



ACLU submission to the Office of the United Nations High Commissioner for Human Rights on the Death Penalty in the United States

April 10, 2012

The American Civil Liberties Union (ACLU) submits this statement regarding the U.S.' administration of the death penalty in preparation for the United Nations Secretary General's forthcoming report on the question of the death penalty to the 21st session of the Human Rights Council (Sep 2012) and pursuant to decision 18/117 adopted on 28 September 2011.

The U.S. Death Penalty

The administration of the death penalty in the U.S. has been a failed experiment with inestimable damage to the country's standing and image in the world as an ally of human rights and democratic values. Since 1976 when the modern death penalty era began in this country,¹ 1,289 people have been executed.² The U.S. death penalty system in 34 states, in the federal system, and in the military continues to violate international law. As of October 2011, there were 3,199 people awaiting execution across the country.³

Positive Signs in Recent Years

The U.S. has recently taken some important steps towards conforming to international law by barring the execution of juveniles, the intellectually disabled, and those who did not commit homicides.⁴ The number of new death sentences has dropped dramatically – from a peak of 315 in 1996 to 78 in 2011.⁵ Four states – New York, New Jersey, New Mexico, and Illinois – have recently repealed the death penalty. Connecticut is poised for abolition this year.⁶ No executions have taken place in California or Pennsylvania – with nearly 1,000 prisoners on their death rows combined – in the past six years.⁷

Twenty-five years ago this month, the U.S. Supreme Court dismissed racial disparities in the death penalty as an “inevitable part of our criminal justice system.”⁸ Rejecting this assumption, North Carolina passed the landmark Racial Justice Act in August 2009.⁹ The law requires that courts enter a life sentence for any death row defendant who proves that race was a factor in the imposition of his death sentence. A decision in the case of the first defendant to have a hearing under the Act is expected soon.

Increasingly, judges, prosecutors, law enforcement officials, and other former supporters of the death penalty acknowledge that its problems are too legion and the consequences of error too severe. In November 2011, Oregon Governor John Kitzhaber, who oversaw two executions before, placed a moratorium on all executions in the state, finding that the system is arbitrary, expensive, and “fails to meet basic standards of justice.”¹⁰ Staunch conservatives across the country, many of whom wrote their states’ death penalty laws, now agree that the system is broken.¹¹ In 2009, the American Law Institute withdrew the section of the Model Penal Code upon which most state statutes were based, because it no longer wanted to play any role in legitimizing the death penalty.¹²

Still, significant problems remain.

Imposition of the Death Penalty on the Mentally Ill and Intellectually Disabled

There are significant gaps in the legal protection accorded severely mentally ill capital defendants in the U.S. Mentally ill defendants are particularly vulnerable in capital cases. The American Bar Association and many leading mental health groups have urged states to exempt the severely mentally ill from the death penalty,¹³ but the U.S. continues to execute the severely mentally ill. For instance, last month, Mississippi executed Edwin Turner.¹⁴ Turner had attempted suicide at the age of 18 by trying to shoot himself in the face. He had been released from a mental hospital just weeks before the murders for which he was convicted.

Despite the constitutional prohibition, the U.S. also continues to execute the intellectually disabled.¹⁵ Arizona executed Robert Moorman in February 2012, though he had been diagnosed with mental retardation and attended special education classes as a child. He was first admitted to a mental health hospital at 13 years old.¹⁶

Whether capital appeals on federal habeas review can proceed if the defendant is mentally incompetent remains an open question under U.S. law. The Supreme Court recently granted review in two cases dealing with this issue.¹⁷

Death Row Prisoners Spend Excessive Time on Death Row

Often, condemned prisoners wait decades in solitary confinement before execution, in violation of internationally-recognized prohibitions against this form of cruel punishment and psychological mistreatment.¹⁸ Supreme Court Justice Stephen Breyer and former Justice John Paul Stevens have recognized that such a lengthy delay raises constitutional concerns in statements unsuccessfully urging the Court to review the issue.¹⁹

