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Capital Punishment in the United States

Submission to the Office of the United Nations High Commissioner for Human Rights following UN General Assembly resolution 62/149 entitled “Moratorium on the use of the death penalty” adopted in December 2007

Introduction

Beginning in September 2007, the United States experienced a *de facto* moratorium on its use of the death penalty when the U.S. Supreme Court granted certiorari in the case of *Baze v. Rees*. In *Baze*, the Court was concerned with whether Kentucky's lethal injection protocol and procedures created a substantive risk of unnecessary pain in violation of the Eighth Amendment of the U.S. Constitution.

On April 16, 2008, the Supreme Court held that Kentucky's system was constitutional, but allowed challenges to lethal injection methods in other states to proceed. The moratorium ended on May 6, 2008, when Georgia executed William Earl Lynd. As of the date of the writing of this report, twenty-two prisoners are scheduled for execution.

During the moratorium's seven months, evidence continued to mount that the United States' capital punishment system is broken. We continued to see innocent prisoners released from death row. Race, class, and geography continued to determine who was charged with capital murder and sentenced to death. People continued to be sentenced to death because of ineffective assistance of counsel. Funding for public defender systems lawyers remained anemic. The costs of the penalty remained extraordinary. Conditions on death rows throughout the country continued to be deplorable. New Jersey, Maryland,

and California recognized that capital punishment needs to be ended or examined to understand why the capital punishment system is such a failure.

Innocence

During the moratorium, five innocent men were released from death row. Four of the five were black and all of them were indigent. As of this report, 129 death row prisoners have been exonerated in the past 35 years.

Race

Racial biases and disparities continue to plague the U.S.'s death penalty system. Among other problems, African Americans charged with capital murder often must face all-white or virtually all-white juries, because prosecutors strike blacks from their juries. This occurs despite Supreme Court decisions banning this discriminatory practice. In *Snyder v. Louisiana*, a decision released on March 19, 2008, the Supreme Court reiterated that this practice violates the Constitution, holding that a trial judge impermissibly allowed a prosecutor to strike a black juror from the jury of a black defendant.

Troy Davis, an African American man, is probably innocent of the 1989 murder of a white police officer. Several of the witnesses who testified at his trial have recanted and assert they were coerced by the police to say that they saw Davis commit the crime. No murder weapon has been found and there is no physical evidence linking Davis to the murder. Nevertheless, the Georgia Supreme Court voted 4-3 against Troy Davis' request for a new trial. Davis remains on death row.

A November 2007 study of death sentences in Connecticut found that the decision to seek the death penalty was more often related to the race of the victim and the defendant, and not to the severity of the crime. Minorities who are alleged to have killed white victims are most likely to be charged capitally. "Racial Disparities in the Capital of Capital Punishment," as reported in the New York Times on April 29, 2008, is another recent study of race and the death penalty that focused on capital cases from Harris County, Texas. This study found that there is "a robust relationship between race and the likelihood of being sentenced to death even after the race of the victim and other factors were held constant." (NYT Sidebar by Adam Liptak, April 29, 2008.)

Indigent defense

The American Bar Association, on October 29, 2007, released a new report renewing its 1997 call for a moratorium on the use of capital punishment and citing its three-year study of capital punishment in eight states. Among other things, the report cites racial disparities and inadequate counsel as problems that need to be addressed.

Georgia's indigent defense system has come under scrutiny because the attorneys representing Brian Nichols are not getting paid and are unable to provide the vigorous

defense a capital defendant requires. The Georgia Public Defender Standards Council has run out of money.

In a potentially far reaching ruling, a trial judge in New Mexico barred the state from seeking the death penalty because the legislature failed to provide adequate funding for defense representation. The court held that the inadequate funding of the attorneys violated defendant's Sixth Amendment right to counsel. The state's Attorney General, Gary King, agreed that the capital prosecution could not go forward. The court's ruling and the agreement by the Attorney General may mean that no further death penalty prosecutions can proceed in New Mexico without legislative action.

Costs

The ACLU of Northern California released a report called "The Hidden Death Tax," which addressed the high costs and arbitrariness of California's death penalty system. The report found that a capital trial costs counties at least \$1.1 million more than a non-capital murder trial, and that the state spends an additional \$117 million a year pursuing the execution of those already on death row. One trial alone cost California tax payers \$10.9 million.

