

# USA

## LIFE AND DEATH DECISIONS

**President Obama commutes two death sentences. Execution in Virginia after clemency denied**

*In the application of the death penalty in this country, we have seen significant problems – racial bias, uneven application of the death penalty, situations in which there were individuals on death row who later on were discovered to have been innocent because of exculpatory evidence. And all these I think do raise significant questions about how the death penalty is being applied*  
President Barack Obama, 2 May 2014<sup>1</sup>

On 17 January 2017, three days before leaving office after eight years in the White House, President Barack Obama commuted one military death sentence and one federal death sentence. The prisoner in each case will now serve life imprisonment without the possibility of parole.

The federal prisoner is Abelardo Arboleda Ortiz, one of three Colombian nationals convicted in 2000 of a drug-related murder committed in 1998 in Kansas City, Missouri. Abelardo Ortiz and German Sinisterra were sentenced to death, while the third man was sentenced to life imprisonment. Sinisterra died in 2013, leaving only Abelardo Ortiz facing execution for the crime. In 2002, the US Court of Appeals found that Ortiz and Sinisterra had been denied their consular rights after arrest, in violation of the Vienna Convention on Consular Relations, but decided they had not been prejudiced and upheld the convictions and death sentences. The claim that Abelardo Ortiz had intellectual disability, which would render his execution unconstitutional, was also rejected on appeal.

The military prisoner spared execution by President Obama is Dwight Loving. He was a former US Army private who was one of two soldiers sentenced to death for two murders committed in Jacksonville, North Carolina, in 1988. His co-defendant was resented to life imprisonment in 2010.<sup>2</sup>

The death penalty is incompatible with basic principles of human rights, and an executive decision to remove anyone from death row by commutation rather than by execution is to be welcomed. However, President Obama could have done more – the President's power under the Constitution to “grant Reprieves and Pardons” is largely unfettered, and there are nearly 70 individuals on federal and military death rows.<sup>3</sup> While there were no federal executions during his term in office, federal prosecutors have continued to seek the death penalty throughout these eight years, and at Guantánamo, the death penalty is currently being pursued against six detainees facing prosecution by military commission in proceedings that do not meet international fair trial standards.<sup>4</sup> His administration did little or nothing to lead the country away from judicial killing, even though the President himself acknowledged serious injustices in the capital justice system, as noted above.

<sup>1</sup> Remarks by President Obama and German Chancellor Merkel in Joint Press Conference, 2 May 2014, <https://www.whitehouse.gov/the-press-office/2014/05/02/remarks-president-obama-and-german-chancellor-merkel-joint-press-confere>. See also, Time to do something, Mr President. After Oklahoma's 'botched' execution, a call for human rights leadership, 2 May 2014, <https://www.amnesty.org/en/documents/amr51/028/2014/en/>

<sup>2</sup> For further information on commutations and pardons during this and previous presidencies, see <https://www.justice.gov/pardon/clemencyrecipients>

<sup>3</sup> See *Schick v. Reed*, 419 U.S. 256 (1974) (“A fair reading of the history of the English pardoning power, from which our Art. II, §2, cl.1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress. Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution”).

<sup>4</sup> USA: Broken promises. Failure to close Guantánamo is part of a deeper human rights deficit, 10 January 2017, <https://www.amnesty.org/en/documents/amr51/5433/2017/en/>

There are more than 2,800 men and women on state death rows in the USA. On 17 January 2017, Virginia's Governor Terry McAuliffe denied clemency for one of them. Ricky Gray was killed in Virginia's death chamber the following evening. It was the second execution in the USA this year, and the 1,444<sup>th</sup> since judicial killing resumed on 17 January 1977 after the US Supreme Court approved new capital laws in *Gregg v. Georgia* in 1976.

In a statement denying mercy for Ricky Gray, Governor McAuliffe said "It is the Governor's responsibility to ensure that the laws of the Commonwealth are properly carried out unless circumstances merit a stay or commutation of the sentence. After extensive review and deliberation, I have found no such circumstances. I will continue to pray for all of the individuals and families affected by these tragic and horrible crimes." He thereby rejected the call for clemency from more than 50 experts working in mental health, the treatment of victims of violence and sexual abuse, and the treatment of substance abuse and addiction. Ricky Gray's crimes were "horrible", they wrote in their appeal to the governor, but it was also "beyond dispute" that he was "the victim of horrific sexual and physical abuse – starting at a very young age and continuing throughout his childhood, which led to drug abuse, crippling addiction, and ultimately criminal behaviour".<sup>5</sup>

In 2016, a clinical psychologist wrote that in addition to the "punching, whipping and beating" to which Ricky Gray's father subjected him, the rapes by his half-brother "were so pervasive – so frequent and over such a long period of time – that they can only be described as sexual slavery". He concluded that because there was never any therapeutic intervention, Ricky Gray continued to suffer severe symptoms of post-traumatic stress disorder as an adult. His exposure to alcohol and drugs from an early age meant that substance abuse became his "only way to deal with overwhelming, traumatic experiences that marked his childhood".

