it is a punishment we do not like to impose but feel we need to because anything less diminishes the value of the victim's life, or is it on the other side, a punishment that just do not impose because we feel it diminishes ourselves?

A lot of people feel very strongly one way or the other on that question. For those people, the question is essentially undebatable. If you feel very strongly it is either very morally right or very morally wrong, none of the practical arguments are going to matter. The practical arguments, therefore, are addressed to the swing voter, to the people who are not quite solid one way or the other. The one that has gotten the most attention is the question of deterrence, does the death penalty when actually enforced cause some would-be murderers to refrain and thereby save innocent lives?

There are several ways to judge this question. The one you hear most often, which is also the least valid, is to compare different jurisdictions and say the ones that have the death penalty have higher murder rates than the ones who do not have the death penalty. That does not work because the states different in a lot of different ways, and it gets the cause and effect backwards. It is the states that have lower murder rates by and large that are the ones that decide they can do without the death penalty.

One step more sophisticated although admittedly still simple is this graph that I have prepared for you in your packet. I looked at the states of the United States and their changes in murder rates since the moratorium period. From 1968 to 1975, there was

effectively no death penalty in America and nobody was executed, and it was doubtful whether anybody would be again. I broke down the states into three groups based on what has happened since then, those that have had no executions, those that have had some executions but fewer executions per murder than the national average, and those that have had more executions per murder than the national average.

The more executions per murder than the national average is the red line on the graph. I regret we cannot put this up today for the television audience. As you can see, as the death penalty got going into the 1980s and into the 1980s, those states that actually used the death penalty had a greater drop in their murder rates than those states that were either not using it at all or using it very little.

This again is not proof and it is a fairly simple analysis. There are some more sophisticated studies. There is a whole generation of new econometric studies, and I will not try and explain the math behind them because I am not entirely sure I understand it myself, but at a much higher level of sophistication we see study after study showing that there is a deterrent effect, and estimates range between five and eighteen innocent lives saved per execution. These studies have been around for about 6 years now. Very recently we have seen some criticism coming out, or I should say critiques, and the critiques have a very different tone than the flame wars that we had 30 years ago with Professor Alec's (ph) studies.

The tend to be along the lines that, yes, but, the deterrent effect shows up in the states that enforce the death penalty the most, and in those that only enforce it

sporadically, like, for example, California and Pennsylvania, there is no evidence of a deterrent effect. I do not know if they are right. Again, it is beyond my field of knowledge. But assuming for the sake of argument that that criticism is correct, I think it is consistent with our position, that the death penalty does have a deterrent effect, but only where it is really enforced, and in states such as Pennsylvania, California, and Maryland, where it is largely obstructed and only a handful of executions get through, then it does not have a deterrent effect, and that is why that obstruction needs to stop. So the death penalty I believe does work and does save innocent lives where it is actually enforced.

I do want to mention the public opinion that was mentioned by Virginia. It is true that support for the death penalty is down from its all-time peak. It is also true that it is up from its all-time low. Most statistics are. In fact, death penalty support is pretty steady over the last several years. The questions that Gallup asks as its standard questions tend to understate the death penalty because they ask for a single response for the penalty for all murders. A much better question that Gallup has only asked for about 4 or 5 years is, What do you think of the death penalty relative to the way it is actually enforced today? Do you think it is imposed too often, not often enough, or about right? If you take the about right and not often enough figures and add them together, you see that support for the death penalty is rock solid at three-quarters of the American people over the last 5 years. So it is not correct to say that support for the death penalty is diminishing, and I think as the deterrent studies keep coming out, as we see more support for the deterrent theory, as we see forensic science improve so that we have greater and greater confidence that we do

indeed have the correct perpetrator, I think we will see support for the death penalty continue firm. Thank you.

MR. TAYLOR: Thank you, Kent. Next will speak Ruth Friedman, Director of the Federal Capital Habeas Project, dealing especially with federal court appeals and state convictions. She has been involved in litigating many such cases and in some capital trials, and she will talk now. Thank you.

MS. FRIEDMAN: I feel very privileged to be here today and to be part of this discussion.

I think one reason why I was included on this august panel was because of who my clients are. I have been representing men and women on death row for about 18 years, primarily in the Deep South where most of the executions in the country take place. I work on federal death row issues now, but for most of my career I have been involved in state court systems, both representing my own clients, but also recruiting others to do this work, consulting with them, and also advising governments on how to improve representation for poor people accused and convicted of capital crimes.

I want to talk to you a little bit about, for starters, Alabama. For most of the years that I worked in Alabama, there was a limit to the amount of compensation that a lawyer could earn representing somebody accused of a capital crime. It is not like people were trying to get rich on these trials, but these are very complicated cases, and as I am sure we all would agree, the stakes are the highest they could be in our system. And you

would imagine if you were preparing for a capital trial you would want to spend as much time and be as much prepared as you could possibly be.

There are two stages to these trails. One is a guilt-innocent stage, and if a person is found guilty, it moves on to a penalty phase, the punishment stage. Alabama paid lawyers $1,000 for preparation of each of these stages, and that includes everything. It includes legal research, writing motions, interviewing the client, travel, preparing instructions, you name it, developing a strategy, $1,000 per case. These are tough cases, and I am sure many of you are familiar with the fact that the Supreme Court has come out with decades of jurisprudence, there are also specialized evidentiary rules that govern these trials, and each lawyer needs to be familiar with them to represent his or her client.

Lawyers in this town earn hundreds of dollars an hour for their cases. Let us say an Alabama lawyer was due $100 an hour for doing one of these cases. That means he or she was given 10 hours to work on a capital trial within the capital punishment phase. That is a little over a day to do the case. It is not the kind of time I would want a lawyer to spend if my life were at stake.

It also means that the system itself is set up with a disincentive for adequate representation that is really not fair to the lawyer or to the client. Though its payment rates are still very low, Alabama has actually gotten rid of the ceiling now, the $1,000 cap, but it still means that over 70 percent of the people on Alabama's death row are there because their lawyers were subject to that cap.

I am familiar with statistics like this because, as I mentioned, I worked in Alabama, and I worked for a nonprofit organization called the Equal Justice Initiative, in Montgomery. It is a small organization full of decent, dedicated, and hard-working lawyers, but there are only about five or them now, and there are 190 people on Alabama's death row, and 300 facing capital murder trials now. There is no Public Defender system in states like Alabama, no institution comparable to the Attorney General or the District Attorney's office like Congressman Lungren was talking about who become specialized in this kind of work and who gain expertise. There is no state entity in Alabama to find lawyers for people who are unrepresented, or to help train them, or to recruit them.

That might mean, and it does mean, and I have seen it happen, that a local judge will appoint somebody whose main field of work is divorce law, or who is a criminal lawyer but has never handled a death penalty case before who does some other kind of litigation. That happens all the time. I think of myself as a very smart and capable lawyer, but if you are trying to sell your house, do not hire me. I might miss something in the contract and cost you the chunk of money, and that is the situation we have here in capital trials in places like Alabama. Folks shouldn't get a real state lawyer to represent them at the trial for their life, but that is what people get, and often with very dire consequences. Because if the lawyer makes a mistake, if he does not know that law that is coming out of the Supreme Court or does not follow all the rules to the letter, it is the client who pays. That is the way our system is set up.

I want to imagine just a minute post-conviction litigation and federal habeas corpus litigation, and probably your eyes are going to start to glaze over when you see the words federal habeas corpus, but it is a very important stage of review for my clients. For many of them it is the first time they are in front of a judge who was not elected and subject to political pressure, who are not in front of a judge who signed off on what the Attorney General wrote the fact-finding should be in the case, the first time he was given a lawyer from the beginning of the stage of the process and given the resources to litigate the case.

About 10 years ago, Congress passed a statute that drastically altered the habeas corpus review. One of the things it did was it imposed for the first time a statute of limitations in an effort to speed up the proceed. So death row inmates now have one year in which to file their federal habeas corpus petition. This rule applies even when someone is on death row and does not have a lawyer. They are still subject to that year. As I mentioned, the State of Alabama does not find lawyers for people who are on death row, and I have known of instances where the Attorney General sat in Alabama and counted the days until the one year was over and then notified the defendant that at that point they were going to set an execution for him. The State of Alabama does not feel obligated to ensure that its citizens have a fair review process.