In New York, a federal judge said that prosecuting a capital case was not worth the costs involved. Legendary U.S. Federal District Court Judge Jack B. Weinstein said that seeking the death penalty against Humberto Pepin Taveras in New York would be a waste of prosecutors' time and effort and taxpayers' money. The case already had reached \$750,000 in defense costs. There has only been one death sentence, Ronell Wilson in 2007, recommended by a federal jury in New York since the federal death penalty was reenacted in 1988.

Access to the Courts

On September 25, 2007, the same day that the Supreme Court granted certiorari in *Baze v. Rees*, the Chief Judge of the Texas Court of Criminal Appeals, Sharon Keller, refused to keep the courthouse open past 5:00 pm so that an inmate scheduled for execution that night could challenge his death sentence under the *Baze* cert grant. Lawyers representing the condemned man, Michael Richard, had computer problems and called the court to tell the clerk of the court that they would have to file their *Baze* challenge after 5:00 pm. However, per Chief Judge Keller's instructions, the courthouse was closed at 5:00 pm, and Richard was executed later that night.

Conditions on Death Row

Conditions on many of the country's death rows remain deplorable. There have been two suicides on Texas's death row. Jesus Flores killed himself on January 29, 2008. William Robinson committed suicide on February 4, 2008. Robinson, housed in the section of the prison for inmates with mental health issues, was on suicide watch when he killed himself.

The ACLU National Prison Project and the ACLU of Nevada filed suit against the State of Nevada because of the grossly inadequate medical care provided at Ely State Prison, where the state's death row inmates are housed. Eleven of the 12 people executed in Nevada in the past 35 years have "volunteered" for execution.

Methods of Execution

In *Baze v. Rees*, the Supreme Court was asked to decide whether the lethal injection protocol and procedures used by Kentucky were constitutional. The question was whether the protocol and procedures created a substantial risk that the condemned inmate would experience unnecessary and excruciating pain. Like virtually all other states, Kentucky uses a three-drug lethal injection cocktail. The first drug, sodium thiopental, is supposed to render the inmate unconscious because the next two drugs are extremely painful. The second drug, pancuronium bromide, paralyzes the inmate. The third drug, potassium chloride, causes cardiac arrest. The problem is that if the first drug does not result in unconsciousness, the paralytic will keep the inmate from screaming in pain when the second and third drugs are injected. Even though the American Veterinarian Association does not allow the use of the cocktail on animals, the Supreme Court ruled that the Kentucky protocol was not cruel and unusual punishment.

The Supreme Court of Nebraska ruled in February 2008 that the electric chair constituted cruel and unusual punishment under the state constitution. This leaves Nebraska without a functioning capital punishment process since it does not have a lethal injection protocol. In the decision, Judge William Connolly stated, "[w]e recognize the temptation to make the prisoner suffer, just as the prisoner made an innocent victim suffer. But it is the hallmark of a civilized society that we punish cruelty without practicing it."

Progress

The seven months between the grant of certiorari in *Baze v. Rees*, and the execution of William Earl Lynd, was the longest the United States had gone without an execution in over twenty-five years.

During this respite, New Jersey abolished its death penalty. The process began when the state passed a law for a death penalty study commission. The commission found that "[t]he alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims." On December 17, 2007, Jon Corzine, Governor of New Jersey, signed the abolition bill into law.

The New York Court of Appeals ruled that the death sentence for John Taylor, who was the remaining inmate on the state's death row, was unconstitutional under state law. The decision followed an earlier decision in 2004 which overturned the state's statute because

of flaws in the jury instructions. The New York legislature has repeatedly rejected attempts to re-instate the death penalty.

Other states are also recognizing that their capital punishment systems need to be examined. The California Commission on the Fair Administration of Justice was created to examine problems with the death penalty process in that state. The legislature of the Maryland has approved a death penalty study commission.

With some jurisdictions realizing that the capital system is not working, the United States still uses this vicious method of punishment, even if it conflicts with international law. In *Medellin v. Texas*, the U.S. Supreme Court ruled that the President does not have the authority to order states to bypass their procedural rules and comply with a ruling from the International Court of Justice. This ruling allowed Texas to set an execution date in 2008 for a Mexican citizen who was not offered access to the Mexican Consulate at the time of his arrest. Even the International Court of Justice cannot halt the “killing machine” in Texas.