The Death Penalty's Arbitrary and Disproportionate Application

Use of the death penalty is arbitrary and random, still as likely as being “struck by lightning” as it was when the Supreme Court struck down states’ former death penalty statutes in 1972.²⁰ Among thousands of potentially eligible cases, only a handful of those convicted are sentenced to death; worse, the factors that determine who is sentenced to death are not legal, but accidents of race, class, and geography²¹

Numerous studies establish that murder of whites, particularly by blacks, results in capital prosecution in far higher percentages than murders of people of color.²² In its recent periodic report to the U.N. Human Rights Committee, the U.S. government acknowledged “the overrepresentation of minority persons, particularly Blacks/African Americans, in the death row population.”²³ Beyond North Carolina, U.S. constitutional law continues to prevent successful challenges to these racist practices.²⁴

U.S. law has also failed to eradicate discrimination in jury selection, and people of color continue to be excluded from capital juries at alarming rates.²⁵

The U.S. Death Penalty System Fails to Protect the Innocent

Since 1973, 140 innocent people in 26 states have been exonerated from death row.²⁶ Tragically, many have not escaped execution. On September 21, 2011, the state of Georgia executed Troy Davis, a Black man who was almost certainly innocent of the murder of a white police officer. Despite the unreliability of the evidence that convicted him and the worldwide call for clemency, Georgia refused to commute Davis’ sentence to life.

Other executions have taken place when serious doubts about the defendant’s guilt lingered. Texas executed Cameron Todd Willingham in 2004 and Claude Jones in 2000 - two men whose guilt turned almost exclusively on purported scientific evidence that later proved unreliable.²⁷

Men with strong claims of innocence remain on death row. Missouri has held Reginald Clemons on death row for 20 years for murders that he almost certainly did not commit. Clemons, a Black man with no criminal record, and three others were charged with murdering two white women by pushing them off a bridge. The case has many of the classic concerns that plague capital punishment – racism, prosecutorial misconduct, a coerced confession, lying witnesses, ineffective defense counsel, and no physical evidence. The white codefendant is now out of jail, while Clemons, and another Black codefendant remain on death row. The third Black codefendant was executed. All three have consistently maintained their innocence.

Inadequate Counsel and Insufficient Access to Resources

Capital cases require qualified counsel and adequate resources, which very few individuals can afford. Many states fall woefully short of providing them to indigent clients. In 2009, the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions observed troubling deficiencies in the provision of counsel to capital defendants.²⁸ Recently, the Supreme Court considered the case of Alabama death row prisoner Corey Maples, who missed a necessary deadline in his appeals when he was abandoned by counsel. The Court faulted Alabama's indigent defense system as contributing to Maples' dilemma, noting its low eligibility requirements for counsel in capital cases and the gross under-compensation of counsel.²⁹ Fortunately, the Court allowed Maples' appeal to proceed. Unfortunately, the problems persist, as many on Alabama's death row have no lawyer to represent them at all.³⁰ U.S. law still permits states to execute prisoners who have no lawyers.³¹

Death Penalty Prosecutions under the Military Commissions Act of 2009

The federal government's decision to seek the death penalty in military commissions at Guantánamo Bay against numerous defendants accused of terrorism rather than in federal courts raises troubling international law concerns.³² These commissions have been set up to achieve easy convictions and hide the reality of torture. The rules also violate due process by allowing under some circumstances hearsay evidence and coerced or secret evidence.³³

Limitations on Access to Courts

U.S. federal courts continue to severely restrict access to federal habeas review, as the International Court of Justice determined.³⁴ Recent Supreme Court decisions have made these limitations, often the only avenue to relief for wrongly convicted or wrongly sentenced prisoners, even harsher and more restrictive.³⁵

Lethal Injection Risks Cruel and Unusual Punishment

Although the Supreme Court has held that one current method of lethal injection used in the U.S. is constitutional,³⁶ several condemned prisoners have suffered excruciating pain as they were put to death. Execution drugs remain unavailable for many states, which led some to obtain the drugs illegally from foreign sources. In March 2012, a federal court ordered the FDA to review all drugs imported for execution for safety and effectiveness.³⁷

Conclusion

Abolition of the death penalty in the U.S. would remedy the numerous constitutional and international law violations plaguing its system. Important interim reforms could include fuller federal review of cases, implementation of measures to prevent police and prosecutor misconduct, and adequate funding for effective indigent defense. As a first step, the federal government should fulfill its commitment in the Universal Periodic Review process to study the racial disparities of the death penalty.³⁸ The federal government could also place a moratorium on all federal death penalty trials and executions.