But the problems do not end there, maybe they just begin there. Prisoners with lawyers also miss their deadlines. Maybe it is because the lawyers are not paid well, or there are not standards in particular states to ensure their competency, or because there are not any consequences for them if they miss their deadlines. I have seen lawyers who

miscalculate the dates, some who even refuse to meet their clients. These are literally fatal errors, and it is the client who suffers them.

These sorts of things do not just happen in Alabama. There have been people in Texas, people in Missouri, people elsewhere, who have been executed despite the fact that they never received federal habeas corpus review because their lawyer missed the deadline, period.

I bring these cases to your attention because I think we cannot have this discussion without talking about how these cases really work and how our capital punishment system really works. These problems are real and we have to understand the impact on real men and women who are subject to them.

As I mentioned in Alabama, the state of which I am most familiar, but I have practiced elsewhere, does not act to provide a death row inmate for a lawyer for post-conviction. If he is lucky enough to find one in time, the state pays him a pittance for what he or she does, particularly in the case of me. That client may have no right of access to any forensics, the State of Alabama has labs and people who can test DNA, et cetera, but the indigent person does not have that kind of right of access, not even if means sometimes his ability to prove his innocence, and this is a similar story in quite a number of states.

For example, in Arkansas, there was this case recently where the lawyer in post-conviction was drunk literally in court. Both the judge and the prosecutor were aware of it, they noted it on the record, and they did nothing about it. The judge affirmed the death sentence, and then the Arkansas appellate courts affirmed the death sentence. The

best part of the case might be that the lawyer who then took the case into federal court where he might raise these issues was the same drunk lawyer.

In Texas you might have read recently about the case of someone named Justin Fuller. He was executed last week or the week before. His lawyer filed briefs with the state courts that were literally gibberish. They cited parts of other cases. He filed the same brief or the same parts of briefs in cases and did not even change the client's name. What is truly frightening in a case like that is that this same lawyer is still on the list of qualified attorneys ready to take capital cases.

We as Americans pride ourselves on our legal system, and we stand by it, but our system of capital punishment does not live up to our standards. I think this afternoon as we talk about cutting back on review, we need to talk about and confront how the system actually operates, and I look forward to hearing your questions and comments this afternoon.

MR. TAYLOR: Thank you, Ruth. My first question to Representative Lungren keys off of something Kent Scheidegger said about the fundamental disagreement over the fundamental moral question of whether it is right ever to take a life for a life. I wonder what you think. I think I know your feeling about that, but I would like to hear you explicate it a little bit. And also whether the moral absolutes that we think we are talking about sometimes really are moral absolutes, or do they break down into some kind of a cost-benefit analysis over risk of executing the innocent, the possibility of deterring murders, et cetera.

MR. LUNGREN: Let me try and take the last part first, and that is, I guess the question is, can we justify the use of capital punishment in an admittedly fallible system because it has human beings involved. In other words, unless we can show that there is 100-percent accuracy in every determination we make in the ultimate conviction and the sentence, can we justify the death penalty. So I guess it suggests that if you believe that unless you can create something which we as humans cannot create, that is, a perfect system, the death penalty is not justified. I think what you have to do is establish a system which has as many protections as you can possibly have to come to as close an analysis to say that this is as good as we can possibly get it, and then you allow the death penalty to be part of our societal response to violence.

We have had a winnowing of the application of the death penalty for probably a century. It is limited not to all murders, it is limited to murders with malice aforethought, but it is also limited to murders aforethought which have aggravated circumstances. And we established a bifurcated trial as was suggested in which the jury first makes a determination with respect to guilt or innocence, and then makes a determination with respect to the sentence. We do not do that in any other part of our criminal justice system or any other part of our justice system. We are in fact going the extra mile.

The question then becomes to some who ask about the federal system whether or not there is additional wisdom in the federal courts or a special wisdom in the federal courts as opposed to the state courts. Or as one Justice of the Supreme Court said

once, "We are the top guys because we are the last guys." Chief Justice Rehnquist said when he was a Justice of the Supreme Court, "Our system is based on the fact that the trial is the Main Event," capital M and capital E. "And the reason is we believe there is something about an opportunity to confront witnesses, and opportunity to check the demeanor of witness, and opportunity to see the defendant as he or she is there before us, and to have a jury of our peers make that determination." The after-conviction looks are looks that are extremely important to make sure that there has not been an error, but they are after-the-fact determinations. You do not have the chance to see the demeanor of the witness, to see how he or she shapes up under questioning. And unless you want to question the entire jury system, the entire system we have of confrontation of witnesses for determination of justice, then I think you have to say that while post-conviction review or analysis is important, it cannot always take the place of determinations that were properly made in the trial setting.

To go to your question with respect to whether it is moral, it seems to me I come to this conclusion based on three analyses, one, retribution. We talked about retribution as opposed to vengeance. The standard dictionary definition of retribution is a deserved punishment for evil done. In other words, does the punishment fit the crime? We have basically limited the death penalty to those cases I have mentioned in which there is a loss of life with these other circumstances involved with it. It seems to me, under those circumstances it is an appropriate response to the evil done.

As a matter of fact, up until about 20 years ago, there was general acceptance in Western civilization, or maybe it was 40 years ago, that it was a diminution of the value of life not to say that if you take another's life under certain circumstances, you basically give up your life. Now the argument has turned around saying that we as the state, if we take the life of someone who has taken the life of an innocent, we are just as guilty, and I find it difficult to accept that moral argument.

Secondly, deterrence, and Kent Scheidegger has mentioned some of the studies on deterrence. I would just say this, if in fact it is not 100-percent deterrent, it is only 5-percent deterrent, do I have the right as a public policy maker to say to those handful of people who otherwise would be murder victims, You are not worth saving? I think that is the other part of the moral argument that we have to make and we have to consider. Or as Dennis Prager said recently in a writing, "If you don't think it is a deterrent, think of it this way. What if we made the proclamation in the State of California tomorrow that if you commit murders Monday through Saturday you can get the death penalty, but if you commit murder on Sunday, you won't get it? Do we suspect that that would not have any impact on murders in California?"

Then third, the incapacitation of dangerous criminals to prevent future crimes. I had the experience while I was Attorney General to review a terrible case out of Fresno and to deal with the parents of the child that was killed. Why was he killed? Because someone who was serving life imprisonment in California sitting in Folsom Prison in my district directed the murder of witnesses to his prior crime because he had some

misguided notion that since he was on appeal, he was successful on appeal and these witnesses were not around to testify against him, he would get out. He directed the murder of people from his cell. I think there is an absolute case of where incapacitation by way of death penalty would have saved the lives of three innocent individuals.

And finally I will just say this, if we forget in our society the difference between the taking of innocent life and the taking of non-innocent life, then we have undercut the whole sense of self-defense. To have a moral equivalent between society taking the life of someone who has committed a crime of such an outrageous nature resulting in the murder of someone and equating that with someone who was murdered I think is not only unfortunate, but it creates a distortion in our moral analysis. There is and always has been in our jurisprudence a difference between taking the life of an innocent and taking the life of a non-innocent, and I think that is an important thing we cannot fail to maintain.

MR. TAYLOR: Thank you very much. Ginny Sloan, I am going to ask you a different question, but from now on if any of you would prefer to respond to what you have heard from someone else rather than answer my next question, that is an option. So you can take it either way.

I know, Ginny, you have given a lot of thought to how the death penalty issue affects our politics, state and federal elections, judicial selection, legislative priorities. Could you share some of those thoughts with us?

MS. SLOAN: Sure, but I do want to respond just briefly about something Congressman Lungren just said about the trial process and how federal habeas review should not be the main event. I do not think anybody thinks that federal habeas review should be the main event. The question is whether it has to be because of the kinds of problems that Ruth articulated, the complete lack of qualified, experienced, well-resourced lawyers at the trial stage, and so many states that have the death penalty makes it essential for us to have habeas review where at least federal law provides for those kinds of lawyers, and those lawyers do not want to go back and recreate the wheel. I think we would all agree that if we had the kinds of counsel that Rush is talking about from the very beginning, a lot of these problems would go away, but we do not.