Military Commissions and Capital Punishment

On October 17th 2006, U.S. President George W. Bush signed into law the Military Commissions Act (MCA). The Act was in response to a U.S. Supreme Court Decision which invalidated a previous attempt of the U.S. government to set up military commissions system to try “alien unlawful enemy combatants” detained as part of the U.S. government’s “war on terror.” The MCA is the latest attempt by the U.S. government to establish a commissions system to try “alien unlawful enemy combatants.” The MCA lacks basic substantive and procedural protections codified in the U.S. Constitution, the Geneva Conventions, and numerous international human rights treaties, including the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Elimination of All Forms of Racial Discrimination. The violations include the denial of the right of habeas corpus, independent trial court, and curtailment of the right of judicial review and the right to a remedy for human rights violations. The military commissions also allow for the use of evidence obtained through torture. The MCA also protects perpetrators of torture, by granting persons who committed acts of torture against detainees retroactive immunity for their crimes.

The MCA explicitly allows for the use of the death penalty in 15 cases. These crimes, in unqualified terms, include: the murder of protected persons (persons protected under the Geneva Conventions); murder in violation of the laws of war; or spying. The following crimes also allow for the penalty of death in cases where one or more person died as a result of the crime: attacking civilians; taking hostages; employing poison or similar weapon; using protected persons as a shield; torture; cruel and unusual treatment; intentionally causing serious bodily injury; mutilating or maiming; using treachery or perfidy; hijacking or hazarding a vessel or aircraft; terrorism; or conspiracy. There are a number of additional crimes specified in the MCA, but they do not explicitly allow for a sentence of death.

Once a sentence of death is handed down by a military commission, there are a number of procedural steps that must be followed before the sentence can be carried out. The President of the U.S. must approve all death sentences, and “may commute, remit, or suspend the sentence ... as he sees fit.” In addition, the decision can be appealed to the U.S. Court of Appeals for the District of Columbia Circuit and, following the Circuit Court, to the U.S. Supreme Court. If a “judgment as to the legality of the proceedings” is upheld by the Supreme Court of the United States, or, if the accused fails to submit his or her appeal on time, the sentence can be executed, unless the President of the U.S., as stated above, intervenes.

Despite the serious deficiencies in the current system of military commissions, hearings, and proceeding, it is even more troubling that even an acquittal by these commissions - and to date, only handful of people have been permitted to appear before them – does not result in release. Detainees are simply returned to the general population at Guantanamo where they are held indefinitely as “enemy combatants.” To date, the U.S. government has announced charges against 16 men, including six cases in which the U.S. is seeking the death penalty.

The Death Penalty in the US scrutinized by UN Human Rights Treaty Bodies:

Since 2006, two U.N. treaty bodies, namely the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, have addressed the imposition of death penalty in the U.S. The ACLU submitted comprehensive shadow reports to said committees which addressed the problem of capital punishment in the U.S. The reports are available online at: <http://www.aclu.org/pdfs/iccprreport20060620.pdf> (HRC) and http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf (CERD).

The Human Rights Committee and the Committee on the Elimination of Racial Discrimination have issued the following concerns and recommendations after a thorough examination of U.S. compliance with these two human rights treaties:

CERD concluding observation issued on March 7, 2008

Paragraph 23

The Committee remains concerned about the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim, as evidenced by a number of studies, including a recent study released in October 2007 by the American Bar Association (ABA).¹ (Article 5 (a))

Taking into account its general recommendations No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party undertake further studies to identify the underlying factors of the substantial racial disparities in the imposition of the death penalty, with a view to

elaborating effective strategies aimed at rooting out discriminatory practices. The Committee wishes to reiterate its previous recommendation – contained in paragraph 396 of its previous concluding observations of 2001 – that the State party adopt all necessary measures, including a moratorium, to ensure that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.

HRC concluding observation issued on July 28, 2006

Paragraph 29

The Committee regrets that the State party does not indicate that it has taken any steps to review federal and state legislation with a view to assessing whether offences carrying the death penalty are restricted to the most serious crimes, and that, despite the Committee's previous concluding observations, the State party has extended the number of offences for which the death penalty is applicable. While taking note of some efforts towards the improvement of the quality of legal representation provided to indigent defendants facing capital punishment, the Committee remains concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities as well as on low-income groups, a problem which does not seem to be fully acknowledged by the State party. (articles 6 and 14)

The State party should review federal and state legislation with a view to restricting the number of offences carrying the death penalty. The State party should also assess the extent to which death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the State party should place a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty.