

July 13, 2015; Deep Divide on Death Penalty

As I was flying over the Pacific Ocean on my way to Portland, Oregon for a vacation, I decided to pass the time by reading the U.S. Supreme Court's last major decision of their 2014 – 2015 term, *Glossip v. Gross* which deals with the controversial subject of capital punishment. All four of the defendants had been convicted of gruesome murders and sentenced to death. The Supreme Court was faced with the issue of whether or not Oklahoma's current death penalty law is constitutional.

No legal matter impacts life more drastically than the imposition of the death penalty. Once the lever is pulled and the inmate's heart stops pumping, there's no reversing course. Right or wrong, good or bad, society has exacted its ultimate revenge for criminal behavior.

Some readers may question why I should bother to discuss the matter of capital punishment. After all, Guam doesn't have the death penalty. Or, does it? While Guam's local laws don't currently authorize capital punishment, the federal court system still does. Therefore, suspects indicted by a federal jury for certain crimes committed here on Guam may face the prospect of the death penalty. It's happened in the past and could happen again in the future. Also, military tribunals on Guam can, and have, imposed the death penalty.

Also, keep in mind, that each state and territory can decide for itself whether or not to authorize capital punishment. If so inclined, the Guam Legislature could pass a law today reinstating the death penalty. Yes, I said "reinstating" the death penalty. Local law has sanctioned capital punishment in the past and there is no current legal obstacle preventing senators from adding us back onto the list of jurisdictions permitting legally sanctioned executions.

Obviously, the introduction of such legislation would open the floodgates to impassioned pro and con arguments. Few legal topics incite greater controversy than does capital punishment.

The *Glossip* case highlights our nation's deep divide on the subject. The decision to uphold the constitutionality of Oklahoma's death penalty law was backed by only five of the Supreme Court's nine justices. The remaining four believed that the law failed to pass constitutional scrutiny. This is not surprising. After all, the American public is also very conflicted on the matter. A 2014 Gallup poll indicates that 63% of Americans support the death penalty while 33% oppose it.

The justices on both sides were passionate in making their arguments. In fact, in defending their respective positions, they frequently bordered on being rude to each other. Justice Samuel A. Alito, Jr., writing for the majority, accused dissenting Justice Sonia Sotomayor of resorting to "outlandish rhetoric" that revealed the weakness of her legal arguments. Sotomayor had said the majority's findings were "factually wrong." Justices Antonin Scalia and

Clarence Thomas, who both voted with the majority, referred to Justice Steven C. Breyer's dissenting arguments as "gobbledygook."

The reasons for the justices' heightened level of contentious infighting are not immediately apparent from a quick review of the *Glossip case*. After all, the issue before the Court had nothing to do with constitutionality of capital punishment itself. Rather, the controversy surrounded the manner of execution. Under a relatively new Oklahoma law, death-row inmates are executed by means of a lethal injection that relies on the administration of a three-drug cocktail. Attorneys for the condemned inmates argued that midazolam, the first drug administered in the State's three-drug protocol, sometimes fails to eliminate the pain caused by the second and third drugs. As a consequence, the prisoner's level of suffering is so intense it violates the 8th Amendment's prohibition against "cruel and unusual punishment."

In arguing their respective positions on the constitutional propriety of this lethal cocktail, the justices unleashed a Pandora's Box of volatile pro and con arguments that reflect our nation's highly divided and emotional sentiments on the subject. Both sides provided a historical analysis of the death penalty. Predictably, the two sides differ significantly over what lessons should be learned from America's 400 year involvement with state-sanctioned executions. Ultimately, a majority of the justices held that the Oklahoma law did not offend the 8th Amendment because the State had already taken steps to improve the method of administering the drugs. Therefore the executions could resume.

In order to cast a little more light on the topic of the death sentence, over the next few weeks I'll attempt to provide a wider perspective on the matter, look at the issue from both sides, and discuss Guam's unique historical experience with capital punishment.