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Judicial Speech: Off-the-Bench Criticism of Supreme Court Decisions by Judges Fosters Disrespect for the Rule of Law and Politicizes our System of Justice

Arthur L. Alarcon

JUDICIAL SPEECH: OFF-THE-BENCH CRITICISM OF SUPREME COURT DECISIONS BY JUDGES FOSTERS DISRESPECT FOR THE RULE OF LAW AND POLITICIZES OUR SYSTEM OF JUSTICE

*Arthur L. Alarcón**

On April 17, 1992, Robert Alton Harris, a condemned state prisoner, filed a civil action in the Northern District of California requesting a temporary restraining order to prohibit all executions in the San Quentin gas chamber.[1] Harris' execution date was April 21, 1992.[2] The district court issued a temporary restraining order on April 18, 1992.[3]

On April 19, 1992, a three-judge panel of the United States Court of Appeals for the Ninth Circuit granted the state's petition for a writ of mandate to vacate the district court's order.[4] Within a few hours, a stay of Harris' execution was issued pending an en banc determination of the validity of the district court's temporary restraining order.[5]

Shortly after midnight on April 21, 1992, the United States Supreme Court granted the State's application to vacate the stay of execution of death.[6] The Court held that the civil action was an artfully disguised attempt to avoid application of the ancient principle that a petitioner abuses the writ of habeas corpus by filing successive petitions.[7] Harris had previously filed several petitions for a writ of

* Senior Judge, United States Court of Appeals, Ninth Circuit.

1. Fierro v. Gomez, 790 F. Supp. 966 (N.D. Cal. 1992). This action was filed on behalf of several death row prisoners. *Id.* at 967. Harris was the only condemned man with a scheduled execution date. *Id.* at 971.

2. Harris v. Vasquez, No. 92-0588-T at 1 (S.D. Cal. filed Apr. 18, 1992).

3. *Fierro*, 790 F. Supp. at 971.

4. Gomez v. United States Dist. Court, 966 F.2d 460, 460 (9th Cir. 1992). Judge John T. Noonan dissented from that opinion. *Id.* at 461 (Noonan, J., dissenting).

5. Harris v. Vasquez, 961 F.2d 1450 (9th Cir. 1992).

6. Gomez v. United States Dist. Court, 112 S. Ct. 1652, 1653 (1992).

7. *Id.*; *see* Salinger v. Loisel, 265 U.S. 224, 230-32 (1924) (holding that prisoner's filing of successive petitions for habeas corpus not permitted).

habeas corpus in the District Court for the Southern District of California.[8]

The Court explained its ruling in the following words:

> Harris claims that his execution by lethal gas is cruel and unusual in violation of the Eighth Amendment. This case is an obvious attempt to avoid the application of *McCleskey v. Zant*, —— U.S. ——, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), to bar this successive claim for relief. Harris has now filed four prior federal habeas petitions. He has made no convincing showing of cause for his failure to raise this claim in his prior petitions.
>
> Even if we were to assume, however, that Harris could avoid the application of *McCleskey* to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. See *In re Blodgett*, —— U.S. ——, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992); *Delo v. Stokes*, 495 U.S. 320, 110 S.Ct. 1880, 109 L.Ed.2d 325 (1990) (KENNEDY, J., concurring). This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.
>
> The application to vacate the stay of execution of death is granted, and it is ordered that the orders staying the execution of Robert Alton Harris entered by the United States Court of Appeals for the Ninth Circuit in No. 92-70237 on April 20, 1992 are vacated.[9]

Twice more that night, the Supreme Court vacated separate stays granted by members of the Court of Appeals for the Ninth Circuit pending en banc review of the denial of the April 18, 1992 petition by the three-judge panel.[10] Harris' habeas petition was based on his

8. Harris v. Vasquez, No. 92-0588-T (S.D. Cal. filed Apr. 18, 1992); Harris v. Pulley, No. 90-380-E (S.D. Cal. filed Mar. 26, 1990); Harris v. Pulley, No. 82-1005-E (S.D. Cal. filed Aug. 13, 1982); Harris v. Pulley, No. 82-0249-E (S.D. Cal. filed Mar. 5, 1982).