I would note one other thing, and that is that we are once again debating cutbacks on federal habeas. In 1996, the Anti-Terrorism and Effective Death Penalty Act created a lot of new restrictions on habeas corpus, and the state court judges for the most part supported those kinds of restrictions because they were the beneficiaries, their judgments would be upheld without a lot of federal review. The kinds of restrictions that are being imposed in this Congress, for the first time, the Conference of Judges of every state in this country unanimously opposed those restrictions and supported the right to habeas review because habeas review is catching the kinds of errors that have created the kinds of cases we are troubled by where innocent people or the people who should not have been convicted of a capital crime have been caught in the system.

To get to your question, Stuart, I think that the death penalty has had a distorting, a terribly negative effect on politics in our country at every level of our system. Some of you are probably old enough to remember Michael Dukakis' disastrously wooden answer to the question about whether he would support the death penalty for someone who raped his wife. Bill Clinton learned a lesson from that, and that is that he had to show how tough he was on crime when he was running in 1992 from the presidency. To do that, he flew home from the campaign trail to personally sign a death warrant for a man who had effectively lobotomized himself when he was captured, he shot himself in the head, and this man, the day that he was executed declared that come November, which was several months from then, he was going to vote for Bill Clinton for president. Also, when the guards after his execution came to clean out his cell, found a piece of pie under his bunk. This was a man who was in the habit of saving his desert until he went to sleep, and so before he went off to executed, he put his pie under his bed for when they brought him back so he could have his desert that night. That is how impaired this man was, but it did show that Bill Clinton was tough on crime.

Some other examples, people running for election to the state bench have declared, and I have seen these billboards in Texas, that they will impose the death penalty more than their opponents if they are elected. Which of us in this room would want to appear before that judge who is supposed to be applying the law to the individual case before him or her? And another judge seeking election was defeated solely because she concurred in an opinion that overturned a death sentence. Forget about being appointed to

the state bench or to the federal bench if you oppose the death penalty. California Governor Gray Davis created a litmus test that you could not be named to the bench in California if you opposed the death penalty. And people who come before Congress for federal judicial appointment, if you support the death penalty, you might as well just pack up and go home.

As Bill Clinton showed, capital punishment has been a litmus test for politicians running for office, and to show that you are tough on crime, and implicitly, of course, that your opponent is not, you have to support the death penalty. You can be as tough a law-enforcement official as there is, but if you do not support the death penalty, you might as well kiss your political career good-bye. And I think it distorts the legislative process as well, these radical cutbacks to habeas corpus that have been proposed over the years, and, of course, some have been enacted, are in the interests of obtaining this ephemeral concept of finality and closure for victims, and it is the death penalty that is driving these cutbacks. But what often gets overlooked is that it affects non-capital cases as well, so that people in non-capital cases are also having their ability to seek the vindication of their constitutional rights in federal court dramatically restricted.

Finally, though, after all those negatives, I think that there may be some hope. Governor Tim Kaine in Virginia is a death penalty opponent, and this opponent attacked him for doing his duty as a lawyer and taking on capital cases on a pro bono basis. John Corzine, the Governor of New Jersey, is also a death penalty opponent and seems to have suffered no political consequences. So perhaps there is hope, and we can only wait

and see. The death penalty was not an issue in the past presidential election, although I can say perhaps it should have been because of President Bush's cursory, shall we say, examination of clemency petitions of people seeking clemency when he was Governor of Texas, but it was not an issue in that campaign, and Governor Kaine won in Virginia, and Governor Corzine in New Jersey, so perhaps in the future we can see the death penalty becoming less and less of an issue in these political campaigns. I just hope so.

MR. TAYLOR: Thanks, Ginny. I have a question for you, Kent. As you know, many critics say the death penalty is administered in a racially biased manner. They tend to focus on the race of the victim, not the defendant. For example, a widely cited statistic is that about 80-percent of murder victims in cases resulting in execution are white, even though only about 50-percent victims of murder victims nationally are white, a fairly dramatic disparity focusing on the race of the victim. Is there a discrimination pattern here, and what do these statistics mean?

MR. SCHEIDEGGER: There is one type of discrimination that would give us pause and would be a weighty argument against the death penalty if it were valid, and that would be discrimination on the race of the defendant. If indeed people are sitting on death row who would not be there if they were a different race, that would be a powerful argument that their sentences in their individual cases are unjust. The interesting thing is, we have seen in study after study, including those sponsored by the opponents, that they cannot find evidence of such discrimination. Let me read to you from the famous Georgia study, or infamous, the Baldus and Woodward, "What is most striking about these results is

the total absence of any race of defendant effect." So the idea that the death penalty is fundamentally racist is just not correct.

As you mentioned, Stuart, the focus then has shifted. We should have focused on that result. That should have been celebrated. That should be the headline story. We have seen the same results in New Jersey, we have seen it in Maryland, but now they go on to talk about the race of the victim. That in essence is a claim that the death penalty is not imposed often enough in cases where the victim is black. That does not mean that anybody presently on death row does not deserve to be there, but there are some more people who deserve to be there who are not.

That would not be the reason to overturn anybody's sentence, but it would be a matter of great concern if it were true. But the evidence is not anywhere near as strong as is commonly believed. In the Georgia study there was a trial before a federal district court. After extensive hearings hearing from experts on both sides, the judge found as a matter of fact that this often-cited study does not prove what its author claims.

In the Maryland study by the University of Maryland by Professor Paternoster, if you look at the data statewide, there appears initially to be an effect based on the race of the victim, but that effect disappears when you go county by county. So what is really happening here is that the people in the more conservative counties elect prosecutors who are more willing to go for the death penalty in a case where it is a borderline call, and because those more conservative counties tend to be counties which higher white

populations, that shows up as more death penalties in white victim cases, not because of racial bias, but because of the county-by-county election of prosecutors.

This is then attacked as geographic disparity. No, this is local democracy. This is the system working as designed, that the people of the locality choose their prosecutor to impose the penalties that they want.

So really it is a matter of the system working as intended, it is a matter of perhaps insufficient or a lower degree of support for the death penalty in the urban jurisdictions, and that is something that I would hope would change in the future. But if it does not, the people of those jurisdictions have elected the leaders they want who are making the decisions they want, and it is their choice to make.

MR. TAYLOR: Thank you. A question for you, Ruth, and this goes to habeas corpus which does make some eyes glaze over, but it is extremely important, and it is almost all Supreme Court death penalty jurisprudence is about habeas corpus. There is a bill in Congress this year called the Streamlined Procedures Act. I believe Congressman is a sponsor, and I believe Mr. Scheidegger, and I believe you testified against it. I would like to know what is wrong with it, and more broadly, habeas corpus law I thought was originally designed to enable possibly innocent defendants to get a shot at overturning erroneous convictions. It seems to be mired in endless procedural technicalities about whether the lawyer met a deadline 5 years earlier in some state court. Is this any way to run a death penalty review system?

MS. FRIEDMAN: I have a lot to say on the Streamlined Procedures Act and on the last part of your question, but I feel I need to respond to what Mr. Scheidegger said about race. For those of us practicing particularly in the Deep South, there is no question but there is racial bias at work here. In Alabama, 65 percent of the people who have been executed for capital crimes are African American, and 80 percent of the victims in those cases were white. Mr. Scheidegger says the way to remedy that is to add cases where the victim is black. The question is, how do we arrive at those decisions to begin with? How do we end up with those kinds of numbers, instead of trying to impose something on top of them?

One way I know we arrive at them is through discriminatory selection in jury selection, because I have seen this again and again and again in Alabama. In the 1990s and into the 2000s, you will see the only African American person in the courtroom is the defendant. You still people tried by all-white juries or juries from which most people of color have been excluded. When I was working in Alabama, we won literally I think a couple of dozen cases, or I should say a couple of cases were overturned, on the basis of discriminatory jury selection. One point I want to make is most of those cases were actually won by my office, and as I noted before, we do not take all the cases. We cannot. We do not have enough lawyers, and they still do not have enough lawyers, so you wonder about the other cases that are out there that are not being tried.

There was also a point made about who was elected. Alabama has 19 appellate judges. Zero of them are African American, and this is in a state that is I think 26

to 27 percent black. And of 140 trial judges, four of them are African American. I think in this country that it is hard to say that race is not at play here.

