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## More Lawmakers Take a Stand Against Death Penalty

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A perfect storm of problematic executions, wrongful convictions and recent court rulings against the practice of lethal injection has led a growing number of states to challenge the death penalty through lawsuits and legislative action.

Adding still more to the momentum are a public backlash against the cost of capital cases and the development of more effective defense techniques, such as mitigation specialists who humanize death row inmates.

Eleven states have halted some or all executions -- including Florida and Maryland in December -- and more lawmakers have been speaking out against the death penalty.

Last month alone, Maryland's governor urged legislators to replace the death penalty with life without parole, North Carolina's governor said executions should be halted until issues surrounding lethal injection are solved and Montana's Senate voted to abolish the death penalty.

Court decisions have also continued to come down, such as a Delaware judge granting class action status on Feb. 22 to all death row inmates based on a case challenging lethal injection. *Jackson v. Danberg*, No. Civ. 06-3000-SLR (D. Del.). "It's probably the strongest momentum since the death penalty was reinstated in the mid-1970s," said John Holdridge, director of the American Civil Liberties Union (ACLU) Capital Punishment Project, which advocates against the death penalty.

The Death Penalty Information Center recently listed the following 11 states as those that have stopped some or all executions: Arkansas, California, Delaware, Florida, Maryland, Missouri, New Jersey, North Carolina, Ohio, South Dakota and Tennessee, according to Richard Dieter, executive director of the nonprofit Washington, D.C.-based organization, which opposes capital punishment.

North Carolina's officials were in talks last week in hopes of resolving the situation, and the state's attorney general hinted on March 1 that a solution may be imminent. The executions have stopped either through government-issued moratoriums or judges' rulings, and have had varying effect.

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In South Dakota, for example, Gov. Mike Rounds on Feb. 23 signed legislation that clarifies the mixture of drugs to be used in executions, which is an issue that has delayed just one execution, said his press secretary, Mitch Krebs. The law goes in effect on July 1, and Krebs said other executions are expected to resume as scheduled.

Meanwhile, in New Jersey, executions have been on hold since January 2006, when the state Legislature appointed a commission to study the issue. This January, the group recommended the death penalty be abolished. Reverend M. William Howard of Bethany Baptist Church in Newark, N.J., who chaired the 13-member New Jersey Death Penalty Study Commission, agreed with speculation that the state could become the next to abolish the death penalty.

"I don't think that's a wild idea at all," he said, pointing out that Gov. Jon Corzine has pledged to sign such legislation into law.

## 'A CHANGING TIME'

Most of the 38 states that have the death penalty use the same lethal injection protocol to execute death row inmates. The method has come under fire recently, with lawsuits pending in several states questioning everything from the way the drugs and painkillers are administered to whether the procedure is cruel and unusual punishment.

Kelly Culshaw, assistant public defender in the Ohio Public Defender Office who is representing death row inmate Richard Cooley in a case pending in the 6th U.S. Circuit Court of Appeals, said lethal injection is fraught with problems. *Cooley v. Taft*, No. 05-4057 (6th Cir.).

"The inmate is suffering excruciating pain during the execution process but is paralyzed so there is no way for you to see or know what's happening," she said. "Other issues have also been coming to the forefront, such as the training and experience of the people who execute people in Ohio."

A request for comment to the state attorney general's office, which is defending former Ohio Gov. Robert Taft in the suit, was not answered.

Because the same concerns have been expressed in many states, Dieter, the Death Penalty Information Center official, said it is possible that more states will halt executions, but he added that it is difficult to predict which ones. However, he and others agreed that conservative states such as Texas -- which easily leads the nation with 383 executions since 1976 -- are least likely to stop executing.

It is possible, moreover, for states with temporary moratoriums, such as Florida, to lift these bans and resume their executions soon, Dieter said. He also did not rule out the possibility of the U.S. Supreme Court hearing the issue. Late last week, a Florida commission recommended that death row inmates be completely sedated before being injected with lethal chemicals. The commission submitted its final report and recommendations to Gov. Charlie Crist, but he took no immediate action.

"It's a changing time right now for the death penalty," Dieter said. "Around the world the death penalty is slowly becoming eradicated, and I think the U.S. is coming to sort of a similar conclusion, not necessarily that it's wrong but that it just isn't working."

Dieter said one of the reasons the death penalty is under attack now is that many lawsuits only recently worked their way through the system to reach higher courts. In addition, a number of death row inmates were exonerated in recent years thanks to DNA evidence, putting the issue under a national spotlight, he said.