9. *Gomez*, 112 S. Ct. at 1653.

10. *Id.*; Vasquez v. Harris, 112 S. Ct. 1713 (1992).

brother's recantation of testimony he gave at the trial of this matter in state court twelve years earlier.[11] In vacating the fourth stay order issued by various judges in the preceding twelve hours, the Supreme Court stated: "No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."[12]

Harris was executed on April 21, 1992. Within days of Harris' execution, several federal judges made public, off-the-bench remarks criticizing the Supreme Court's orders in the Harris matter. One judge wrote a guest editorial for the *New York Times* in which he appeared to argue that recent decisions of the Supreme Court compel lower federal courts to commit " 'treason to the Constitution.' "[13] Four days after the execution, another judge gave a speech at the Yale Law School that was covered by the national media.[14] The judge's statement of his views later appeared in the *Yale Law Journal*.[15] The judge's audience was told that the Supreme Court's decision in the *Gomez* case "was the logical culmination of a series of Supreme Court decisions subordinating individual liberties to the less-than-compelling interests of the state and stripping lower federal courts of the ability to protect individual rights."[16]

None of the members of the Supreme Court responded to these attacks. They remain unrefuted. The reason is obvious. It would be inappropriate for the Supreme Court to join in a public controversy

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11. Harris v. Vasquez, No. 92-0558-T, at 5-7 (S.D. Cal. filed Apr. 18, 1992).

12. *Vasquez*, 112 S. Ct. at 1714 (1992).

13. John T. Noonan, *Should State Executions Run on Schedule?*, N.Y. TIMES, Apr. 27, 1992, at A17. Judge Noonan's criticism of the Supreme Court is expressed in the following words:

> Prompt enforcement of that penalty conflicts with the precedents built up under the Constitution, Bill of Rights and Civil Rights Act. If death penalties are to be inflicted according to a state's schedule, these protections must give way. A Federal court must even commit "treason to the Constitution" and abstain from exercising its jurisdiction.
>
> So, at least, is the present position of the U.S. Supreme Court, Justices Harry A. Blackmun and John Paul Stevens dissenting. That Court has resolved the national ambivalence and decided that it is intolerable for a Federal court to delay an execution to decide a constitutional question. Robert Alton Harris was a casualty of this decision. Was the Constitution, too?

Id.

14. *See* Katherine Bishop, *No Rush to More California Executions*, N.Y. TIMES, Apr. 27, 1992, at B10; Richard C. Paddock, *9th Circuit Judge Criticizes High Court over Execution*, L.A. TIMES, Apr. 26, 1992, at A1.

15. Judge Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205 (1992).

16. *Id.* at 205 (footnote omitted).

initiated by its judicial critics, or to attempt to rally public support for its decisions through the media or in a public forum.

I was astonished by this public, off-the-bench criticism of contemporary decisions of the Supreme Court by jurists whose views concerning the appropriateness of a stay of Harris' execution were rejected by the Supreme Court in the *Gomez* case. I had thought that criticism of the decisions of the United States Supreme Court was clearly contrary to elementary principles of ethical judicial conduct. It also appeared to be terribly unfair because the authors of the criticism must have known that the Justices of the Supreme Court could not ethically slip off the bench to defend themselves at a press conference.[17] While I had never researched the question whether it was proper for a federal judge to use the media as a weapon to attack the Supreme Court, I had assumed, since I was a student in law school, that federal judges were prohibited from using the prestige of their offices to undermine respect for the law in off-the-bench remarks.

Fortunately, since 1992, no other judge has used the media to express his or her disapproval of decisions of the Supreme Court. Hopefully such conduct will not recur when the next sensational death penalty case reaches the United States Court of Appeals.

