Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases

Ronald J. Tabak
WHY AN INDEPENDENT APPOINTING AUTHORITY IS NECESSARY TO CHOOSE COUNSEL FOR INDIGENT PEOPLE IN CAPITAL PUNISHMENT CASES

Ronald J. Tabak*

I. INTRODUCTION

The revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require that an agency “independent of the judiciary” be responsible for “ensuring that each capital defendant in the jurisdiction receives high quality legal representation.” This independent agency “and not the judiciary or elected officials should select lawyers for specific cases.”

These mandates reflect two realities that have become overwhelmingly clear: (1) judges—whether initially elected, subject to retention elections, or appointed—are subject to political pressures in connection with capital punishment cases; and (2) lawyers whom judges have appointed in capital punishment cases have frequently been of far lower quality than could have been selected.

Accordingly, an entity whose members are free from the political pressures that judges face, and have the requisite expertise and commitment to effective representation of people facing the death sentence, should be appointing counsel for these individuals.

* Special Counsel, Skadden Arps Slate Meagher & Flom LLP. Co-Chair of Death Penalty of, and Special Counsel to, the American Bar Association Section of Individual Rights and Responsibilities.

2. Id. at 3.1(B).
II. INCUMBENT AND PROSPECTIVE JUDGES FACE POLITICAL PRESSURES CONCERNING CAPITAL PUNISHMENT

A. Election, Re-election, and Retention Campaigns

Judges are either elected or face retention elections (in which voters decide whether judges should remain on the bench) in thirty-two of the thirty-eight states in the United States that have capital punishment. 3

In 2003, the ABA's Commission on the 21st Century Judiciary released its report, Justice in Jeopardy, which was the basis for a resolution on judicial independence adopted at the ABA annual meeting in August 2003. 4 A consultant advised the Commission that "state court judges around the country" have faced re-election attacks or opposition in retention elections due to their adjudication of death penalty and other criminal matters. 5 These included, inter alia:

In 1992, Florida Justice Rosemary Barkett's retention was opposed by the National Rifle Association and a group of prosecutors and police officers, on the grounds that she was "soft on crime."

In 1992, Mississippi Justice James Robertson lost his re-election bid, on the basis of a death penalty decision the Justice wrote.

In 1996, The Tennessee Conservative Union and other groups successfully campaigned for the defeat of Tennessee Justice Penny White on account of a decision she joined overturning a death sentence. 6

During Justice White's retention election, the Republican Party used this message: "If you support capital punishment, vote NO on Penny White." 7 This and other attacks were based on her concurrence in

5. Id. at 48.
6. Id. at 25.
a decision in the only death penalty case that she ever adjudicated.8 Following her fifty-five percent to forty-five percent defeat in an election with an 18.6% voter turnout, Tennessee’s Governor said, “[s]hould a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so.”9

Following her defeat, the Tennessee Supreme Court—which previously had reversed or remanded about sixty percent of death penalty cases10—has mostly affirmed in capital cases. And its administrative office has sent out press releases when there are affirmances.11

In 1999, Justice White spoke about judicial independence to a group of judges.12 After her talk, one judge said to her, “You know, I got some really bad press over a bond motion not long ago. I’m here to tell you, I haven’t granted bond since, and I won’t. I can’t take the heat.”13

Justice Robertson’s defeat in the 1992 Mississippi Democratic primary resulted from a “law and order” campaign by an opponent backed by the state prosecutor’s association. Justice Robertson was attacked for stating in a concurring opinion that the Constitution forbids capital punishment for rape—something the United States Supreme Court had held in 1977.14 He was also attacked for supposedly believing that the death penalty was not justified for killing an unarmed delivery person in cold blood.15 Yet, his actual basis for dissent was that the trial court had neglected to charge the jury on the meaning of the “heinous, atrocious or cruel” aggravating factor, and ultimately, his view prevailed after the United States Supreme Court granted certiorari and remanded the case.16

In Texas, Court of Criminal Appeals Judge Charles F. Baird was defeated in 1998 after dissenting from the denial of the writ to death row inmate Karla Faye Tucker.17 The day following that decision, Baird’s re-election campaign consultant accurately said, “[t]his is the worst thing
you could have done for your political campaign." In contrast, another member of the Court of Criminal Appeals promised during her campaign that "[i]f you elect me, I will never, ever vote to reverse a capital murder case," and she lived up to that promise over the next five years, in about 250 capital cases—in none of which she voted for a reversal.  