¹ Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

² Death Penalty Information Center, Searchable Execution Database, available at <http://www.deathpenaltyinfo.org/executions> (choose “Search by Details”).

³ NAACP Legal Defense and Educational Fund, Death Row USA (Fall 2011), available at http://www.naacpldf.org/files/publications/DRUSA_Fall_2011.pdf.

⁴ Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Kennedy v. Louisiana, 554 U.S. 407 (2008).

⁵ Death Penalty Information Center, The Death Penalty in 2011: Year End Report (Dec. 2011), available at http://www.deathpenaltyinfo.org/documents/2011__Year__End.pdf.

⁶ With Senate Vote, Connecticut is on Track to End Capital Punishment, *N.Y. Times* (Apr. 5, 2012).

⁷ NAACP Legal Defense and Educational Fund, Death Row USA (Fall 2011), available at http://www.naacpldf.org/files/publications/DRUSA_Fall_2011.pdf.

⁸ McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

⁹ American Civil Liberties Union, North Carolina Racial Justice Act (Dec. 7, 2011), available at <http://www.aclu.org/capital-punishment/north-carolina-racial-justice-act>.

¹⁰ Helen Jung, Gov. John Kitzhaber: Oregon Death Penalty Fails ‘Basic Standards of Justice’, *The Oregonian* (Nov. 22, 2011), available at http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_oregon_deat.html.

¹¹ Adam Nagourney, Fighting to Repeal an Execution Law They Once Championed, *N.Y. Times*, Apr. 6, 2012; M. Naymik, Jim Petro Questions about the Death Penalty Stop Short of Calling for Repeal, *Cleveland Plain Dealer*, Jan. 22, 2012.

¹² American Law Institute, Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty (Apr. 15, 2009), available at <http://deathpenaltyinfo.org/documents/alicon.pdf>; Franklin E. Zimring, Pulling the Plug on Capital Punishment, *Natl. Law Journal*, Dec. 7, 2009.

¹³ American Bar Association, Resolution 122A, available at <http://www.deathpenaltyinfo.org/documents/122AReport.pdf>; National Alliance on Mental Illness and Murder Victims’ Families for Human Rights, Double Tragedies (July 6, 2009), available at http://www.nami.org/Content/ContentGroups/Policy/Issues_Spotlights/Death_Penalty/DoubleTragedies.pdf; American Psychological Association, “The Death Penalty in the United States,” available at <http://www.apa.org/about/governance/council/policy/death-penalty.aspx>; E. Packard, “Associations Concur on Mental Disability and Death Penalty Policy,” *38 Monitor on Psychology* 14 (Jan. 2007).

¹⁴ Edwin Hart Turner Executed in Mississippi Despite Claims He Was Mentally Ill, *Huffington Post* (Feb. 8, 2012), available at http://www.huffingtonpost.com/2012/02/09/edwin-hart-turner-executed_n_1265535.html.

¹⁵ See, e.g., Renee Feltz, Cracked, *Texas Observer* (Jan. 5, 2010).

¹⁶ M. Kiefer, Execution to conclude shocking Arizona murder case, *Arizona Republic News* (Feb. 26, 2012).

¹⁷ Ryan v. Gonzales, No. 10-930, 2012 WL 895970 (U.S. Mar. 19, 2012); Tibbals v. Carter, No. 11-1218, 2012 WL 895971 (U.S. Mar. 19, 2012).

¹⁸ See, e.g., Pratt & Morgan v. AG for Jamaica, 4 All. E.R. 769, Judicial Committee of the Privy Council (Nov. 2, 1993); Soering v. United Kingdom, 11 Eur. Ct. H.R. 439 (Ser. A, No. 161) (July 7, 1989).

