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Volume 23

Number 1 *Symposium—The Death Penalty Approaches the 1990s: Where Are We Now*

Article 6

11-1-1989

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Recommended Citation

Michael E. Tigar, *Judges, Lawyers and the Penalty of Death*, 23 Loy. L.A. L. Rev. 147 (1989).

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JUDGES, LAWYERS AND THE PENALTY OF DEATH

*Michael E. Tigar**

The judicial selection controversy again raises the question of the role judges should play in defending countermajoritarian principles. Eighteen years ago, I addressed an aspect of the problem in my answer to Alexander Bickel's *The Least Dangerous Branch*.¹ There, I tried to set out a theory of Article III federal judging in the context of foreign relations and military policy.

Here, I want to pick up only one strand of the debate: I want to talk about death. The electoral fate of Chief Justice Rose Bird of California had much to do with the death penalty,² and it leads us to consider a judge's obligations.

Today in the Fifth Circuit, a judicial debate rages that is ostensibly about death and lawyers, but will surely influence the judicial selection process, especially if the practice of seeking specific commitments on ideological issues from judicial nominees continues.

It is time to restate what judging should be about under a constitution containing fundamental guarantees of minority rights. Only when we have addressed this issue can we intelligently ask what kind of system will produce judges who can discharge their obligations. Judging in such a system surely requires a firm commitment to defense of individual and group rights against the state's power. But there is more. Judges must be both willing and free to build a space within which claims for justice may be argued and determined, always contentiously and often tendentiously. Judicial freedom to build such a space can only be guaranteed by selection systems that are designed to insulate judges from political pressures.

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1. Tigar, *Judicial Power, the "Political Question Doctrine" and Foreign Relations*, 17 UCLA L. REV. 1135 (1970), reprinted in 3 VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1971) (discussing A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962)).

2. See, e.g., Galante, *California Justices Face Own Executions*, 9 Nat'l L. J., Nov. 3, 1986, at 1, col. 1.

Judicial willingness is another matter. Honest selection processes and structural guarantees of independence can only create the preconditions of countermajoritarian judging; they cannot inoculate the judges against "robe fever."

The death penalty cases now undergoing federal collateral review in the Fifth Circuit provide an object lesson. In a recent case, a three-judge panel of the Fifth Circuit denied a motion for certificate of probable cause and a motion for stay of execution.³ Judge Edith Jones wrote these words in a special concurring opinion: "The veil of civility that must protect us in society has been twice torn here. It was rent wantonly when [the defendant] robbed, raped and murdered [his victims]. It has again been torn by [defense] counsel's conduct, inexcusable according to ordinary standards of law practice."⁴

The lawyer in this case was a volunteer from New York, one of hundreds who have answered the call of federal judges and the organized bar to take capital cases. The judge's condemnation of defense counsel's conduct was made without giving him any opportunity to respond. When I looked into it, I found that he seemed to be guilty, at most, of some delay in getting papers filed when the stay of execution he had earlier obtained was automatically vacated as the result of the United States Supreme Court's decision in *Franklin v. Lynaugh*.⁵

Judge Jones went on in her opinion to say:

I would advocate considering the imposition of sanctions in cases such as this. At a minimum, I would suggest that counsel who have engaged in delaying tactics should be struck from the rolls of the Fifth Circuit and not be allowed to practice in our court for a period of years.⁶

Similar language, though less harsh, appeared in a recent opinion by Judges Gee and Davis.⁷ Their condemnation of counsel rested on their "assumption" that delay was the result of deliberate misconduct rather than the pressure under which the volunteer small-firm counsel was laboring.⁸

If Judge Jones' remarks come to reflect the Fifth Circuit's view, how can we ask lawyers to devote themselves to these gut-wrenching cases?

3. *Bell v. Lynaugh*, 858 F.2d 978 (5th Cir. 1988).

4. *Id.* at 985-86.

5. 108 S. Ct. 2320, *on remand*, 860 F.2d 165 (5th Cir. 1988).

6. *Bell*, 858 F.2d at 986.

7. *Franklin v. Lynaugh*, 860 F.2d 165, 166 (5th Cir. 1988) (*per curiam*) (defense counsel sought habeas corpus relief sixty hours prior to defendant's scheduled execution).

8. *Id.*

How can we expect them to spend thousands of uncompensated hours of time and thousands of dollars in expenses, when their vigorous and assertive efforts to spare their clients' lives will be met with hyperbolic condemnation in the Federal Reporter and threats to undermine their livelihoods by barring them from practice in the court of appeal?

The lawyer censured by Judge Jones may have been guilty of inconveniencing his adversary and judges. However, he did nothing more serious than one sees in litigation at all levels of the system, and which, in most cases, merits only the mildest of rebukes, if any.

Broader concerns compel us here. We must expect—I would even say hope—that death cases will inspire commitment proportional to the stakes involved. Saving lives from the hangman's noose has inspired some of our profession's proudest hours.

Moreover, the federal courts have taught us that any issue not raised at the earliest possible hour may be waived.⁹ Inevitably, this leads to a proliferation of argued points, a tactic at odds with the more common practice of selecting only those arguments perceived as strongest. All lawyers and judges now know that Justices of the Supreme Court have often granted stays when the Fifth Circuit has summarily refused them,¹⁰ a fact that ought to make judges a little more tolerant of these multi-claim petitions.

Finally, the reinstatement of death sentences in large numbers has brought an expected and salutary consequence: a re-examination of the process of investigation and trial to see if it will ever be fair, decent, and reliable enough to permit us to kill people based on its results. In approximately half of the cases, federal review finds defects in state procedures.¹¹ Additionally, the federal-collateral-review counsel is often the first to make a thorough review of the constitutional issues in the record.

The high-stakes process of rearranging fundamental values demands two kinds of participants: advocates who are willing to be courageous, selfless, tireless, diligent and eloquent enough to bear the battle; and,

9. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1979); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

10. See, e.g., *Hawkins v. Lynaugh*, 109 S. Ct. 569 (1988) (Fifth Circuit denied stay in *Hawkins v. Lynaugh*, 862 F.2d 487 (5th Cir. 1988)); *Bell v. Lynaugh*, 109 S. Ct. 254 (1988) (Fifth Circuit denied stay in *Bell v. Lynaugh*, 858 F.2d 978 (5th Cir. 1988)); *Bridge v. Lynaugh*, 109 S. Ct. 20 (1988) (Fifth Circuit denied stay in *Bridge v. Lynaugh*, 838 F.2d 770 (5th Cir. 1988)); *Franklin v. Lynaugh*, 483 U.S. 1056 (1987) (Fifth Circuit denied stay in *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987)).

11. Von Drehle, *Capital Punishment in Paralysis*, Miami Herald, July 10, 1988, at 1A, col. 1. See generally Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

judges who are willing to have the tolerance, patience, wisdom, and—yes—humility to understand the demands of the system their predecessors built and in which we now live.

I hope I am not misunderstood. I raise this issue to make a proposal: the judges of the circuit should begin an earnest discussion with the lawyers of the circuit—and with the bar groups who help to recruit volunteer lawyers—to address these concerns.

In the days of Fortescue's *De Laudibus*,¹² when judges came from the ranks of lawyers and continued to meet and dine together, there was less risk that either would forget their mutual allegiances and oaths to justice. Today's selection process requires us to recreate that dialogue through other means.

12. See J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (S.B. Chrimes rev. ed. 1986) (1st ed. 1545). This fifteenth-century work, which was written by Chief Judge Fortescue of the King's Bench, discussed the constitutional and legal institutions of England. *Id.* at xliii.