Even when death penalty-oriented attacks fail to defeat incumbent judges, they can still have an impact on the courts. For example, North Carolina Chief Justice James Exum decided never again to run for re-election after surviving a re-election campaign in which, despite his numerous votes to uphold death sentences, he was attacked for his personal opposition to capital punishment. 

A subsequent North Carolina Supreme Court Chief Justice, Burley Mitchell, said the following in a letter to the state's Law Enforcement Officers Association eliciting its support for his re-election: "In the first year of my leadership, the Supreme Court heard 87 criminal appeals. We allowed only one new sentencing hearing and did not send a single criminal case back for a new trial." 

Campaign appeals such as Justice Mitchell's are increasing in frequency. In Alabama, incumbent Supreme Court Judge Kenneth Ingram ran a commercial that began with videotape from the scene of a rape/murder, followed by a statement that Judge Ingram had sentenced the murderer to death, and then featured the victim's daughter saying "[t]hank heaven Judge Ingram is on the supreme court." 

The trend of increased politicization of judicial retention elections will probably continue, because "special interest groups have discovered that they are vehicles by which offending judges can be unseated and state judicial policy making can be influenced." 

B. Judicial Appointments 

Both at the state and federal levels, people who wish to be appointed as judges, and judges who wish to be elevated to higher courts, also face political pressures concerning capital punishment.

18. Id. at 133-34.  
19. Id. at 134.  
An egregious example at the state level is California Governor Gray Davis. Dean Peter Keane of the Golden Gate University Law School stated that several people who had been interviewed for possible judicial appointments were “absolutely traumatized” by death penalty questions they had been asked, and added that the Governor was requiring potential judges to say “they thought the death penalty was the greatest thing since sliced bread.”24 Davis’ spokeswoman Hilary McLean said all of Davis’ judicial appointees will have “certainly indicated clearly that they will uphold the law” on capital punishment, and that if they were personally opposed to the death penalty, “[t]hat person would be asked some additional questions about the process, about the death penalty. In that instance, whether or not the person would be ultimately appointed by the governor, I can’t tell you.”25

At the federal level, ranking minority member on the Senate Judiciary Committee, Orrin G. Hatch, who now chairs the Committee, announced in 1993 that Republicans would challenge any judicial nominees of the new President, Bill Clinton, who would “look for excuses not to carry” out capital punishment.26 Republican staffers pointed out that “the death penalty is a politically potent issue and worth raising, even if they have limited success in opposing judicial nominees.”27 Among those whom Senate Republicans unsuccessfully opposed in their two years in the minority at the outset of the Clinton administration were Rosemary Barkett and Martha Craig Daughtrey, both of whom were confirmed for court of appeals positions.28 The Republicans gained control of the Senate in 1995, and continued to use the death penalty as an issue in the judicial confirmation process.

The Republicans’ position affected President Clinton’s selections of whom to nominate to the federal bench.29 As then-NAACP Legal Defense & Educational Fund assistant counsel George Kendall stated in 1999, ever since Senator Hatch’s 1993 statement, the “White House has refrained from nominating anyone who has a background in working on cases where the death penalty was an issue and even other people who

25. Id.
27. Id.
28. See id.
29. See Breaking the Most Vulnerable Branch, supra note 7, at 145-46 (comments of George F. Kendall).
have shown a sensitivity to human rights.\textsuperscript{30} For example, President Clinton did not nominate Jeff Coleman, a Jenner & Block partner with a superb legal record (mostly in commercial cases) who had secured habeas relief for a Georgia death row inmate whom he had represented pro bono.\textsuperscript{31} Some Senate Judiciary members were upset by that, and by Coleman’s work on some uncontroversial civil liberties cases.\textsuperscript{32}

In October 1999, the Senate defeated the federal district court nomination of Missouri Supreme Court Justice Ronnie White.\textsuperscript{33} All Republican Senators, except one who was absent, voted against the nomination, at the behest of Missouri Senator John Ashcroft, who was about to run for re-election.\textsuperscript{34} Senator Ashcroft asserted that Justice White was “pro-criminal,” had “a serious bias against the death penalty” and had “a tremendous bent toward criminal activity.”\textsuperscript{35} These accusations were extremely dubious, particularly since Justice White had voted to affirm in most capital punishment cases, and was endorsed by the Missouri police organization.\textsuperscript{36} Earlier in 1999, Missouri Senior Judge Charles Blackmar, a Republican who formerly served as Chief Justice of the Missouri Supreme Court, said that Ashcroft was “tampering with the judiciary, not only in Missouri but in any state that has the death penalty. He apparently is saying that a vote against the death penalty is activist or liberal and a vote for it is apparently all right.”\textsuperscript{37}