I am pleased that the *Loyola of Los Angeles Law Review* has afforded the participants in this Symposium the opportunity to explore, in this academic sanctuary, the question whether public off-the-bench criticism of the decisions of our Supreme Court by federal judges is appropriate and ethical, or antagonistic to the integrity of our form of government and system of justice. It is my view that public, off-the-bench criticism of the decisions of the Supreme Court by judges of lower federal courts is prohibited by existing ethical rules. If

17. Professor William G. Ross has stated that judges should refrain from commenting on the subject of their published opinions. He noted that a published opinion is a

> self-contained entity which must speak for itself. Any public comment by a judge concerning that opinion detracts from its integrity. Such comments may distort the legal process by encouraging lawyers and even courts to interpret the decision in the context of the judge's remarks. In contrast to statutes, which may be interpreted with reference to legislative history, a judicial decision must be its own exponent.

William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 601 (1989) (footnote omitted). Additionally, Professor Ross has commented that

> [t]here usually is no excuse for an appointed judge to detract from the integrity of the judicial system by offering any apology for what he has written or done. While some judges might suppose that such comments will help to restore or maintain public confidence in the judicial system, comments about individual decisions are far more likely to subtly erode public respect.

Id. at 606.

it is not, then rules should be adopted to make it clear that such conduct will not be tolerated because of the threat it would pose to the rule of law if other lower court judges were to publicly attack decisions of the United States Supreme Court.

I. HISTORICAL PERSPECTIVE

Among the grievances against the King of England listed in the American Declaration of Independence is the following: "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[18] The Declaration of Independence goes on to state: "A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people."[19]

In drafting our Constitution, the Founders were determined to protect federal judges from political control, either by the President and Congress, or the electorate. To that end, Section 1 of Article III of the United States Constitution provides: "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."[20]

In guaranteeing lifetime appointment, the Founders insulated federal judges from political retaliation should a majority of the electorate disagree with their decisions. Removal of federal judges from politics has served this nation well in protecting the rights of the minority from majoritarian tyranny. Judicial independence from political concerns has resulted in decisions that ended segregation in restaurants, buses, schools, juries, and in the workplace. Federal judges were free to render these judgments without regard to whether they were consistent with the contemporary views of a majority of the voters within their jurisdiction.

The Founders made Congress and the President subject to the political control of the electorate. The Founders wisely concluded that law making and law enforcement should reflect the views of the majority. Whether a law is faithful to the Constitution, however, must be determined by judges unconcerned about the politics of the moment or election returns. Off-the-bench statements to the media in an at-

18. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).
19. *Id.* para. 30.
20. U.S. CONST. art. III, § 1.

tempt to influence public opinion threaten judicial independence by politicizing our system of justice.

Some of us are old enough to remember others who sought to politicize the Supreme Court because of the unpopularity of some of its decisions by plastering "Impeach Earl Warren" signs all over our nation's highways. Fortunately, no judicial member of the lower federal courts slipped off the bench to give legitimacy to this movement by publicly expressing his or her disdain for the Supreme Court's opinions. Public attacks on Supreme Court decisions by federal judges may incite unstable members of society to engage in civil disobedience and to defy the decisions of our nation's highest court, or worse, to commit acts of violence against its members.

The political branches of our government have very effective methods of enforcing their authority against civil disobedience. The President can mobilize the national guard or the armed forces of the United States. Congress can enact laws to permit administrative agencies to seize property, to impose severe criminal penalties for a defiance of its power, or to raise taxes to promote the general welfare.

Judges are armed only with their pens, their legal knowledge, and their integrity. Judges must rely on our American tradition of respect for the written opinions of our appellate courts and the principle of stare decisis. Judges who deliberately use the media to draw attention to their disagreement with decisions of the United States Supreme Court encourage others to demonstrate their disrespect for the rule of law and seriously threaten our system of justice. A decent respect for the independence of the judicial branch of our government should compel federal judges who do not agree with the Supreme Court to remain silent.