Quickly, and if there is more time I will talk about it later, we actually did a study in one of those counties where the death penalty was sought a good deal in Georgia. It was in the course of a trial and we were representing a black man accused of raping and killing a white woman, and we looked into when the death penalty was sought and when it was not, and the district attorney claimed that it was sought when the case was particularly aggravated or when the victim's family wanted it, and it just so happened that it was sought overwhelmingly where the victims were white, and the only time where it was sought where the victims were black was when there was more than one victim. We received a court order to look at the district attorney's files and went through all of them and looked at the degree of aggravation in the case, meaning whether felonies were attached, whether the defendant had a criminal history, and going through all of that, there was still no way to answer for the racial effect on when death was sought.

Just to finish that, one of the saddest things I have ever done as a lawyer was to go out and interview the families of victims, since the district attorney said we seek it when the families want it. I went to see in some of those very aggravated cases the families of black homicide victims, and it was a very painful experience, because the prosecutors never spoke to many of these people and they learned what happened to the perpetrators of the crimes against their children by seeing it on television. It is a very distorted system.

I have a feeling I have probably used up my time, but I wish to stay a moment or two on habeas corpus, if I may.

The Streamlined Procedures Act, otherwise known as SPA, some of us object just to the name, yes, it is something that I testified against, and it is something that I think is a very, very problematic bill. That is because it would cut back drastically and dramatically on the ability of the kinds of problems that I talked about earlier, and I could go on for many hours about them, to ever see the light of day or get redress.

It would mean that in cases, and I will try not to make your eye glaze over, where claims were defaulted, where it means that a lawyer did not raise a claim or missed a deadline or did not file a brief, there would be no ability ever for a federal court to look at that claim. And that would be even if the lawyer was drunk at the time, it would be even if, and this is a particularly telling one, the prosecutor withheld the means for bringing that claim. We have seen these cases happen a lot, where evidence was hidden and only came to light many years later, and at that point, and this happened in a case called *Banks* at the U.S. Supreme Court, the State of Texas said you did not find out soon enough that we lied about the witnesses, and, therefore, we are going to try and make sure that your claim is considered defaulted, the Streamlined Procedures Act would bar such claims for review, and it would do a whole host of other things that are extremely problematic.

In the case I mentioned of the drunk lawyer in post-conviction, in that case in Arkansas, the federal judge on his own initiative sent the case back for a redo in state post-conviction because clearly the defendant did not have an adequate shot there. The

Streamlined Procedures Act would forbid that because that on which it was sent back was unexhausted and --

(tape interruption)

MS. FRIEDMAN: (In progress) -- that the Streamlined Procedures Act once again would stop the courts the ability to do that.

I could go on and on. My biggest concern is that we are cutting back on habeas corpus and we are not at the same time, first of all, it is very difficult to win in federal court for a death row inmate or any inmate, very, very difficult, but I agree with what was said earlier that the trial should be the main event and I would like to see the people on the panel and elsewhere, people in authority, give the resources necessary to make that true at trial. We do not have a political will in this country to make sure that poor people accused of heinous crimes get the kind of defense that they should, and that is a change I think we need to see before we begin talking about cutting back further on the ability of people to get a shot at review.

MR. TAYLOR: I think the Congressman is up next, so fire away.

MR. LUNGREN: I will just mention a couple of things, one on racial disparity. The point has been made by a number of different studies. In a *Stanford Law Review* article by Cass Sunstein and Adrian Vermeule called *Is Capital Punishment Morally Required?*, this statement was made, "African Americans, for example, are far more likely than other groups to be victims of crime. In 2003, 48-percent of murder victims were white, and 48-percent were African American, meaning that the racial

disparity and the probability of becoming a murder victim is even greater than any racial disparity in the probability of ending up on death row." This is their conclusion, "An important corollary is that the benefits of capital punishment, to the extent that it operates as a deterrent of murder, are likely to flow disproportionately to African Americans."

A Cornell University study showed that African Americans were convicted of committing 51-percent of all murders, but at the same time, the study indicated that African Americans comprise 41-percent of death row population. I know in the State of California where I was Attorney General for 8 years, those people who were executed were almost all non-black while I was there.

And on the question of habeas corpus reform since you referred to the 1996 Act which my office wrote, even though it was passed by the federal officials, and then the new one, the bill which I am the main author of, one of the things we put in that law back in 1996 was to say that if states adopted the Powell Commission recommendations on giving adequate counsel and in paying for adequate counsel on post-conviction collateral remedy, those states would be given an expedited review. We left that up to the federal courts to make that determination, and since 1996 they could not find a single state in which that were the case, even though we wrote it after the experience in California. So the original bill that I introduced with Senator Kyl, a companion bill which you have attacked, part of which was incorporated in legislation we passed this year, gives that determination to the Justice Department since they do not have a dog that hunts in that fight, that is, it is not federal cases, it is state cases. And I would hope that at least my two friends on the

other side would support that, because that specifically says to a state, in order for you to get expedited review by the federal system, you have to adopt these recommendations that were in fact made by the Powell Commission so that we do not have the problem on post-conviction remedy litigation that you have talked about, not having people who were trained and not having money for that.

So in some ways, what we are trying to do is to agree with you that there have been some shortcomings in some states, and we are trying to provide a carrot to those states. That is, you will get expedited review in terms of time certain, if you will adopt these protections for those who have been convicted and sentenced to death.

MR. TAYLOR: Thank you. Ginny, if we can move on because habeas corpus is fascinating, but it is also complicated, you alluded earlier to exonerations of people who had been on death row. As you know, Justice Scalia in his opinion in June in *Kansas v. Marsh*, a concurring opinion, did a patented Scalianization of the arguments that you are citing. Basically, the thrust of what he is saying is that all this stuff we are hearing about people on death row being executed or exonerated is so much fluff, that there is no proof that anybody has ever been executed in recent years who is innocent, and precious little evidence of exonerations that hold up to his withering fire in his view. Do you want to take a shot back at him?

MS. SLOAN: I would be happy to.

MR. TAYLOR: I thought so.

MS. SLOAN: The problem with proving that somebody who has been executed was actually innocent is that the resources are so scarce in these cases that once somebody has been executed, people have to move on to people who are still living. They cannot put any resources into investigating these cases for the most part.

However, Cameron Willingham in Texas was executed, I cannot remember in what year, for arson in which his house burned down and his children died as a result of that. It was 2004. There were a number of forensic experts who testified that the case involved arson. When there was a reexamination of the case, largely because, I believe, of the *Chicago Tribune* reporters who looked into it again and talked to a number of forensic experts and asked them to look at the testimony of the experts during the trial, concluded that it was basically junk science and there had been no arson at all and that the fire was accidentally started, so here was a man who was executed for a non-crime. So there is case for you, and there are several others that have come from Texas and elsewhere.

We have a local case here of Kirk Bloodsworth, the first man exonerated as a result of DNA testing, a former Marine from Maryland who was prosecuted and convicted twice for raping and murdering a little girl. He always declared his innocence, and the judge at his retrial decided not to sentence him to death again because he had a lingering doubt about whether he was really guilty. There was DNA, and it took so long for it to be tested, but finally it was tested, and the semen that was found in the little girl's panties turned out not to be Kirk Bloodsworth's, but still the prosecution argued that he did it. Even though he was released from prison, they did not agree that he was innocent until

finally years later they put the DNA into the federal system and matched it with a man who was serving time in the very prison where Kirk Bloodsworth had been all those years, and finally Kirk Bloodsworth received the apology that he was due.

These kinds of cases happen all the time, and I simply was astonished at Justice Scalia's statement. There clearly are innocent people on death row, and we have to remember as well that there are people who are on death row and in prison who are innocent, but also people who do not deserve to be convicted of a capital crime or to have been sentenced to death, and that is a whole other issue that we simply cannot forget, it is not just innocent people, it is people who are wrongfully convicted or wrongfully sentenced.

MR. TAYLOR: Thanks. Kent, feel free to continue that argument by rehabilitating Justice Scalia, or a question. Let's suppose Osama bin Laden is captured and put on trial. Would it make sense to execute him or any suicidal terrorist for that matter such as Zacarias Moussaoui? On the one hand it is hard to think of anybody I would rather see executed as a moral matter, on the other hand, these people are obviously not deterrable and would be celebrated as martyrs and used to recruit more jihadists which might get more Americans killed. So where does the path of common sense lie through that maze?