Arbitrariness or inconsistencies in the application of this irrevocable punishment are never far from view. Exactly five years before Governor McAuliffe denied clemency to Ricky Gray, the Governor of Delaware had granted it to state death row inmate Robert Gattis, saying that his "family background is among the most troubling I have encountered", the evidence of which he agreed "puts Mr Gattis, his case, and his potential defenses to capital murder in an entirely different light." The "substantial dysfunction, abuse and neglect Mr Gattis experienced as a youth does not in any way excuse the cowardly murder" of which he was convicted, but it did warrant clemency.<sup>6</sup> This was an outcome supported by a number of mental health professionals. As in the case of Ricky Gray.

In 2011, the Governor of Ohio commuted the death sentence of Joseph Murphy. While noting that the crime of which he was convicted was "heinous", the governor pointed to the defendant having suffered "severe and sustained verbal, physical and sexual abuse" during his childhood and adolescence. While this did "not excuse his crime", the governor agreed with the then Chief Justice of the state Supreme Court when dissenting against Murphy's death sentence, saying that "in all of the death penalty cases I have reviewed, I know of no other case in which the defendant... was as destined for disaster as was Joseph Murphy".<sup>7</sup> More than 50 mental health professionals had in effect said the same thing about Ricky Gray, but he was killed by the state.

The death penalty assumes 100 per cent culpability on the part of the defendant and no responsibility elsewhere. While the links between trauma suffered by individuals during childhood or later in life and their own propensity to violence are complex and variable, resort to the death penalty ignores this complexity and diverts resources from efforts to explain past violence and prevent its recurrence. The death penalty is a simplistic solution that denies any causation and is itself a part of a cycle of violence that does not move our understanding of the roots of violence forward one iota.

## EVOLVING STANDARDS

Over a century ago, the US Supreme Court said that the Constitution's Eighth Amendment ban on "cruel and unusual punishments" was not a static concept but could "acquire meaning as public opinion becomes enlightened by a humane justice."<sup>8</sup> In 1958, it said that the Eighth Amendment drew its meaning from the "evolving standards of decency that mark the progress of a maturing society".<sup>9</sup> In 1976, in *Gregg v. Georgia*, using this test, the Court asserted that "the most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman (v. Georgia)*". In that 1972 ruling, the Court had found the death penalty unconstitutional, not in and of itself, but because of the arbitrary manner in which it was being handed out. In *Gregg*, it found that 35 states had enacted new death penalty statutes.<sup>10</sup> It gave the green light to a resumption of executions.

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<sup>5</sup> See Amnesty International Urgent Action, <https://www.amnesty.org/en/documents/amr51/5493/2017/en/>

<sup>6</sup> Statement of Governor Jack Markell Regarding the Commutation of Sentence of Robert Gattis, 17 January 2012, <http://news.delaware.gov/2012/01/17/statement-of-governor-jack-markell-regarding-the-commutation-of-sentence-of-robert-gattis/>

<sup>7</sup> Kasich commutes Murphy death sentence to life without parole, Communication Department, Office of Governor John Kasich, 26 September 2011, <http://governor.ohio.gov/Portals/0/pdf/news/09.26.11%20Kasich%20Commutes%20Joseph%20Murphy.pdf>

<sup>8</sup> *Weems v. United States* (1910).

<sup>9</sup> *Trop v. Dulles* (1958).

<sup>10</sup> Six of those states are now abolitionist – Connecticut, Illinois, Maryland, New Mexico, New York and Rhode Island.