II. IMPACT OF JUDICIAL CANONS ON JUDICIAL SPEECH

The goal of the Code of Conduct for United States Judges (Code) is that the "integrity and independence of the judiciary may be preserved."[21] The Commentary to Canon 1 explains that "[p]ublic confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility."[22] The Code also cautions those who aspire to an appointment to the federal judiciary that, to avoid the appearance of impropriety, "[a] judge must therefore ac-

21. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 (1994).

22. *Id.* Canon 1 commentary.

cept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."[23]

In Canon 3A(6), the Code deals expressly with extrajudicial comment concerning a pending case. The Code provides: "A judge should avoid public comment on the merits of a pending or impending action . . . ."[24] Criticism by a federal judge of a Supreme Court decision denying a stay of the execution of a condemned state prisoner does not squarely fit within Canon 3A(6). Criticism of the Supreme Court's refusal to consider the merits of the claim in *Gomez*[25]—that the use of lethal gas violates the Eighth Amendment—clearly is public comment on the merits of a pending case. The *Gomez* case involved all prisoners on death row in California, not just Harris.[26] The *Gomez* case was pending in the district court at the time of Judge Reinhardt's Yale Law School speech and the publication of his remarks in the *Yale Law Journal*.[27] In fact, that matter is now pending before the United States Court of Appeals for the Ninth Circuit.[28]

Canon 4A authorizes a federal judge to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice."[29] The Commentary to Canon 4 states that it authorizes a judge to advocate "revision of substantive and procedural law and improvement of criminal and juvenile justice."[30] Thus, Canon 4 appears to permit a judge to seek to influence Congress that current law requires "revision." The term "revision," however, is not applicable to off-the-bench judicial speech that criticizes a decision of the Supreme Court.[31]

Professor E. Wayne Thode, the reporter for the Special Committee on Standards of Judicial Conduct of the American Bar Association, has explained that "Canon 4A permits a judge to engage in projects directed to the drafting of legislation, and Canon 4B permits

23. *Id.* Canon 2A commentary.
24. *Id.* Canon 3A(6).
25. Gomez v. United States Dist. Court, 112 S. Ct. 1652, 1653 (1992).
26. *Id.*
27. Reinhardt, *supra* note 15.
28. Gomez v. United States Dist. Court, No. 94-16775 (9th Cir. filed Oct. 18, 1994).
29. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4A (1994).
30. *Id.* Canon 4 commentary.
31. The term "revise" is defined as "[t]o review and re-examine for correction. To go over a thing for the purpose of amending, correcting, rearranging or otherwise improving it; as, to revise statutes, or a judgment." BLACK'S LAW DICTIONARY 1321 (6th ed. 1990). *Webster's Dictionary* defines "revise" as "to make a new, amended, improved, or up-to-date version of: . . . [as in] a dictionary." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1944 (3d ed. 1976).

him to appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, or the administration of justice."[32] An off-the-bench criticism by a federal judge of an opinion of the Supreme Court would not fit within Professor Thode's construction of the words crafted by his committee in drafting the Code.

My research did not disclose any academic commentary on the question whether it is proper for a federal judge to criticize Supreme Court opinions. Those scholars who have commented on the propriety of off-the-bench judicial speech appear to agree that it should be limited. For example, one author argues that a judge may be prohibited from speech that would be deemed acceptable if uttered by a private citizen because the public is unable to distinguish between a judge's conduct on and off the bench.[33] Further, a judge's duty to rule fairly and impartially and "to 'conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary'—limits his Constitutional right to voice his opinions."[34]

It is no justification that the opinion that is criticized deals with an issue that affects fundamental constitutional rights. Professor Ross makes this point quite eloquently:

