

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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Constitution Project's Bipartisan Report Recommends End to Death Penalty "Cocktail"

Comprehensive Examination of Death Penalty Administration Offers Major Reforms from Arrest to Execution

WASHINGTON, D.C. -- A bipartisan panel of criminal justice system experts that conducted one of the most comprehensive reviews ever undertaken of the administration of the death penalty in the United States is recommending that states currently relying on lethal injection as a means of execution should use a deadly dose of a single anesthetic or barbiturate approved by the Food and Drug Administration, rather than a complex cocktail of drugs, the dosage and administration of which can easily be miscalculated.

That is only one of 39 recommendations offered to courts and policymakers in a [major report](#) released today by The Constitution Project's Death Penalty Committee. The new report examines systemic flaws in the administration of the death penalty in America, from arrest to execution, and provides proposals on how to address them.

Last week, Oklahoma became the center of national attention because of the gruesome, botched execution by lethal injection of Clayton Lockett using an untested three drug cocktail obtained from undisclosed sources. A minute-by-minute account of the bungled procedure released by the state's Department of Corrections suggests Lockett was conscious and writhing in pain for more than 30 minutes before state officials called off the execution. Lockett died of an apparent heart attack ten minutes later. In January, a similar scene was reported in Ohio during the execution of Dennis McGuire.

However, problems with lethal injections are only a small part of what ails administration of capital punishment in America, said former Texas Governor Mark White, a co-chair of the committee.

"From the moment of arrest to the moment of death, the criminal justice system faces vexing challenges in carrying out the ultimate punishment," he said. White, a Democrat and death penalty supporter, oversaw 19 executions during his term as governor.

"Without substantial revisions -- not only to lethal injection, but across the board -- the administration of capital punishment in America is unjust, disproportionate and very likely

unconstitutional," said committee member Mark Earley, who served as a Republican Attorney General of Virginia. During his tenure, the state carried out 36 executions.

White noted that the issuance of the new report could not be more timely. Just last week, President Obama declared that America continues to have "significant problems" in the application of the death penalty - from uneven application, to racial bias, to the actual innocence of some who have been sentenced to death. He asked Attorney General Holder to look at how the death penalty is administered in this country, and report back to him.

"Our comprehensive report represents a bipartisan consensus of essential reforms agreed to by both death penalty supporters and death penalty opponents, and provides a detailed roadmap for the Department of Justice to follow," White said.

"We hope these recommendations will be embraced by officials from both parties in Washington and around the country," Earley said. "There's nothing conservative about executing an innocent person, and leaders who support the death penalty bear the greatest responsibility in ensuring it is administered more fairly."

TCP's [Death Penalty Committee](#) is a group of criminal justice and other experts reflecting the full range of stakeholders - including those with experience as judges, prosecutors, defenders, law enforcement officers, policymakers, victim advocates and scholars - from across the ideological spectrum whose diverse views mirror the array of opinions people across America have about the death penalty.

The report looks at a number of death penalty issues in addition to lethal injection. For instance, in 2002, the U.S. Supreme Court held that it is unconstitutional to execute a person with "mental retardation," now commonly referred to as intellectual disability. But the court largely left the details of implementing the decision to the states, which has resulted in jurisdictions crafting procedural rules that do not ensure the intellectually disabled will not face execution. Some states adopted definitions of intellectual disability that are fundamentally at odds with clinical consensus and demand a burden of proof for establishing intellectual disability that is far too stringent and unyielding.

Now, more than a decade after its initial ruling, the Supreme Court is finally examining the constitutionality of how some states determine whether or not a defendant is intellectually disabled. The court heard oral argument in *Hall v. Florida* in February and is expected to rule before June. However most observers think it is unlikely that a new ruling will provide a detailed framework that states can follow to determine whether a defendant has an intellectual disability. The new report suggests that states adopt procedures that incorporate updated scientific knowledge and are designed to adjudicate fairly and accurately those defendants against which a state can constitutionally seek the death penalty.

The new report notes that, in 2009, the National Academy of Sciences said the criminal justice system "has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." In fact, more than 50 percent of the first 225 wrongful convictions overturned by DNA testing involved "junk science" relying on invalid or improper forensic evidence.

The TCP report recommends that Congress develop federal standards for accreditation of forensic labs, and recommends that only forensic examiners from labs that meet the accreditation standard be allowed to testify in capital cases. Additionally, it proposes that, to avoid both intentional and unintentional bias in the processing of evidence, forensic labs should operate independently of law enforcement.

The report looks at a number of other issues surrounding administration of capital punishment, including the continued lack of safeguards to prevent executing innocent people, ensuring the 6th Amendment right to effective counsel for defendants facing the death penalty, changes in "felony murder" laws and improving the executive clemency process for death row inmates.

White said members of TCP's committee are devoted to transcending the political and philosophical divisions that have long plagued this country's debate about the death penalty, and to achieve consensus on meaningful measures to improve fairness in administering capital punishment and to reduce wrongful convictions and executions. The report passes no judgment about the use of the death penalty, but insists that, where states choose to use it, it must be administered in a more just manner.

Copies of the full report are available at <http://www.constitutionproject.org>.

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[About The Constitution Project](#)

Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project (TCP) brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time. TCP seeks to reform the nation's broken criminal justice system and to strengthen the rule of law through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.