

DEATH PANELS FROM BAD LEGISLATION

[Marcy is tending bar for Glenn Greenwald today over at Salon and has a wonderful piece on John Brennan and resultant bad policy in the Obama Administration. Please give her a visit – bmaz]

Australia, Belgium, Canada, Denmark, France, Germany, Ireland, Italy, Mexico, New Zealand, Norway, Poland, Spain, Sweden, Switzerland, Turkey, the United Kingdom (England), and even Venezuela. What do all these developed first order modern countries have in common?

They abolished the death penalty. Conspicuously absent of course is the United States. We are the only country in the Americas, whether North or South, that utilizes the death penalty in anything other than declared war exceptional circumstances. The conspicuousness of the US on the world death penalty map is chilling in terms of who we are aligned with in our beliefs; and it isn't what might be referred to as the enlightened group of nations.

What is the purpose of the death penalty in a modern society at this point? Sure isn't deterrence. In an article in the Ohio State Journal of Criminal Law, Dr. Jeffrey Fagan of Columbia University writes,

There is no reliable, scientifically sound evidence that [shows that executions] can exert a deterrent effect.... These flaws and omissions in a body of scientific evidence render it unreliable as a basis for law or policy that generate life-and-death decisions. To accept it uncritically invites errors that have the most severe human costs.

In accord are John Donnohue and Justin Wolfers in an article entitled "The Death Penalty: No Evidence for Deterrence", where the authors conclude claims that the death penalty saves

lives and acts as a deterrent "are simply not credible." Are there studies to the contrary? Yes, and they are debunked in the above studies and evaluations, as well as in any number of others.

It is not for purposes of financial efficiency either; the death penalty is hideously expensive for the states and nation. When I first began my legal career, the data consistently showed that litigating and executing death penalty cases, as opposed to non-capital punishment treatment (including life imprisonment), was severely more expensive. That is still the case. From the CSM:

This year, state budgetary crises have given death penalty opponents their most successful argument yet – money.

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Administering the death penalty is breathtakingly expensive. Contrary to popular opinion, it costs substantially more to execute people than to send them to prison for the rest of their lives.

In California, which houses the nation's largest death row, it costs about \$137 million annually to maintain the state's death penalty system. The state has conducted only 11 executions since reinstating the death penalty in 1978, bringing the average cost per execution to \$250 million. That's right – a quarter of a billion dollars per execution.

California's estimated cost of administering a system without capital punishment (imposing instead a maximum sentence of life without the possibility of parole) is \$11 million annually, which means the state could save \$126 million per year if it rescinded a penalty that it almost never uses. That's big money – money that could be allocated to healthcare and to education, money that could put more police officers on the streets and take

more killers off them.

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Two years ago, New Jersey calculated that the death penalty had cost over \$250 million since its reinstatement in 1983 – and for all the money invested, the state had not a single execution to show for it. Little wonder New Jersey decided to cut its losses and close death row.

The CSM article is a good, short and informative read.

As anyone who is a student of the American socio-political scene (and if you read here you almost certainly are) can attest, the death penalty is like a holy grail third rail for the conservative right wing. Even the right to lifers are death penalty aficionados. The Democrats are not a whole lot better.

Why is the death penalty still prevalent in the United States? Primitive bloodlust is about the only rational answer.

So, who will rid us of this meddlesome death penalty? We have certainly established it will not be the politicians inhabiting the Congress and Executive Branch. That leaves, as it always seems to these days, the Federal Judiciary, and the wave is building. From a great article by John Schwartz in today's New York Times:

In dozens of capital cases in recent years, appeals court judges, some of whom have ruled in favor of the death penalty many times, have complained that Congress and the Supreme Court have raised daunting barriers for death row prisoners to appeal their convictions, and in many cases the judges have taken on their colleagues.

"There is an increasing frustration among federal judges throughout the system," said Eric M. Freedman, a critic of the death penalty who teaches on the

subject at Hofstra Law School.