> While some judges rightly may feel that discussion of the subject requires loud or even shrill voices, it does not follow that judges are the appropriate persons to bring additional histrionics to an already heated subject. Just as a judge ordinarily should not attempt to be a scholar, so also should a judge generally refrain from donning the mantel of the moral philosopher, criminologist or polemicist. There are plenty of other persons who admirably can fulfill those roles. But only a judge can be a judge.[35]

The Supreme Court's recent opinions clarifying the right of a state prisoner to obtain review of the merits of his or her federal constitutional claim have inspired the critical comments of many legal writ-

32. E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 75 (1973).

33. James D. Noseda, Comment, *Limiting Off-Bench Expression: Striking a Balance Between Accountability and Independence*, 36 DEPAUL L. REV. 519, 528 (1987).

34. Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 613 (1987) (quoting CODE OF JUDICIAL CONDUCT Canon 2 (1972) (footnote omitted)).

35. Ross, *supra* note 17, at 627.

ers.[36] There is no evidence that any of these authors first delivered their views to the media before their articles appeared in legal journals. This outpouring of legal commentary amply demonstrates that there was no compelling need for any federal judge to initiate or to join the criticism of the decisions of the nation's highest court.

Failure to refrain from making off-the-bench comments to the media or in a public forum regarding sensitive issues "may undermine faith in the judicial system even if there is no actual impropriety on the bench since such pronouncements suggest that judges may permit their personal predilections to prevent them from enforcing the law as written."[37]

III. CONCLUSION

The Code does not *expressly* prohibit public, off-the-bench criticism by judges of Supreme Court decisions. It is my view that the present Code implicitly prohibits such conduct because it may "be misunderstood by the public as being unwilling to enforce the law as written, thereby undermining public confidence in the integrity and impartiality of the judiciary."[38] Each federal judge is under a duty to

36. *See, e.g.*, Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371 (1991); Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453 (1993); Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255 (1992); Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992); Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 (1992); Joseph L. Hoffman, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817 (1993); Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133 (1992); Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295 (1992); Henry J. Reske, *Courts Battle over Harris Execution*, A.B.A. J., July 1992, at 78; Eric D. Scher, Sawyer v. Whitley: *Stretching the Boundaries of a Constitutional Death Penalty*, 59 BROOK. L. REV. 237 (1993); Charles M. Sevilla & Michael Laurence, *Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345 (1992); J. Thomas Sullivan, *"Reforming" Federal Habeas Corpus: The Cost to Federalism; the Burden for Defense Counsel; and the Loss of Innocence*, 61 UMKC L. REV. 291 (1992); Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1 (1991); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

37. Ross, *supra* note 17, at 629.

38. *In re* Gridley, 417 So. 2d 950, 954 (Fla. 1982).

preserve "the integrity and independence of the judiciary."[39] The fact that there are no reported cases concerning the propriety of extrajudicial public criticism of Supreme Court opinions by federal judges is probably due to the fact that it has been assumed by members of the judiciary that it is improper, whether or not such speech is actually barred by the Code.

Judges should heed the advice of the former chief justice of the Supreme Court of the Province of British Columbia who admonishes newly appointed jurists as follows:

> You will be asked to make speeches to legal and other organizations and you may properly accept such invitations and comment fairly freely on the law as it is, *less freely on the law as you think it ought to be.* Any criticism, direct or implied, of . . . delivered judgments is generally to be avoided in statements made off the bench, lest your hearers infer criticism of a . . . court and hence, perhaps, political bias, or disrespect for other courts.[40]

In summary, the Code sets forth minimum standards of ethical judicial conduct. Judges should refrain from off-the-bench public comment that "fall[s] far short of any speech that would warrant sanctions. Like any other restraint, the best form of judicial restraint is self-restraint."[41]

39. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 (1994).

40. L. Yves Fortier, *Should Judges Speak Out?*, JUDGES' J., Summer 1985, at 42, 45 (quoting J.O. WILSON, A BOOK FOR JUDGES (1980)).

41. Ross, *supra* note 17, at 596.