What is significant for the purposes of this Article is not the inaccuracy of the charges against Justice White, but that those who ended up defending him—and attacking Ashcroft in 2001, when he was up for confirmation as United States Attorney General—did so largely on the basis of the high percentage of death penalty cases in which he had voted to affirm. This in and of itself sent a signal to all would-be federal judges, and all incumbent federal judges who hoped to be appointed to higher courts, that they had better make sure that they not only did not vote to overturn the death penalty in controversial cases but

\textsuperscript{30} Id. at 144.
\textsuperscript{31} See id. at 145.
\textsuperscript{32} See id. at 144-45.
\textsuperscript{33} See Anthony Lewis, Hypocrites in Power, N.Y. TIMES, Nov. 9, 1999, at A25.
\textsuperscript{34} See id.
\textsuperscript{35} Id.
\textsuperscript{36} See id.
\textsuperscript{37} Ray Hartman, More Deathly Politics from John Ashcroft, RIVERFRONT TIMES, Aug. 11, 1999.
that they must also maintain a very high percentage of affirmances in capital punishment cases.38

III. JUDGES HAVE APPOINTED INEFFECTUAL LAWYERS IN DEATH PENALTY CASES

There is a pervasive national problem in the quality of lawyers whom judges have appointed to represent indigent people facing capital punishment.

In July 2001, United States Supreme Court Justice Sandra Day O'Connor pointed to this problem. She said that due to this serious issue, "perhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."39 Earlier that year, Justice Ruth Bader Ginsburg said, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial."40

Newspaper accounts have pointed to major problems in various states. For example, the Seattle Post-Intelligencer reported that in nearly 20% of capital cases since 1981, the "court-appointed lawyers... had been, or were later, disbarred, suspended or criminally prosecuted."41 The Tennessean reported that "dozens of lawyers who have defended clients facing the death penalty in Tennessee have been in trouble themselves—disciplined by the state for unethical or illegal activities. Eleven of them appear on a current list of lawyers who meet Tennessee Supreme Court standards for future appointment in death penalty cases."42 It later reported that the head of a state appellate representation office had testified that Tennessee judges appoint the

38. To put this matter in perspective, one should note that during the period 1973-1995 "of every 100 death sentences imposed, forty-seven [were] reversed at the state level, on direct appeal or collateral review. An additional twenty-one [were] overturned on federal habeas." GUIDELINES, supra note 1, n.46 (citing JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, pt. I, app. A, at 5-6 (2000)).
40. Anne Gearan, Supreme Court Justice Supports Death Penalty Moratorium, ASSOCIATED PRESS, Apr. 10, 2001; see GUIDELINES, supra note 1, at Guideline 1.1, text accompanying note 30.
same ineffectual trial lawyers "over and over again" in death penalty cases.\(^{43}\)

In Philadelphia, Pennsylvania, a Philadelphia Inquirer investigation disclosed that "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders and contributors to the judges's election campaigns."\(^{44}\) The Inquirer further reported that the attorney who one year was appointed the most times, 34, to homicide cases was a former judge who had been removed from the bench for improper conduct.\(^{45}\) The Inquirer found that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."\(^{46}\)

Unsurprisingly, a greatly disproportionate percentage of those sentenced to death in Pennsylvania are from Philadelphia. This is due not only to its district attorney's office having a much greater inclination to seek the death penalty than other district attorneys' offices in the state, but also to the abysmal representation provided by judge-appointed lawyers in Philadelphia cases. One result of the Philadelphia Inquirer investigation was that the Philadelphia Public Defender's office was permitted for the first time to represent defendants facing the death penalty. Thereafter, no one represented by that office has been sentenced to death, whereas numerous defendants who have been represented by judge-appointed counsel have received death sentences.\(^{47}\)

In North Carolina, an October 15, 2002 report by the Common Sense Foundation\(^{48}\) stated that more than one in six of North Carolina's death row inmates were represented at trial by attorneys whom the North Carolina State Bar has disciplined.\(^{49}\) A North Carolina attorney who was not disciplined conceded that during the trial of Ronald Wayne Frye, the lawyer "was drinking heavily, ... downing nearly a pint of [eighty]-
proof run every afternoon” and that he had been “in a car wreck about the same time and was found with a near-lethal blood-alcohol level of 0.44%—at 11 a.m.” The jury that sentenced Frye to death heard almost nothing about his “nightmarish childhood,” during which “his alcoholic parents gave him away at a diner” at age 4, his new father beat him “with a bullwhip,” and he was “shuffled from family to family, six changes in all.” Frye was executed on August 31, 2001. Another lawyer who was not disciplined was Tim Merritt, who was dying of cancer during Bobby Lee Harris’ trial and took prescription drugs to ease his pain. His co-counsel was so disturbed at Merritt’s strange, harmful conduct that he asked him, “Whose side are you on?”