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The law that generates much of the judges' ire is the Antiterrorism and Effective Death Penalty Act of 1996. Since its passage, the act has been cited in a half-dozen to two dozen dissents a year, often in language forceful enough to rival Judge Fletcher's. The law, championed by legislators who believed prisoners were abusing the federal appeals process, restricts federal court review of state court decisions in death penalty cases and puts strong limits on the ability of condemned prisoners to file habeas corpus petitions to get their cases reconsidered.

In April, Judge Rosemary Barkett of the United States Court of Appeals for the 11th Circuit, in Atlanta, complained of the law's "thicket of procedural brambles." Dissenting from a decision by her colleagues, Judge Barkett noted that seven of the nine witnesses in the murder trial of Troy Davis, a death row inmate in Georgia, had recanted their testimony. To execute Mr. Davis without fully considering that evidence would be "unconscionable and unconstitutional," wrote Judge Barkett, who has voted in more than 200 other cases to uphold the death penalty.

Judge Stephen Reinhardt of the Ninth Circuit, a critic of capital punishment, took on the constitutionality of the 1996 death penalty act itself in a dissent in the case of Andrew C. Crater, who had been convicted of taking part in a robbery and shooting spree that killed a Sacramento musician, James Pantages. Judge Reinhardt, appointed by President Jimmy Carter, wrote in 2007 that the act made "a mockery of the careful boundaries between Congress and the

courts that our Constitution's framers believed so essential to the prevention of tyranny."

And here, at long last, we come to the purpose of the title to this post. The judges are right, the pertinent portions of the *Antiterrorism and Effective Death Penalty Act of 1996* are egregious in the way they attempt to choke off appeal rights of those we seek to murder. And make no mistake about it, the death penalty is, both legally and morally, nothing but state sanctioned murder.

The reason the Federal judges are so up in arms about the AEDA of 1996 is that it is literally a chokehold on fair and equitable application of the Constitutional right to Habeas Corpus. Title I of the Act substantially amends federal habeas corpus law as it applies to both state and federal prisoners, whether on death row or imprisoned for a term of years, by providing a bar on federal habeas reconsideration of legal and factual issues ruled upon by state courts in most instances, creation of a general 1 year statute of limitations, creation of a 6 month statute of limitation in death penalty cases, encouragement for states to appoint counsel for indigent state death row inmates during state habeas or unitary appellate proceedings, and a requirement of appellate court approval for repetitious habeas petitions which are often a condemned man's only hope of redress before his life is taken.

What the death penalty and rights restrictive legislation like this does is turn capital juries and Federal appellate panels into "death panels". Not the ginned up fraudulent baloney from Sarah Palin and the rightwing healthcare haters, but real, live, death panels that are choked off from the ability to do justice and equity. Serious people trying to do the most serious work imaginable, determining life or death of a fellow human being. This is an absolute moral, and arguably legal, invasion of

the separation of powers and province of the judicial branch. If you want to really get a taste of what a pissed off Federal judge has to say about this, in a flagrant case where a potentially innocent man is up for execution, read the dissenting opinion from Judge Fletcher described in the NYT article. It is long, but eye opening, fascinating and worthwhile reading.

As Edward Bennett Williams eloquently stated of our founding principles:

Our philosophy of criminal jurisprudence is that the government of the state must prove the guilt of the defendant beyond a reasonable doubt. If they fail to do this, then we leave the defendant to the majestic vengeance of God if he be guilty because the basic philosophy of our criminal jurisprudence is that it's far far better that ten guilty men go free than that one innocent man go to the penitentiary convicted of a crime of which he's not guilty.

The Founding Fathers were wise. If the United States cannot muster the gumption to join the rest of the civilized world and abolish the death penalty, we darn sure need to roll back the egregious provisions in *Antiterrorism and Effective Death Penalty Act of 1996* and return the scales of justice to the neutral and detached judiciary.