Two Justices had dissented in *Gregg*. Justices Marshall and Brennan continued to dissent from all of the Court's decisions upholding the death penalty after that. Later, Justice Lewis Powell said after he retired from the Court that he had come to think that the death penalty should be abolished.<sup>11</sup> He had been one of the Justices who had voted with the *Gregg* majority. So was Justice Harry Blackmun. He gave up on this "death penalty experiment" in 1994 after concluding that "the basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative". He said after two decades on the Court that he "would no longer tinker with the machinery of death."<sup>12</sup> In 2008, the then most senior Justice, John Paul Stevens, revealed that he too had concluded, after three decades on the Court, that "the imposition of the death penalty represents the pointless and needless extinction of life".<sup>13</sup> Justice Stephen Breyer appears to have reached a similar conclusion, judging by his dissenting opinion in *Glossip v. Gross* in 2015 in which he argued that the Court should reconsider the constitutionality of the death penalty four decades after *Gregg* because of the evidence of arbitrariness, discrimination, error and other issues. He was joined by Justice Ruth Bader Ginsburg.<sup>14</sup>

Such judicial doubts can be seen at state level too. On 22 December 2016, for example, a Florida Supreme Court Justice wrote: "As my retirement approaches, I feel compelled to follow other justices who, in the twilight of their judicial careers, determined to no longer 'tinker with the machinery of death'." He declared that "I no longer believe that there is a method of which the State can avail itself to impose the death penalty in a constitutional manner".<sup>15</sup> He retired a few days later. Florida is one of the USA's diehard death penalty states.

Five US states have legislated to abolish the death penalty since 2007 – New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012) and Maryland (2013).<sup>16</sup> The USA's growing isolation on this issue when viewed from a global perspective was expressly noted in these states as their governors signed the abolitionist bills passed by the legislature into law.

The power of executive clemency has played a role in some states, where the abolitionist bills passed were prospective rather than covering already sentencing prisoners. In 2015 in Maryland, Governor Martin O'Malley commuted the death sentences of all inmates then on death row. So did Governor Pat Quinn in Illinois four years earlier, shortly before signing his state legislature's abolition bill. Governor Jon Corzine had done the same in New Jersey four years before that, in 2007. It is now 30 years since New Mexico's then Governor, Toney Anaya, commuted the death sentences of all five inmates then (in 1986) on death row in the state. Several years later, this former prosecutor and state Attorney General said:

"I have consistently opposed capital punishment as being inhumane, immoral, anti-God, and incompatible with an enlightened society. But, beyond the consideration of morality and fairness, capital punishment is a false god that is worshiped by too many – politicians and voters alike. Because of the clamour for capital punishment, society ironically shackles itself and not criminals by giving us a false sense of security, a false sense of accomplishment, a hollow, empty, costly, temporarily-satisfying, vengeful outburst of emotions, yet accomplishing nothing in terms of establishing an effective crime prevention, crime-fighting strategy".<sup>17</sup>

No matter how efficiently the capital justice system can be made to run or which crimes it covers, no matter who has life-or-death decision-making power at any stage of the process, and no matter what method is used to end the life of the prisoner, there is no escaping the death penalty's cruel, inhuman and degrading nature.

Applying an international "evolving standards" test leads to the clear conclusion that the USA is out of step with a global trend against the death penalty. Today 141 countries are abolitionist in law or practice. There are signs that the USA may slowly be moving in this direction too, but the fact that it is behind much of the world on this issue is because principled human rights leadership there has been slow in coming forward. Judges, legislators, prosecutors, governors or presidents should not leave it until the end of their time in office to act against the death penalty.

As a new President takes office in the United States of America, Amnesty International will continue to campaign for the USA to abolish the death penalty once and for all.

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<sup>11</sup> Justice Powell was asked in 1991 by his biographer if he would change his vote in any case. He said, "Yes, *McCleskey v. Kemp*." He went on to say, "I would vote the other way in any capital case." Even in *Furman v. Georgia*, his biographer asked. "Yes" and "I have come to think that capital punishment should be abolished." See J. Jeffries, Justice Lewis F. Powell, Jr., page 451 (Scribners 1994).

<sup>12</sup> *Callins v. Collins*, 22 February 1994, Justice Blackmun, dissenting from denial of certiorari.

<sup>13</sup> *Baze v. Rees*, 16 April 2008, Justice Stevens, concurring in the judgment.

<sup>14</sup> USA: Supreme Court upholds use of execution drug, but two Justices question constitutionality of death penalty itself, 29 June 2015, <https://www.amnesty.org/en/documents/amr51/1976/2015/en/>

<sup>15</sup> *Asay v. State*, 22 December 2016, Justice Perry dissenting.

<sup>16</sup> Also, in 2007 the last death sentence in New York State was commuted, following a 2004 court ruling that its capital law violated the state's constitution. In 2016, the Delaware Supreme Court ruled that Delaware's capital sentencing law was unconstitutional, and this has not been appealed.

<sup>17</sup> Statement by Toney Anaya on capital punishment. Univ. of Richmond Law Rev., Vol 27: 177, 1993.