MR. SCHEIDEGGER: Let me begin with your first part and follow-up on the innocence question. The question of the accuracy of the guilt determination in capital cases is not limited to capital cases, it is a question that pervades all cases, and a person who is convicted and wrongfully convicted of murder is probably more likely to walk out

of prison alive if he is sentenced to death than if he is if he is sentenced to live in prison. Because even though there may be more time to find to the evidence, the resources are not there.

The resources are there in capital cases. Most states, and perhaps Alabama is an exception, I am not familiar with it, provide the state paid counsel that Congress has required and that has promised but not delivered expedited federal review for. In addition to that, Congress for many years has provided federal paid counsel in post-conviction review. And on top of that, there is the executive clemency process. We have seen that work in Virginia with the previous Governor, that is one of the two cases that Ken Starr worked on, giving lingering doubt, yes, he commuted the sentence, and we have seen the same thing in Maryland.

As far as actually executed people, there is no proceeding to make a determination of that. There are resources available on occasion. The *Boston Globe* went down to Georgia and dug up a convicted murderer and did the DNA test, no, back in the ground. So it happens on occasion. On those occasions where the test has been definitive, every time it is confirmed that he was in fact guilty. The poster boy for the innocents for the death penalty used to be Roger Coleman who was on the cover of *Time* magazine. His supporters proclaimed with absolute certainty that he was innocent and this other guy had done it. And finally, when DNA technology came far enough along, the test was done and it came back with absolute proof that he was guilty.

To get back to your Osama bin Laden question, yes, deterrence is not a reason for executing terrorists of that scope. They are not deterrable. That is a matter where it comes down to retribution. Any other penalty for that crime would just be so inadequate as to be a miscarriage of justice. Whether it would make a martyr out of him and prompt more jihadists, I kind of doubt it. They are free to make that argument at the penalty phase, we are so generous that you can make any argument you want at the penalty phase no matter how outlandish, and just jurors have actually found that as a mitigating circumstance. But even so, this is a case where the basic justice of the matter just cries out for the death penalty, and it is a penalty that should be imposed if we do catch terrorists of that magnitude.

MR. TAYLOR: Thank you. Ruth, very hypothetically, suppose that new studies are done that convince you that the death penalty in fact does deter murder. I know that is not going to be easy, but stay with me. Suppose every execution you come to believe saves about five innocent lives through some indirect deterrence causation. Would that lead you to support any use of the death penalty, or is it better that 100 innocent people be murdered hypothetically than that one innocent defendant be executed?

MS. FRIEDMAN: I am going to answer the less-sexy question first, and that is, I want to respond to a point made by both Congressman Lungren and Kent about states providing competent counsel. I absolutely have to take issue with the notion that most states provide competent counsel. I think the Act that Congressman Lungren talked about in 1996 which provided incentives for states that did, no state made it, because no

state provided that counsel. In many instances, the court said if you did X, Y, and Z, we would hold that you did, and no state came back and found the political will to do X, Y, and Z. I am concerned, and maybe I would like to see if Congressman Lungren would respond to whether this new bill which was passed now which, as the Congressman said, moves from the courts, which I think most of us understood to be a neutral arbiter to the Attorney General, with the lead prosecutor in the country, the decision to make whether a state is providing competent counsel for the defense in post-conviction cases, I am hoping what we will see when regulations are passed to support that bill that real teeth are put into it so that we really see that states like Alabama, Arkansas, and Mississippi, and I could go on, provide the kind of counsel we are talking about because I have seen over and over again instances where they have not, and I am very, very worried about that change.

Now to answer the question about in this best-of-all-possible Candide world where the death penalty deters, and I am sorry, what else? It is infallible?

MR. TAYLOR: No, not infallible, just you become convinced in my hypothetical that in fact it does save more lives than it takes. I am not saying it is infallible; there may still be errors as there are now.

MS. FRIEDMAN: There may still be errors. Let me talk about that. I think to talk about deterrence, there are studies on both sides of the issue, and I could sit here and talk about the studies that found problems with the studies that Kent talked about. And even of those studies are the right ones which I think at best you could say there is a draw, and I do not agree with that, of course not, because the system is what it is as I was

describing as I started, and I could talk here for 6 hours about the kinds of problems that we are seeing.

Kent said something about you are more likely to walk if you have been sentenced to death than if you were given a life sentence, and in some ways I would agree with that, because in some ways there is more review, and I want to give you an example of that. It goes back to Ginny's point about the death penalty distorts the entire criminal justice system. I will give you an example of someone who is on Alabama's death row, and that is Walter McMillan. He was there and he served 11 years on death row for a crime he did not commit. It was happenstance that the Equal Justice Initiative took that case. We took a small percentage of the cases. It was just whichever case was next up on the list we took.

It was also happenstance that the lead witness against Mr. McMillan gave a call to his trial attorney, he was in rehab somewhere, and said I cannot live with this anymore. I have to tell you what I did. And he talked about how he had never seen Mr. McMillan before when he testified that he had actually witnessed him commit this crime, and at that point the whole case began to unravel.

The reason I bring this case up, and Mr. McMillan is out and he has been out now for quite a number of years, is twofold. One is the chances that we got that case, maybe we would have gotten it, maybe we would not have, and maybe he would have gotten a lawyer who missed his deadlines or whatever. But the other point I want to make which goes to what Kent was saying I think and which is part of why I could never saw

further death penalty is fine even if it were a deterrent is the trial judge in that case, and I should tell you that Alabama has its own special procedure. The state can put in whatever procedures they want, where a judge can override a jury's life verdict. So that at that penalty phase I talked about before, if the jury comes back, and jurors have to be death qualified in that they have to be in favor of the death penalty to be able to sit on the jury, that jury came back in Mr. McMillan's case and came back with life and the judge overrode it anyway and imposed death, and after Mr. McMillan was released and there is no question but that he was innocent and he has been given a judgment by the State of Alabama, the trial judge said the biggest mistake I made was overriding because if I did not, he would be serving life without, and nobody would have looked at his case.

These errors are rife in the system. I would like us to be sitting here talking about the kinds of changes we could make in the system in the way it is now to catch those errors and to make sure that they do not happen, rather than to be talking about hypotheticals.

MR. TAYLOR: Thank you.

MR. LUNGREN: Could I just ask a question? What does rife in the system mean? The studies I have seen suggest that at best, the Death Penalty Information Center list claims actual innocence for 1.6 percent of all the death sentences imposed between 1973 and 2004, and the court in *Quinones* -- puts it at one-half of 1 percent. I am not trying to diminish any single one, but when you say rife, I think most people would not think rife with a system would be less than 1 percent.

MS. FRIEDMAN: May I answer that?

MR. LUNGREN: Sure.

MS. FRIEDMAN: Actually, I think those statistics are not the accurate ones. The Death Penalty Information Center puts exonerees at 123 I think at the moment, and maybe it is more.

MR. LUNGREN: Yes, 123 out of 7,500 and some odd.

MR. SCHIEDEGGER: And exonerated on that list does not mean proven innocent.

MS. FRIEDMAN: We can talk about that in a minute.

MR. LUNGREN: Their definition was convictions overturned and acquitted at a retrial, or are charges dropped, or given an absolute pardon by the government.

MS. FRIEDMAN: It is 123, and I think we have executed just a little over a thousand. So for every person we have executed, that is 10 percent of that list. I do not think those are very good odds.

I would also like to make the point, and I would be interested in what your response is to this, when we make mistakes, when there is an air crash, everybody gets concerned about how that happened like just the other day in Kentucky. The FAA gets involved and we want to make sure it does not happen again. I would be interested in -- right now we have a system where there is no examination of how these mistakes came to be. There is no state or federal agency that looks and says let's make sure we do not make

any of those mistakes any more. So I would be interested in what you might suggest would be something that we could do, whether it is 1, 10, or 50 percent, to make sure that it does not happen anymore.

MR. LUNGREN: When I became Attorney General, as I said, we were having 3,200 to 3,500 homicides a year in California, and when I left, we had cut it in about half. I think part of that was the reinstitution of the death penalty, along with other things. What is that worth, that 1,700 people in California are not murdered per year that were being murdered before we made changes in the law? I think that happens to be worth a lot.

