

July 27, 2015; The Legal Basis of the Death Penalty

When is the premeditated killing of an American civilian not murder? When the killing is done by the federal or a state government to punish a person for committing a serious crime.

As Americans, we've all been raised in a society that tolerates the notion of capital punishment – that is, the legal execution of a human being. Although we may take the death penalty for granted, much of the world does not. In fact, the latest statistics indicate that 140 countries either prohibit capital punishment or haven't imposed it for over ten years, while only 58 countries, including the United States, authorize and actively execute criminal defendants.

What is the legal basis for allowing the death penalty within the U.S.? As with any legal analysis, the search for this answer begins with the U.S. Constitution. Interestingly, the subject of capital punishment is not directly addressed within the Constitution itself, although there is a reference to it.

The Fifth Amendment provides in part that “No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .” A “capital” crime is defined as “a crime that is treated so seriously that death may be considered an appropriate punishment.” Our founding fathers at least contemplated the possibility of capital punishment but neither specifically endorsed nor precluded its practice.

Legal experts also point to the 10th Amendment as the source for allowing each state to decide whether or not to impose capital punishment. This amendment provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In other words, states are free to establish their own rules and regulations for matters not specifically reserved to the federal government. Since capital punishment isn't exclusively reserved for the federal government, each state is free to decide the matter for itself.

Although all states and territories within the U.S. are legally authorized to permit the death penalty, not all do. As of July 1st, 2015, thirty-one states have statutory provisions recognizing the death penalty, while nineteen states, the District of Columbia and Guam, don't.

Both proponents and opponents of government sanctioned executions also frequently point to the Eighth Amendment in support of their respective positions. The 8th amendment provides that “Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishment inflicted.*”

Glossip v. Gross

While opponents have argued that capital punishment is itself cruel and unusual, the Supreme Court does not agree. In fact, Justice Samuel A. Alito, Jr., who authored the Court's most recent decision on capital punishment, *Glossip v. Gross*, wrote in a rather defiant tone

that “we have time and again reaffirmed that capital punishment is not *per se* unconstitutional.”

In an effort to save their clients’ lives, criminal defense attorneys frequently cite the 8th Amendment’s prohibition against cruel and unusual punishment. They usually argue that imposing capital punishment on a specific defendant, or using a particular manner of execution, is cruel and unusual punishment.

These arguments have proven successful in a number of instances. For example, states can no longer impose the death sentence against a rapist unless the victim dies from the assault. Over the years, the Supreme Court has gradually reduced the crimes for which the death penalty can be imposed, usually reserving it for aggravated murder. The Supreme Court has also held that a state cannot impose a death sentence against a defendant who was under the age of 18 when the crime was committed. Further, a person facing a death sentence must have the mental capacity to understand the seriousness of the crime and its consequences. As a result, severely mentally challenged and insane persons can’t be sentenced to death.

Defendants have also challenged the manner of executions. Courts have ruled that the process may not subject the person to extreme pain. Hanging, electrocution, and the firing squad are all still acceptable. Although death by lethal injection is also acceptable, if a defendant can prove that a certain chemical causes extreme pain, the use of that particular chemical may be stopped. Although this has been a successful defense in some cases, the U.S. Supreme Court recently rejected the argument in the *Glossip v. Gross* case. There the Court held that the problem was in the administration of the chemical rather than the chemical itself. Because Oklahoma had improved the method of administering the drug, executions could resume.

Next week, we’ll explore the historic evolution of the death penalty in greater detail.