In 2002, California—which has experienced considerable problems with the quality of appointed counsel in death penalty cases—adopted qualification standards for death penalty defense counsel. However, the rule adopting these standards has a loophole allowing the trial judge to appoint someone who does not meet the standards and “leaves the selection of a defense lawyer to the judge, who may be inexperienced in death penalty cases or prey to local pressures.” Chief Justice Ronald George stated that at least the existence of the standards would help where the same ineffectual lawyer has been representing defendants in capital cases for years, since the trial judge will now have a ground on which to say, “I can turn him down.”

A Texas State Bar Committee study in 2000, entitled Muting Gideon’s Trumpet, showed that many trial judges used a patronage system to appoint lawyers for indigent defendants. Those appointed by these judges made campaign donations to them. These lawyers were expected to help the judge end the cases quickly. One former judge recalled a colleague, George Walker, who appointed Joe Cannon to

51. Id.
52. See id.
55. See id.
56. See id.
57. See id.
59. See id.
60. See id.
handle death penalty cases. The former judge remarked that, "Joe was a nice man, but he was incompetent to handle capital cases. He was George's buddy. He got the cases because he moved them. There was pressure—keep costs down, keep things moving." Texas' problems with indigent representation in death penalty cases pervades not only the trial and appeals levels, but also state post-conviction proceedings, in which the courts also appoint counsel. In December 2002, the Texas Defender Service issued a scathing report, Lethal Indifference, concerning the assignment of lawyers for post-conviction proceedings. The report concluded that in cases since 1995, Texas death row inmates had a one in three chance of being executed without decent investigation or argument by counsel. The report found that incompetent and inexperienced counsel were often appointed, sometimes notwithstanding drug or serious mental problems. Yet, as the Austin American-Statesman editorialized, the head-in-the-sand response of the presiding judge of the Texas Court of Criminal Appeals—which had itself been responsible for several years' worth of inadequate appointments—"only perpetuates the appearance that the court is more interested in efficiency and moving people through the system than in justice." Even more bizarre was that court's response to the case of Leonard Uresti Rojas, who was executed on December 4, 2002. Over two months later, in February 2003, three members of the Texas Court of Criminal Appeals issued a dissent from the court's rejection of Rojas' assertion that he had had ineffective counsel in his post-conviction proceeding. The dissent noted that the attorney whom the Texas Court of Criminal Appeals assigned to handle the post-conviction case had no death penalty experience, had been sanctioned three times by the state bar association, had a bipolar disorder during the case, and admitted to

62. Id.
63. See generally TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS (2002) [hereinafter LETHAL INDIFFERENCE].
64. See id.; see also Jim Yardley, Texas Death Row Appeals Lawyers Criticized, N.Y. TIMES, Dec. 3, 2002, at A29.
65. See LETHAL INDIFFERENCE at 2.
66. See id. at 22.
69. See id.
having done only minimal work and to having missed key deadlines. Judge Tom Price, who wrote the dissent, reiterated his view, first expressed in a January 2002 dissent, that the court should recognize the right to post-conviction counsel who is “more than a human being with a law license and a pulse.”

IV. CONCLUSION

When judges appoint counsel in capital cases, the appointed lawyers face a potential conflict of interest between the desire to please the judge—so that the lawyers will be appointed in other cases—and their obligation to represent their client zealously. In view of the political pressures faced by judges, whether they face retention elections, must run for re-election, or hope for appointment to higher courts, there is substantial danger that judges will appoint lawyers who are disinclined or unable to raise a vigorous defense or to make crucial objections.

Experience has shown that this is not only a danger; it is a systemic reality in all sections of the United States. As a result, all too many defendants have been executed more because of how badly their court-appointed lawyers have performed than because of how bad their conduct was.

The revised Guidelines thus stand on solid ground in recognizing that one necessary, albeit hardly sufficient, ingredient of any solution to the problem of ineffective defense representation in death penalty cases is to have independent appointing authorities appoint counsel for indigent people facing capital punishment.

---

70. See id.