You talk about these cases as if exoneration means that the death penalty was not appropriate. I argued a case before the United States Supreme Court, a death penalty case, the *Sandoval* case, and was successful with the unanimous verdict. It later went back down to the California system and they went through and eventually set aside the death penalty. Why? Because the guy who defended him at time of trial was too busy running for Congress. Do you know who he ran against for Congress at that time? It was me. I can tell you that he did not spend too much time running against me for Congress, and that was accepted as the chief reason for why there was lack of appropriate representation.

As to that guy, the evidence was absolute. He killed two gang members and then executed two other witnesses who were willing to mention that they had overheard a conversation he had taking credit for the first two murders. Now you have four people

dead, there is really no question that the guy murdered them, two of them with malice aforethought and other aggravating circumstances, yet in all these studies it would suggest that he was not worthy of the death penalty.

When I hear this about rife with the system and so forth, it bothers me. It bothers me that anybody would be unjustly accused or unjustly convicted. But, again, I guess I go back to the question, your point is that as long as it is an imperfect system that is populated by human beings with all of our human intellect, we could never have a death penalty.

MS. FRIEDMAN: Actually, I do not think we have to go anywhere near there. I think there are so many problems with prosecutorial misconduct, with lack of resources for defense counsel, we are so far from a perfect system.

MR. LUNGREN: So that would be with all criminal cases, not just death penalty cases as far as you are concerned?

MS. FRIEDMAN: I cannot speak to all criminal cases, but I can speak to having spent 18 years representing death row inmates, and I think I can speak to that.

MR. TAYLOR: Do you think, Ruth, that we ought to have a federal program that ensures adequate funding for all death penalty defendants at trial so that we do not have all this inadequate counsel?

MS. FRIEDMAN: I think we need some program that does that, and if the state is not going to be willing to do it, crimes are for the most part a function of individual states, and I think a state that is going to say we believe in executions for deterrence or any

other effect should provide the kind of system that will make sure that mistakes are not made. So I do think there should either be a state or federal program that absolutely provides those kinds of resources.

MR. TAYLOR: Let me ask Kent that. It often strikes me, and I know we have federalism issues here, that so much of the argument about the death penalty goes back to inadequate counsel at trial, and I do not think you doubt that that has been a substantial problem a lot of times. Can't we fix that and maybe get on, and how?

MR. SCHEIDEGGER: Yes, I think we could, but here is the problem. Congress did address 10 years ago the problem of inadequate post-conviction counsel by offering the states the expedited proceeding in return for providing the adequate counsel. It is not true, as Ruth said, that no state has done so. California has done so, Arizona has done so. The problem is, the federal courts reneged on their part of the bargain. The federal courts made up additional requirements that are not in the statute in order to block the State of Arizona in the *Spears* case from getting the benefit of the Congress promised.

Congress could do a similar thing with trial counsel. It could offer the states an incentive to beef up their trial counsel programs, but, again, we have this problem that we really cannot rely on the federal courts to keep their side of the bargain. Ruth says it is impossible or very difficult to ever prevail in federal court. You obviously do not practice in the Ninth Circuit.

MS. FRIEDMAN: I wish I did.

MR. TAYLOR: Why shouldn't Congress just say the heck with incentives, we will pay for it and you will not, and use the hammer not the lure to force the states?

MR. SCHEIDEGGER: You are breaching a federal-state boundary that I do not think a lot of people want to breach, and any time you ask Congress to spend any more money, there is going to be reluctance to do that.

MR. TAYLOR: Congressman?

MR. LUNGREN: Congress would do that if in fact our states would get the expedited review from the federal courts. The suggestion was made why are we giving it to the Justice Department because they have some vested interest in it, the courts have the vested interest. When they make the determination that somehow with new rules we do not meet the standard established by the Congress, they are therefore saying we are no longer bound by these rules. We are no longer bound by these time limits. It inures to their benefit, so they are hardly the objective party in this.

The issue that you throw out all the time saying default as if there is no reason for considering procedural default, what is the reason it? It was the abuse of the system, where defendants on death row rather than trying to expedite as was suggested their review, in many cases they do not want to expedite their review, they want to extend it, because, frankly, in most cases they are guilty, in most cases they appropriately received the death penalty, and so your success is not expediting consideration, your success is extending consideration. And one of the rules of the game was that you would wait until the last minute, and then you would bring up some new procedural question that you had

not even brought up even though you knew about it 5 years before, and that is what families are asking me. They ask we are waiting 25 years for this determination. Why isn't there some obligation on the part of the convicted murderer, no longer a defendant, now a convicted murderer who h as been sentenced to death, why isn't there some obligation on his part or his representative's part to bring this up back then instead of now? That is why we have this whole question about procedural defaults, and it is not just something that we want to deny this, it is to try and somehow make sense out of the system so that, yes, there is an obligation. You are not standing before the court as a truly innocent person at that time, you have gone through a determination of guilt or innocence by a jury of your peers, you have gone through a bifurcated trial in which there is a separate determination of your eligibility for the death penalty, and then you received the death penalty. Then you have, at least in California, automatic direct appeal to the California Supreme Court, automatic habeas corpus appeal, and then you go to the federal courts, so that is at the point that you are talking.

So let's remember all the intervening steps that have taken place until you reach that point. Default is not something you just toss off easily and say that is just an excuse that is used, and why should default come into play at all. It is because of the gaming of the system that took place before.

And I understand you have worked with these people on death row, and I appreciate that and I know that that is a difficult thing, and you have seen people that you think are truly innocent. I have dealt with the victims of these murders who say to me,

Why in God's name do I have to wait for 25 years to see justice carried out on that case of the individual who directed murder from his prison cell? The parents of the young man who was killed at their market in Fresno, California, died before the perpetrator was executed this last year, and then one of the big claims as to why he should receive clemency is he was old now and it would be wrong to execute someone who was old and somewhat enfeebled. Boy, is that not a distortion of the system.

MR. TAYLOR: We are going to go to the floor in a minute. I have one final question for Ginny.

MS. FRIEDMAN: May I respond to that?

MS. SLOAN: Let her respond.

(Laughter.)

MR. TAYLOR: Instead of you getting one final question?

MS. FRIEDMAN: I will respond later.

MR. TAYLOR: My question to Ginny is, obviously there is a lot of disagreement about a lot of things. Are there some ways in which this system could be improved that makes sense that reasonable people ought to be able to agree on, including reasonable people who strongly support the death penalty?

MS. SLOAN: Yes. These are the recommendations of the Constitution Project's Death Penalty Initiative. They are supporters of the death penalty, they are opponents of the death penalty, they cover everything from the counsel system to forensic examination of evidence and accreditation of labs, and the standards for prosecutors, open-

file discovery, the kinds of review systems that Ruth was talking about, if the system makes mistakes what do we do about it. We should have a systemic examination of the problems. So, yes, this is what we should be headed toward.

But I want to say something about default. Ruth is the litigator, she knows better than anybody about this, but when you have drunk lawyers, when you have sleeping lawyers, when you have lawyers who are real estate lawyers and they do not understand the law, they are going to default. They are not going to understand that they have to raise objections at a particular time in a particular manner, and once they fail, the question is defaulted all the way up the system. It is what Ken Starr was talking about, that we have all these threshold procedural obstacles, we cannot get to the merits, and that is the gaming of the system. If we could just get to the merits, if the courts would say this lawyer did not raise these issues at the appropriate time because he was drunk, or because he had no experience, or because he had no resources, so let's go back and let's do it over with a good lawyer. Let's forget about default. Let's forget about all these procedural obstacles and get to the merits, it would make the system go so much faster and it would give people so much more confidence that the system is actually examining what it is supposed to examine and fails to do miserably.

MR. TAYLOR: Ruth, do you have anything brief to add before we ask for audience questions?

MS. FRIEDMAN: She should be a litigator.

(Laughter.)

MR. TAYLOR: I do not like to rush anybody, but there are people who have questions, I expect, and it would be nice to get to some of them, and if there are not any, we can continue among ourselves.