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- ¹⁹ Valle v. Florida, 132 S. Ct. 1 (Sept. 28, 2011) (Breyer, J., dissenting from denial of certiorari); Johnson v. Bredesen, 130 S. Ct. 541 (2009) (opinion of Stevens, J., joined by Breyer, J., respecting denial of certiorari); Smith v. Arizona, 552 U.S. 985 (2007) (opinion of Breyer, J., dissenting from denial of certiorari); Lackey v. Texas, 514 U.S. 1045 (1995) (opinion of Stevens, J., respecting denial of certiorari).
- ²⁰ See Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).
- ²¹ See, e.g., A. Mikulich & S. Cull, Diminishing All of Us: The Death Penalty in Louisiana, Jesuit Social Research Institute (Mar. 2012) (death penalty is applied in only 1% of Louisiana murders); L. Montgomery, Md. Questioning Local Extremes on Death Penalty, Wash. Post (May 12, 2002) (the city of Baltimore only had one person on death row while its surrounding county had 9 people on death row, with one-tenth less murders); R. Willing and G. Fields, Geography of the Death Penalty, USA Today (Dec. 20, 1999) (one county in Ohio produces about 25% of the state's death sentences, though only 9% of the state's murders occur there).
- ²² See, e.g., David Baldus, et al., Racial Discrimination in the Administration of the Death Penalty: the Experience of the United States Armed Forces (1984-2005), 101 J. Crim. Law & Criminology 1227 (Fall 2011); Amnesty International, United States of America: Death by Discrimination – the Continuing Role of Race in Capital Cases (Apr. 2003); U.S. Department of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000) (Sept. 12, 2000).
- ²³ Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (Dec. 30, 2011).
- ²⁴ McCleskey v. Kemp, 481 U.S. 279, 312 (1987).
- ²⁵ Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy (Aug. 2010), available at <http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>.
- ²⁶ Death Penalty Information Center, The Innocence List (Jan. 23, 2012), available at <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.
- ²⁷ American Civil Liberties Union, Faces of Justice Denied (Dec. 10, 2010), available at <http://www.aclu.org/capital-punishment-human-rights/faces-justice-denied-cameron-todd-willingham-and-claude-jones>.
- ²⁸ Report of the Special Rapporteur on Extrajudicial, summary or arbitrary Executions, Human Rights Council, A/HRC/11/2/Add.5 (May 28, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.5.pdf>.
- ²⁹ Maples v. Thomas, 132 S. Ct. 912, 917 (2012) (citing American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report 117–120 (June 2006)).
- ³⁰ Maples v. Thomas, 132 S. Ct. 912, 917 (2012) (citing American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report 112 (June 2006)).
- ³¹ Murray v. Giarratano, 492 U.S. 1 (1976).
- ³² Report of the Special Rapporteur on Extrajudicial, summary or arbitrary Executions, Human Rights Council, A/HRC/11/2/Add.5 (May 28, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.5.pdf>; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/6/17/Add.3 (Nov. 22, 2007), available at <http://daccess-ods.un.org/TMP/9489911.html>.
- ³³ U.S. Dep't of Defense, Manual for Military Commissions (Apr. 27, 2010), available at http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf; Military Commissions Act of 2009, 10 U.S.C. § 47A.
- ³⁴ Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 ICJ 124 (Mar. 31, 2004).
- ³⁵ See, e.g., Cullen v. Pinholster, 131 U.S. 1388 (2011); American Civil Liberties Union, Slamming the Courthouse Doors: Denial of Access to Justice and Remedy in America (Dec. 2010), available at http://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf.
- ³⁶ Baze v. Rees, 553 U.S. 35 (2008).
- ³⁷ Beaty v. FDA, No. 11-289, 2012 WL 1021048 (D.D.C. Mar. 27, 2012).
- ³⁸ Humanrights.gov, U.S. Implementation Plan for the 2010 Universal Periodic Review, at ¶ 95 (Mar. 16, 2012), <http://www.humanrights.gov/2012/03/16/u-s-implementation-plan-for-the-2010-universal-periodic-review>; American Civil Liberties Union, Unfinished Business: Turning the Obama Administration's Human Rights Promises into Policy (Mar. 21, 2012), available at https://www.aclu.org/files/assets/unfinished_business_aclu_final.pdf.