

Panel Discussion

CAPITAL PUNISHMENT: IS THERE ANY HABEAS LEFT IN THIS CORPUS?

Ronald J. Tabak

Thank you very much, Scharlette. As Scharlette just said, the existence of the federally funded resource centers has been a major reason *587 why so many people who have been sentenced to death or convicted in violation of the Constitution in what was not harmless error have not been executed. We have with us today the Director of the Illinois Capital Resource Center, Andrea Lyon. Before joining the center, Andrea spent over fourteen years in the office of the Cook County Public Defender, where she supervised a twenty-two lawyer unit and personally tried over 100 homicide cases. She has lectured on death penalty issues at the University of Michigan School of Law, where she is about to teach on a permanent basis, Harvard, the University of Chicago, and other schools. She wrote the Illinois Death Penalty Defense Manual [FN418] and has written extensively elsewhere. She serves on the board of directors of the Women's Bar Association of Illinois and as Vice President of the Illinois Attorneys for Criminal Justice. It will be a severe loss for the death row inmates of Illinois when she is not here on a day-to-day basis, but she is committed to continuing this work, although based in Michigan. She is here to tell you about the role of the federal resource centers in habeas corpus matters and what it will mean to have them defunded. Here is Andrea Lyon.

Andrea Lyon

I want to talk to you about what resource centers do and compare what collateral representation used to be like before there was an organized way of approaching it. I don't know how many of you have ever filed or seen a post-conviction petition in state court, but what they used to be like was basically this: "Dear Judge, my name is Defendant. I've been convicted and I wish I wasn't. I am sure there is something unconstitutional about it. Love, the Defendant." Often, I am sorry to report, that is what a federal habeas corpus petition looked like as well. That's because people didn't know how to litigate these things, and there was no organized way to learn how to litigate them.

The Cox Subcommittee on Death Penalty Representation presented a report regarding the beleaguered, unpopular, politically assailed resource centers at the Judicial Conference of the United States in June 1995. [FN419] The subcommittee was headed by Judge Cox, a conservative judge. This is what the subcommittee said:

PCDOs have both facilitated the provision of counsel to death-sentenced inmates and enhanced the quality of representation. The promise of expert advice and assistance from PCDO attorneys *588 has encouraged private counsel to provide representation for death-sentenced inmates. Private lawyers who communicated with the Subcommittee almost uniformly expressed the view

that they would not willingly represent a death-sentenced inmate without the assistance of a PCDO or similar organization. State and federal judges agreed that PCDO assistance was critical to the recruitment of private attorneys to represent death-sentenced inmates. Furthermore, PCDOs employ staff who have developed significant legal expertise in the fields of capital punishment and habeas corpus law. This expertise assists private appointed counsel in providing quality representation.

PCDOs can also enhance the quality of representation by providing continued continuity of counsel over the course of the case. . . . [FN420]

That report was correct, but we were nevertheless defunded because we were not supposed to win. We were just supposed to stand there next to the guy, because it's not sporting to kill someone who does not have a lawyer. But the people on death row are not supposed to have good lawyers. You are not supposed to really look into the facts and discover that, although the prosecutor said there was no deal with a witness and that she was testifying because she was a good citizen, in reality the prosecutor had offered to drop the murder charges against her if she testified against the innocent defendant. [FN421] The fact that the prosecutor lied would not have been known without an investigation. [FN422] An investigation means that you actually look at the facts and you don't assume that what things appear to be are the truth. This is not a very American pastime. Americans tend not to want to look behind the headline, to look behind the easy feeling you get when you say, "Go get him, Charles Bronson, Rambo" and others we admire but would convict and sentence to death in a second in court.

What has happened is that we did a little bit too good of a job. [FN423] I think it's really important to understand what it is that is being Almost everybody would say they would prefer not to see someone who is innocent killed. Not everyone would say that. I debated a *589 prosecutor who actually said that a ten percent mistake level (which, I believe, is the approximate percentage of people with firm death sentences in Illinois who are factually innocent of the crime) is an acceptable level of error. I am sure he wouldn't feel that way if his brother were on death row. The problem is not so much that, but what happens when there is a really serious investigation of a conviction or a sentence of death. What happens are things like Steve Bright spoke about, the biases of the judiciary and the lies told by prosecutors who have political ambitions and have no better way to get ahead than on the blood of a convicted murderer. [FN424] Probably the only amusing comment I ever heard from John Wayne Gacy, who's departed and not especially missed by many, [FN425] was when he was talking about the prosecutor in the case, who speaks everywhere and is a partner at a big firm. [FN426] Gacy said, "Who is Bill Kunkel? He was nothing until he met John Wayne Gacy." There is some truth in that, and that is one of the problems.

The death penalty is portrayed as a simple answer to complex questions. It is a simple way to feel like you are in control in a country where we feel out of control. We don't understand why someone would blow up the Oklahoma City Federal Building. But rather than try to understand the causes, we simply want to kill the effects. [FN427] It is easier, more palatable, and you can say it quicker.

It is hard to talk about habeas corpus. First of all, it isn't English and it isn't what we are used to. And it requires thinking a little bit, and it requires two or three sentences instead of a half of a sentence. That is a problem. It is easier and simpler and in some ways more satisfying to kill the problem.

Other kinds of answers are not so easy. We are willing to cut funds for something that we know

works, like Headstart, because there is no immediate gratification. We can't see its results right now. And if we can't see the results right now, they're not real.

*590 Resource centers meant that there was some semblance of organization. At meetings of resource center directors, there was some sense of what was going on in other places of the country, what some of the issues judges were looking at were, what some of the things prosecutors were doing were. Something which another resource center turned up was sometimes worth looking into in your case. There was some sense of camaraderie, but we can't have that, can we?

Prosecutors have what they call "The Fryers Club." [FN428] That's what the group of attorneys general who prosecute death cases call themselves. They have a T-shirt that says "hot seats, safe streets."

But we can't have an organized defense, because when we did, we were winning, particularly in the federal courts, where federal judges have had the luxury of making decisions based on the facts and the law in front of them with relatively little political pressure on them. But we We were just supposed to be there.

So what does our demise mean? It means decentralization, fragmentation, and less quality representation overall. That is exactly what is desired by dishonest political people who know that the death penalty does not deter crime, [FN429] costs more, [FN430] and derails much more effective responses to crime and its causes.

It means that there won't be a central place to fight these cases. Instead, there will just be individuals who are out there, flailing along on their own. That is exactly what the resource centers' opponents have in mind.

What we are talking about is not a great deal of money in the overall scheme of things. The entire annual federal budget for all twenty resource centers is only twenty million dollars. [FN431] What upsets our opponents is not the money we get; it is our ability to organize the way in which these cases are handled.

What is most disturbing to me is that it seems that, as a country, we have forgotten history. We've been talking about VE Day and World War II. Yet, one of the first things that happened in Germany when the Nazis came to power was getting rid of habeas corpus. I very much fear that I'm in Germany in 1931 but just don't realize it and *591 should be packing my bags. And I fear that what we have now is an embracing by the courts -- certainly by the state courts and maybe soon by the federal courts -- and the legislatures and the popular media of efficiency over efficacy, of sound bites over substance and, most of all, an embracing use and deification of the politics of fear over fundamental fairness. That's what our demise means.

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