QUESTION: Virginia, in 1972 the Supreme Court struck down the death penalty. They found it too arbitrary, like being struck by lightening. I wonder if you think over these past 30 years things have improved given what we see -- you get the death penalty say in Los Angeles but not San Francisco; you get it if you kill a white victim, but you don't get it if you kill a black victim; or you get Alabama representation versus New York representation. Has the arbitrariness problem been solved?

MR. TAYLOR: Ginny, just tired herself out for a moment, so, Ruth, do you want to take that on?

MS. FRIEDMAN: Has the arbitrariness problem been solved? No, for some of the reasons that were implicit in your question. You still have a situation where it is dependent on who the prosecutor is, whether they seek the death penalty in every single homicide or only in certain ones, or whether what the victim's family or says or whether they don't. It is certainly dependent on race.

Arbitrariness is clear throughout. That is the point I was trying to make earlier about when you have states where the state is not responsible for ensuring decent lawyering, whether somebody gets a decent lawyer becomes a crap shoot, and that is arbitrary in itself. So whether you have someone who is going to get the kind of expertise where a claim is not defaulted or you are not really depends on what lawyer you get,

instead of necessarily what crime you committed, which is not the way a death penalty should be. And I think many of the same problems you see mentioned in the *Furman* case in 1972 you see now, and I think set some of what was brought up in the *Kansas v. Marsh* case that Stuart mentioned earlier where the dissent said we are very worried about the way this is being applied.

MR. TAYLOR: I would love to hear from over here on that question, either of you, and in particular both of you have cited some of the changes that the Supreme Court has required in death penalty law since 1972 with evident approval of their role in preventing error. Has the Supreme Court's jurisprudence been a good thing, and do you think it has been pretty successful in preventing error?

MR. SCHEIDEGGER: Initially, yes. I think the response to the Supreme Court's decision in *Furman v. Georgia*, and then their follow-up decisions in 1976, *Gregg* and its companion cases, those reforms largely did achieve the results that were intended. And, again, I refer to the studies which are cited in the articles that I handed out, studies sponsored by the other side, that the effect of race of the defendant is greatly diminished.

As far as arbitrariness goes, the Supreme Court has required that the system be discretionary. It has forbidden the states from having a mandatory system, you commit X crime, you get Y punishment. That is not allowed. When the system has discretion, there will inevitably be differences in how that discretion is exercised.

And, again, the systematic studies in the area show that there is a class of clearly aggravated homicides where the death penalty is consistently applied, a class of

clearly mitigated where they are not, but in the middle it is going to be a judgment call, and it necessarily will be in a discretionary system. There is no way out of that.

MR. LUNGREN: When Kent talked about a discretionary system, I use the word individualized system. The Court has been very clear that that there has to be an individual inspection of the facts of the case and the defendant appearing before them, and that is why as he says there is discretion that is given to the fact-finders in reaching their ultimate conclusion. Also the question of race. That can be something that is brought up if there is race used in the determination. Inadequacy of counsel can be brought up in post-conviction review. So those things all can be reviewed.

I would have to say if in fact we believe that an individualized review is more appropriate in these circumstances, the system has got to be better now because that is what it requires and that is what has fallen through at least in the states that I am aware of.

MR. TAYLOR: Thank you.

MR. MITCHELL: Gary Mitchell from the *Mitchell Report*, and I am praying that this is going to turn into a question.

The way I have been thinking about this discussion is at 3:45 we close it down, we vote, and then it becomes the law of the land, so how would I vote? Do we keep the death penalty or do we get rid of it? I don't know the answer to that.

MR. TAYLOR: We have all the way until 4:00, actually.

MR. MITCHELL: It seemed to me the easiest answer arguably is do away with it because the one thing you know is, if you eliminate the death penalty, you will not kill an innocent on death row. I have heard the comments today that suggest that there is data that demonstrates that it is a deterrent factor, but if you do away with the death penalty, you know you won't kill anybody on death row who is an innocent. That is a guarantee. What you don't know is whether in doing away with that death penalty, if you believe in the deterrent side of the equation, you may be sort of upping the ante on the other side; more people will die because there is no death penalty and no deterrence.

Here is the part where I said I am praying this turns into a question. The question I am trying to wrestle with is whether the side that favors capital punishment has a ceiling that it is willing to live with. We know the system is imperfect. Currently, according to one statistic, it is half or one percent or one percent, is there a number that if we could walk in here today and say we have incontrovertible truth that X percent of the people who were executed last year were innocent or over the last 10 years, is there a ceiling, is there a point at which you would say that is too much, therefore I am willing to do away with it?

And my question to the other side would be, is there a floor, I think? If it could be demonstrated that capital punishment in fact is a deterrent but it only deterred less than one percent as opposed to if it deterred at a higher level, is there some point at which you would say then we are willing to reconsider our point of view? And if that did not turn into a question, I apologize.

MR. TAYLOR: Why don't we treat as a question and invite a brief answer from one on this side and one on that side or whoever feels motivated to speak first?

MR. LUNGREN: I am in a public policy position as a member of Congress, and so I wrestle with that all the time. The answer is that if it were nothing more than a crap shoot, I would not support the death penalty. But if you have a system that tries as strongly as I think our system does, and gives more protections in the death penalty arena than any other justice program that we have, and then recognizing that I am not infallible nor are other humans infallible and that there could possibly be a mistake, I guess you would say I am willing to live with it because on balance I think far more innocent people are going to be saved and that that individual hypothetically say that is not guilty but could possibly be declared guilty, that at least we have set up a whole system of protections that give that person a real fighting chance to do that, where I look at the victims and I see in many cases that they do not have a fighting chance except for us somehow trying to create a deterrence so that in fact they will not be victims of violence and death. That is the best I can do.

MR. TAYLOR: Thank you. Let me throw it to this side, but I will add a quote that your question reminded me of, Gary, although it comes from the different end of the telescope. John McAdams of Marquette University said this, focusing on deterrence rather than on risk of error, "If we execute murderers and there is in fact no deterrent effect, we have killed a bunch of murderers. If we fail to execute murderers and in doing so would have in fact deterred other murderers, we have allowed the killing of a bunch of

innocent victims. I would much rather risk the former. This to me is not a tough call." I do not suggest agreement with that, but his question was not quite complicated enough.

(Laughter.)

MR. LUNGREN: Your question was better.

MR. TAYLOR: Whichever you would like to take on.

MS. SLOAN: I don't think we will anywhere arguing about deterrence because I think one side will come out with some studies, the other side will refute them, we will be arguing about deterrence endlessly and we will never really know. I found Scott Turow's statement about his examination of deterrence really helpful. He said, "After two years of reading studies, I decided I wasn't going to find any definitive answers to the merits or failings of the death penalty in the realm of social science," and he then went on to examine all the other problems with the system that we have been talking about today. I do not understand how anyone can say that the system is working as well as humanly possible. Yes, we are human beings and the system makes mistakes and that will always happen, but it is more than that.

One thing we have not focused on today is the problem with forensic evidence. People believe that we now have DNA evidence and that is going to solve all of these problems, and people do not know that DNA evidence only exists in approximately 10 percent of criminal cases, so it is not the kind of safeguard that people believe it is.

I brought this article with it. It is not a capital case, but this is the kind of thing that happens in capital and noncapital cases alike, and it is one of the other reasons

why the system is so far from just being a bunch of mistakes that human beings make. This is a man who was convicted in a 1993 rape case and spent 11 years in prison in Illinois. It says, "Chicago police detectives and top officials of a crime lab refused to seek DNA testing in this case despite a lab analyst's belief that the man might be innocent," and the city of Chicago ended up paying him $9 million for his wrongful conviction. "The analyst described how he urged detectives and high-ranking crime lab officials to send the evidence to the FBI for a DNA test because he strongly suspected that the man was innocent. He said his request was refused because policy said he confessed. And on his last day at his job he once again urged this testing and his superior told him 'Don't worry about it. Have fun with staring your career in DNA up in Michigan.' "

This is not human error. This is deliberate ignoring of the facts in the case, and this is the kind of problem that we see time and time again in the capital system and in the noncapital system. So we have to do better than just talking about human error. We have to devote our attention and our resources to cleaning up the system from top to bottom if we are going to be able to say in good conscience that the system works as well as humanly possible.

MR. TAYLOR: Yes?