Holdridge, from the ACLU, said that while many inmates still have inadequate defense counsel, defense lawyers have improved in recent years and are increasingly using mitigation specialists to explain factors that are common in many defendants' lives, such as a history of abuse and mental illness. All of that has helped humanize death row inmates and made more people question execution, he said.

Another reason behind the momentum is financial, Holdridge said, explaining that many taxpayers have only recently learned about the costs of the death penalty.

In an editorial last week against the death penalty, Maryland Gov. Martin O'Malley said that according to a judge, it costs \$400,000 more to process and imprison a death penalty defendant than it does to keep someone serving a life sentence in prison, meaning the state spent about \$22.4 million more by sentencing 56 people to death since 1978.

In New Jersey, the Office of the Public Defender testified in front of the New Jersey Death Penalty Study Commission that, given its caseload of 19 cases as of August 2006, elimination of the death penalty would result in savings of \$1.46 million per year. And the state Department of Corrections estimated that eliminating the death penalty would save the state about \$1 million per inmate.

The political climate has also contributed to the issue, the ACLU's Holdridge said, pointing out that Virginia Gov. Tim Kaine won election in November despite opposing the death penalty in a state that has the second-highest number of executions.

And David Elliot, communications director for the Washington-based National Coalition to Abolish the Death Penalty, predicted that New Jersey and Maryland will be the next to abolish the death penalty, partly because the two states' governors have recently voiced opposition to it.

Finally, several recent botched executions also helped raise concerns. In California, officials took 12 minutes to find a vein in the muscular arm of the co-founder of the Crips gang, Stanley "Tookie" Williams, who was executed in December 2005. In May, similar problems occurred in Ohio, where Joseph Clark's execution took about 90 minutes. Also, this past December, Florida inmate Angel Diaz had to be given a second dose of drugs and needed 34 minutes to die.

Elliot said controversy regarding lethal injection has been building for years, but a lot of information regarding the procedure emerged only recently, as cases made their way past the discovery phase. More is known now, he said, about problems that can arise during executions, the level of pain suffered and the effectiveness of painkillers used.

"Sometimes you reach a tipping point and it could be that we're at the tipping point," Elliot said, "not just with the lethal injection but with the death penalty in the United States." Proponents of the death penalty acknowledged recent defeats, but stressed that most death penalty states still allow executions. Furthermore, some states have been trying to broaden it, such as Virginia, where the Legislature recently proposed that more murder accomplices also be eligible for execution. In Georgia, a lawmaker has proposed allowing a judge to impose the death penalty even if as many as three jurors vote against it.

Michael Rushford, president of the Criminal Justice Legal Foundation, a Sacramento, Calif.-based nonprofit organization that supports the death penalty, said that states are simply trying to ensure their procedures can survive all criticism. "We need to have more medical professionals tell us this is the most humane way to deal with these murderers and make sure the scientists saw it, and that will eliminate the need for lawsuits in the area," he said.

Despite the flurry of activity against the death penalty, some states have said that it will not affect their executions.

"The Texas Department of Criminal Justice does not have any immediate plans to change its execution protocol," Michelle Lyons, the department's spokesman, said in an e-mail statement.

## **MISSOURI HOLDS ITS GROUND**

In Missouri, where a case against lethal injection is pending in the 8th U.S. Circuit Court of Appeals, officials have stood by their procedures.

"We continue to say that our lethal injection process has been quick, it's been humane and it's constitutional," said Brian Hauswirth, a spokesman for the Missouri Department of Corrections.

Hauswirth said he could not discuss the case specifically because it is ongoing. *Taylor v. Crawford*, No. 06-3651 (8th Cir.). In this case, death row inmate Michael Taylor has said that Missouri's three-chemical lethal injection process violates the Eighth Amendment's ban on cruel and unusual punishment.

Chet Pleban, a partner with Pleban & Associates in St. Louis, who is one of Taylor's attorneys, said the case has been slowed down by a number of procedural issues. But he added that it illustrates the current view toward the death penalty.

"The pendulum perhaps is starting to swing the other way now," he said. "It's just a matter of time before we recommend as an orderly society that putting people to death is not where we want to be." A message seeking comment from the spokesman for the Missouri attorney general's office, which is representing the governor in the case, was not returned.

The American Bar Association, meanwhile, has been calling for executions to be halted for years. It established the ABA Death Penalty Moratorium Implementation Project in 2001.

The report on Indiana, the latest state that was assessed, was released in February. It said that executions should stop until the administration of death penalty cases improves. The report found a number of problems similar to the other four states that were already assessed -- Alabama, Arizona, Florida and Georgia -- such as the poor qualifications of, and lack of funding for, defense counsel and a racially disproportionate application of the death penalty, said Stephen Hanlon, who chairs the project.