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Barr: AG race has turned ugly over death penalty

By Bob Barr, Special to the Daily Report

Politics has reared its ugly head in the Republican primary runoff for attorney general. This certainly is not surprising, but it is disappointing nonetheless that a candidate for attorney general is being chastised for questioning a measure that would have made it markedly easier than at present to impose the death penalty in Georgia ("Lawyer: Smith blocked death penalty change," Aug. 5).

The controversy itself is not new; death penalty proponents in recent years have tried in the Georgia General Assembly to pass legislation giving judges the power to impose a death sentence when as few as nine members of a 12-person jury supported it. This would be a dramatic departure from the centuries-old rule in Georgia and most other states that this most serious and irreversible penalty can be imposed only as a result of a unanimous jury decision.

Many lawyers—including me and state Sen. Preston Smith, who is one of two Republican attorney general candidates in the runoff—support the death penalty, but believe also that its use must be carefully considered. We therefore have opposed efforts to cavalierly loosen the circumstances under which this ultimate penalty can be imposed. We do this not because we are "soft" on crime, but because we have high regard for the fairness of the process and understand the finality of the death sentence itself.

Unfortunately, some political supporters of Sam Olens—Smith's opponent in the runoff—do not permit such niceties as respect for judicial process and jury unanimity to stand in the way of trying to score political points. Former state Rep. Barry Fleming, himself a lawyer and a supporter of the less-than-unanimous death penalty verdict, is now attacking Smith for his reasoned opposition.

The fact of the matter is that to change Georgia's death penalty law as Fleming and Olens propose would move our state from the mainstream and place us in the company of only a handful of other states with a "hybrid" death penalty sentencing system; one that permits judges to substitute their judgment for that of the jury's.

The adoption of such a hybrid death penalty sentencing system would precipitate costly and protracted litigation challenging the constitutionality of such policies. Such challenges would likely assert, and I believe correctly so, that the policies violate the Sixth and Eighth Amendments to the United States Constitution. Such inevitable litigation would tie up Georgia's death penalty system for years and cause executions to grind to a halt, one of the major reasons for Smith's opposition to the legislation.

In addition, these constitutional challenges would effectively "break the bank." It would take millions of taxpayer dollars to pay for the court, prosecution and defense costs associated with resolving the constitutionality of these new death penalty laws. If such laws were held unconstitutional, which is likely, Georgia might see reversals of its death sentences for five to 10 years after the laws took effect. Untold sums of money would be wasted at a time when the state can ill afford it.

The law would also undermine our traditional American value of providing a trial by a jury of one's peers, effectively making the judge the trier of fact and diminishing the role and value of juries. This is a strange posture for so-called "conservatives," who often decry "judicial activism," to advocate.

The death penalty is the ultimate punishment, and when it is applied—as I and Preston Smith believe it should be in appropriate cases—we should be certain we have made the right decision. Unanimous juries help ensure that our system is fair, accurate and effective. Georgians, especially those of us trained and working in the law, should never, as former state Rep. Fleming has done, permit politics or our feelings about case outcomes to take precedence over sound law.

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