MR. LUNGREN: Before you ask that question, you would not believe that just paying the $9 million was enough? Wouldn't you want to punish the people who intentionally did that so that that would deter others from doing that in the future?

MS. SLOAN: Do you think I am going to fall for that?

(Laughter.)

MR. LUNGREN: No. I was just wondering.

MS. FRIEDMAN: I think that is a critical point.

MS. SLOAN: It is.

MS. FRIEDMAN: I think that is an absolutely critical point that some effort be made so when mistakes are made that people be held accountable.

MR. LUNGREN: Right, because you believe in the deterrent effect.

MS. FRIEDMAN: Because prosecutors again and again say if you discriminate on the basis of race and we prove it, if you withhold evidence, we have seen that the Supreme Court said evidence was withheld and so we are reversing this death penalty, and what happens? The same prosecutor gets to re-prosecute the same person and put on the death penalty.

MR. LUNGREN: I agree with you.

MS. FRIEDMAN: So I guess I would ask you, what steps will you take? I am an individual litigator.

MR. LUNGREN: If you were my prosecutor you would be punished.

MS. FRIEDMAN: No, I mean as a congress person.

MR. LUNGREN: For retribution and for deterrence so that anybody else who worked for me or worked for our system would know that if they crossed that line they would be punished, too, because I believe in deterrence.

MS. SLOAN: Will you drop in that bill?

MR. LUNGREN: If it were intentional, absolutely.

MS. SLOAN: Even willful blindness? We will work with you on it.

MR. LUNGREN: They have committed a crime if it is intentional.

MR. SCHEIDEGGER: Let me make a point on what you just raised about finding the people who commit the errors. This is one point where I actually believe with Professor Liebman (phonetic), by the way. You said that one of the problems is that the review of these cases is done many years later when the people who are involved have moved on to other stages of their careers and they are no longer subject to the same sanctions. So to fix the problem in California, I wrote legislation, and State Senator Morrow introduced it, to have state post-conviction review done promptly after trial. It was the anti-death penalty side that came in and killed that bill. They were not interested in that reform. They did not want the proceedings moved up. They wanted it delayed as long as possible.

MS. FRIEDMAN: But you do not have to change the way the procedure is done in order to answer the question we are talking about. If you have the *Banks* case at the Supreme Court where the prosecution lied about the fact that they paid one of the witnesses and lied about the fact that they coached the witnesses, and the Supreme Court says that was an intentional act, whether it was intentional or not, the same people come back and re-prosecute. We had a case out of Georgia where the prosecution center had a memo and told the jury commissioners how to under-represent and keep black people and women off of the jury rolls. It was an intentional act of discrimination. The Supreme

Court voted 9 to 0 with Scalia voting to overturn the death sentence saying this is wrong and sent it back. And what happens? The same prosecutor goes and tries to put him back on death row. That is a place where somebody needs to step in and say we don't think that is good.

MR. TAYLOR: I am going to get to this gentleman's question, but first let me see if I can distill one question that comes out of what you said, Ruth. As far as I know, if a state prosecutor lies, obstructs justice, intimidates witnesses, and commits a parade of obvious crimes to try and nail somebody and his cronies in the state government are willing to let that go, there is no federal law that can be used to go after him, no federal criminal law.

MR. SCHEIDEGGER: You are about 145 years late. It was made a federal crime by the Reconstruction Congress to deprive a person of his civil rights.

MR. TAYLOR: Section 241. Has that ever been used except in a race case to go after a state prosecutor, ever once?

MR. SCHEIDEGGER: Probably, but I am not sure.

MR. TAYLOR: Bet? Yes, sir. Your question?

QUESTION: I may have the same problem he did about having a question or not. I am probably, I know, as liberal as anybody up there, and I agree with just about everything you have said on this side of the table. But I want to redo a list, Timothy McVeigh, Richard Speck, Ted Bundy, Osama bin Laden, Mr. Dahmer, I want to retain the right to execute those people.

MS. FRIEDMAN: I think that is why I talked about the experience in the South, and that is where I have practiced, and it is true elsewhere in the country, that when we talk about a system that does not exist, we are talking about something that I think does not have very much meaning for my clients, the people facing execution. We could talk about that and I could tell you my personal, moral, religious beliefs about that, but that is not the system that we have. That is not the system that we have.

And I guess I would like to come back and have that conversation when that is the system and those are the six on death row, I would love to have that conversation with you. That is not the system that we have.

MR. TAYLOR: We have about 4 minutes. First, way back, and then over there.

QUESTION: United States is one of the few OECD countries with death row, so I am wondering what the panelists think about the "international norm" that banned the death row in most of the Western European countries and whether the U.S. is a special case, whether you should not be paying any attention to international norms.

MR. TAYLOR: Kent, do you want to take that on?

MR. SCHEIDEGGER: There are a number of surveys of people in other countries that show support for the death penalty in Britain, in Australia. There was a referendum in one of the states of Mexico, the largest state, which was a landslide in favor of the death penalty. So I think a large part of the problem is simply the degree to which countries are responsive to the will of their people on this particular issue.

Western Europe, yes, they abolished the death penalty, Eastern Europe they had to in order to get into the Common Market and get the economic benefits that come with that. But as far as a worldwide attitude of the people against the death penalty, I do not think that exists.

MR. LUNGREN: If you are asking whether international sentiment ought to decide things for us, I think that is something that public policy makers and the Congress can take into consideration if they wish. I think it is absolutely outside the scope of members of the Supreme Court.

QUESTION: Congressman Lungren, I share your consternation about what does and what doesn't work. We want we want to do what does work. You say deterrence works and vengeance doesn't? Am I correct?

MR. LUNGREN: I talked about retribution as opposed to vengeance.

QUESTION: Retribution.

MR. LUNGREN: I think retribution is an appropriate element of social policy.

QUESTION: So we should make the punishment fit the crime.

MR. LUNGREN: True.

QUESTION: And we should certainly not accommodate the criminal by giving him what he wants. In the case of the gang member who had two witnesses from prison?

MR. LUNGREN: No, he was not a gang member. He was just a bad actor.

QUESTION: Just a bad guy.

MR. LUNGREN: The other one was the other case that I handled before the Supreme Court.

QUESTION: It seems to me that these people have too much liberty to communicate with the outside. They must have too much access to order something like that.

Aside from that point, how about we do something like this, and you have to forgive me because I am not a lawyer, I might be way out of line here. But how about we give a sentence of life without parole, period, to an obvious killer like Scott Peterson? However, everybody wants his head on a pike. It would be we are giving him what he wants if he stays in prison for life. Forget that. What I'm trying to say is let's give them what they don't want. Let's give Osama bin Laden life without parole locked in a box. Let's obliterate his memory. He does not have the opportunity to preach or to commune with the fellows of like mind. We remove that opportunity from them. Let's give them what they don't want.

MR. LUNGREN: You are asking whether in cases of life without possibility of parole we ought to make it such that they cannot exact punishment to others, I would certainly agree with that, but we have found in our prison system in many cases it is almost impossible not to have communications go out. It is probably an impossible task to say that you are going to create a scenario in which someone is not going to be able to communicate in some way, shape, or form, particularly if they have some following, and I

just happen to think that has been the experience. But I also take your point that maybe we should not make it as convenient for some people who are serving in prison, but at the same time we have never gone to the idea that we torture people or that we create conditions so severe that that would be considered inhumane or torturous. Even if we did move in that direction, I doubt that the American people would support that. That may seem strange if you execute someone but you would not torture them, but, frankly, that is part of who we are as a society. We do not torture an individual who has been the torturer. We do execute, but that is a sense of retribution that that is the highest form of punishment for those who would commit the worst of our crimes as we so define them. And they have been defined differently over time, but basically now with the guidance of the Supreme Court they are limited in almost all cases where there is actually a taking of life. There is a question in a terrorist case or in a case of treason whether that would still be required, I happen to think it may still be required under a review by the U.S. Supreme Court.

MR. TAYLOR: I think we are out of time. I would like to thank the audience and all four panelists. One thing that strikes me is that when you have panelists as knowledgeable and as thoughtful as these four with such a deep chasm of disagreement between them, it dramatizes how hard this issue is and I think shows why we are going to be debating it for a while. But I think they have debated it well today, and I thank them all for it, and thank you for listening.

(Applause.)

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