American Bar Association votes for moratorium on capital punishment

by Marianna Wertz

The American Bar Association, the nation's largest and most influential organization of lawyers, voted on Feb. 3 for a moratorium on executions in this country, saying that under current practice, they are administered through "a haphazard maze of unfair practices." A resolution calling for the moratorium was passed by the ABA's House of Delegates, representing the association's 370,000 members, on a 280 to 119 vote at the ABA's semi-annual convention in San Antonio.

The resolution calls for the moratorium to be effective "until jurisdictions implement policies to ensure that death penalty cases are administered fairly, impartially, and in accordance with due process, and minimize the risk that innocent persons may be executed." *EIR* Founding Editor Lyndon LaRouche welcomed the development, saying, "While not an adequate step back toward civilized justice in the U.S.A., it deserves vigorous support as far as it goes."

A heated debate

The issue was hotly debated before passage. Both ABA President Lee Cooper, of Birmingham, Alabama, and a spokesman for the Clinton administration, opposed the resolution. Cooper, a proponent of the death penalty, said he thought the resolution should have directly addressed the issue of capital punishment. "I took the position that we were voting up or down on the death penalty," Cooper said.

Outgoing Deputy Attorney General Jamie S. Gorelick also spoke against the resolution, noting that it could adversely affect pending cases involving domestic terrorism, including the Oklahoma City bombing case, in which the administration has reportedly decided to seek the death penalty. In fact, ever since Bill Clinton lost his first bid for reelection as governor of Arkansas, over the issue of his death-row clemency decisions during his first term, he has shunned the appearance of using the powers of executive clemency, both during his later incumbencies as Arkansas governor, and during his first term as President; Gorelick's intervention is coherent with this.

Resolution supporters obtained the endorsement of 20 of the 24 living former ABA presidents. Former ABA President John Curtin, a Boston lawyer, said there was an "appalling risk" of executing innocent people. "Why should we be in front?" he asked. "Because it's the right thing to do."

As passed, the resolution does not take a position for or against capital punishment in most cases, although the association has opposed executions of mentally retarded persons and people who were 18 or younger when they committed their crimes. It also has long-standing policies supporting appointment of competent counsel; preserving, enhancing, and streamlining *habeas corpus* review, and eliminating discrimination in capital sentencing on the basis of the race of either the victim or the defendant. It is in these areas that the resolution urges each jurisdiction across the nation to examine its practices, to assure that people charged with capital crimes receive the due process protections.

The report accompanying the resolution particularly points to legislation passed by the 104th Congress in 1996, significantly curtailing the availability of federal *habeas corpus* to death row inmates, and withdrawing federal funding from the post-conviction defender organizations, in motivating the resolution. This legislation, the report states, has resulted in "a situation in which fundamental due process is now systematically lacking in capital cases."

The federal government and 38 states have capital punishment statutes. There are currently more than 3,000 men and women on death row nationwide.

Documentation

What follows is from the American Bar Association Section of Individual Rights and Responsibilities Section of Litigation resolution regarding capital punishment.

Recommendation

Resolved, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements poli-

cies and procedures that are consistent with the following long-standing American Bar Association policies intended to 1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and 2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted February 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal *habeas corpus* proceedings (adopted August 1982, February 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted August 1988, August 1991); and

(iv) Preventing execution of mentally retarded persons (adopted February 1989) and persons who were under the age of 18 at the time of their offenses (adopted August 1983).

Further Resolved, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

Report

Introduction: The American Bar Association has adopted numerous policies bearing on the manner in which the death penalty should be applied in jurisdictions where it exists. These policies were adopted in view of the ABA's extensive experience with the administration of the death penalty and in light of several ABA-sponsored studies. The policies concern: 1) competent counsel in capital cases; 2) proper processes for adjudicating claims in capital cases (including the availability of federal *habeas corpus;* 3) racial discrimination in the administration of capital punishment; and 4) the execution of juveniles and mentally retarded persons.

The time has now come for the ABA to take additional decisive action with regard to capital punishment. Not only have the ABA's existing policies generally not been implemented, but also, and more critically, the federal and state governments have been moving in a direction contrary to these policies. The most recent and most dramatic moves, both strongly opposed by the ABA, have come in the form of laws enacted by Congress in 1996. Federal courts already are construing one law to significantly curtail the availability of federal *habeas corpus* to death row inmates, even when they have been convicted or sentenced to death as a result of serious, prejudicial constitutional violations. Another law completely withdraws federal funding from the post-conviction defender organizations that have handled many post-conviction cases and that have mentored many other lawyers who have represented death row inmates in such proceedings.

These two recently enacted laws, together with other federal and state actions taken since the ABA adopted its policies on capital punishment, have resulted in a situation in which fundamental due process is now systematically lacking in capital cases. Accordingly, in order to effectuate its existing policies, the ABA should now call upon jurisdictions with capital punishment not to carry out the death penalty until these policies are implemented. Of course, individual lawyers differ in their views on the death penalty in principle and on its constitutionality. However, it should now be apparent to all of us in the profession that the administration of the death penalty has become so seriously flawed that capital punishment should not be implemented without adherence to the various applicable ABA policies.

Background: The backdrop for the Recommendation is the two decades of jurisprudence and legislation since the United States Supreme Court upheld new death penalty statutes in *Gregg v. Georgia,* after having invalidated earlier death penalty statues in 1972 in *Furman v. Georgia.* In *Furman,* the Court believed that then-existing state statutes failed to properly balance the need to ensure overall consistency in capital sentencing with the need to ensure fairness in individual cases. Four years later, in *Gregg,* the Court concluded that new state statutes' special procedural requirements for capital prosecutions provided a means by which the states would achieve that balance.

However, two decades after *Gregg,* it is apparent that the efforts to forge a fair capital punishment jurisprudence have failed. Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency. To a substantial extent, this situation has developed because death penalty jurisdictions generally have failed to implement the types of policies called for by existing ABA policies. . . .

Unless existing ABA policies are now implemented, many more prisoners will be executed under circumstances that are inconsistent with the Supreme Court's mandate, articulated in *Furman* and *Gregg,* that the death penalty be fairly and justly administered. . . .

Conclusion: As former American Bar Association President John J. Curtin, Jr., told a congressional committee in 1991, "Whatever you think about the death penalty, a system that will take life must first give justice." . . .

[T]he Association has identified numerous, critical flaws in current practices. Those flaws have not been redressed; indeed, they have become more severe in recent years. . . . This situation requires the specific conclusion of the ABA that executions cease, unless and until greater fairness and due process prevail in death penalty implementation.