Justices and the Death Penalty

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Recently retired but, luckily, not retiring United States Supreme Court Justice John Paul Stevens has reviewed Professor David Garland's book PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION.[1] In the review, Justice Stevens explains his view that death penalty laws in the U.S. today are unwise, unjustified and unconstitutionally irrational.

Justice Stevens's book review builds on his opinion in a 2008 death penalty case, *Baze v. Rees*. In *Baze*, Justice Stevens joined a Supreme Court majority that upheld the constitutionality of Kentucky's method of lethal injection. He concluded that this decision was dictated by Court precedent that he should follow. But Justice Stevens, writing for himself, also announced in the case his conclusion, based on his decades of judicial experience in death penalty appeals,

> that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[2]

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[1] *See* John Paul Stevens, *On the Death Sentence*, N.Y. REVIEW OF BOOKS (Dec. 23, 2010), *available at* http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/?pagination=false&printpage=true (reviewing David Garland, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (Cambridge: Harvard University Press, 2010) (available for purchase at www.amazon.com/Peculiar-Institution-Americas-Penalty-Abolition/dp/0674057236/ref=sr_1_1?ie=UTF8&s=books&qid=1291393760&sr=1-1)).

[2] *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

In summer 2010, shortly after his retirement after thirty-five years on the Supreme Court, Justice Stevens discussed the death penalty during a wide-ranging interview with National Public Radio legal affairs correspondent Nina Totenberg. In the interview, Justice Stevens elaborated that the one judicial vote he thinks would change is his 1976 vote upholding Texas's death penalty statute. "We did not foresee how [that decision] would be interpreted," Justice Stevens said. "I think that was an incorrect decision."[3]

Justice Stevens follows, in his legally analytical and pragmatic opposition to the death penalty, in the paths of some of his former Supreme Court colleagues and predecessors:

- In 1972, five justices—Justices William O. Douglas, William J. Brennan, Jr., Potter Stewart, Byron R. White and Thurgood Marshall—decided in *Furman v. Georgia* that imposition of death sentences under state laws in effect at the time would be unconstitutional.[4]

- Thereafter, although the Supreme Court (including, in the 1976 Texas case, then newly-appointed Justice Stevens) upheld some of the state death penalty statutes that were enacted in the wake of *Furman*, Justices Brennan and Marshall continued, until their respective retirements in 1990 and 1991, to dissent from every Supreme Court decision affirming a death sentence—they noted, in each case, their adherence to their views "that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments…."[5]

- Justice Harry A. Blackmun, who had been a dissenter in *Furman*, announced in 1994, shortly before his

[3] Nina Totenberg's summer 2010 interview with Justice Stevens is available, in audio form and transcribed, at www.npr.org/templates/story/story.php?storyId=130198344 (part one) and www.npr.org/templates/story/story.php?storyId=130332059 (part two). The Supreme Court decision upholding the constitutionality of Texas's death penalty statute was *Jurek v. Texas*, 428 U.S. 262 (1976).

[4] *See Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*).

[5] *See, e.g.*, *Wilkerson v. Texas*, 493 U.S. 924 (1989) (Marshall, J., joined by Brennan, J., dissenting from denial of *certiorari*). I picked this death penalty case decision at random in one of the volumes reporting decisions from Justice Brennan's final Term on the Court.

retirement, that he had changed his mind—he wrote that he felt "morally and intellectually obligated simply to concede that the death penalty experiment has failed."[6]

- Much earlier, almost nine years before *Furman*, Justice Arthur J. Goldberg, joined by Justices Douglas and Brennan, had urged, skeptically, the Court to consider the constitutionality of the death penalty for the crime of rape.[7] (Justice Stevens knew Justice Goldberg, who was almost twelve years older, to some degree across many years—each served in World War II, graduated from Northwestern Law School, and practiced law in Chicago and at times in Washington. Although Goldberg resigned from the Supreme Court in 1965, he lived until 1990, a period that included fourteen years of Justice Stevens's Court service. Goldberg figures prominently and interestingly in Stevens's review of David Garland's book.)

What is noted less often is that Justice Robert H. Jackson also was a death penalty opponent. Jackson knew the death penalty as a trial lawyer. His diverse private practice in New York State (1913-1934) included criminal defense work, mostly done free for indigent clients. He defended clients charged with capital crimes and, in some of those cases, he won acquittals or at least non-capital sentences. Each of his capital cases gave defense lawyer Jackson a sense that the possible death penalty affected, unduly and unpredictably, the judge and his judging.

In time, Jackson also came to know the death penalty in his role as a Supreme Court justice. During the 1940s and 1950s, state death penalties were widespread and capital case appeals to the Court were common. Justice Jackson never embraced a view that the death penalty is unconstitutional. Indeed, he voted to affirm many death sentences. But sometimes he did not. And his judicial experiences in all of those capital cases—analyzing how the ultimate stakes involved affected his own thinking and judging, and assessing how they affected the behavior and

[6] *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of *certiorari*).

[7] *See Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., joined by Douglas & Brennan, JJ., dissenting from denial of *certiorari*).

judging of his Supreme Court colleagues—confirmed his personal conclusion that death penalty laws were unwise.

Robert Jackson stated his personal opposition to the death penalty to family, friends and colleagues throughout his life. In summer 1946, for example, he gave this explanation to fellow Allied prosecutors of the principal Nazi war criminals at Nuremberg:

> I do not believe in the death penalty, but as long as any man is punished anywhere for any offenses with death, there is no reason to withhold the death penalty from these men. It is the presence of the death penalty that makes the Supreme Court of the United States strain for curious reasons for reversal.[8]

Jackson's friend Professor Herbert Wechsler worked for the International Military Tribunal (IMT) at Nuremberg during 1945-1946. Years later, Wechsler recorded in a comment to one of his great scholarly achievements, the Model Penal Code, that Jackson had said shortly before his death (1954) that "he opposed capital punishment because of its deleterious effects on the judicial process and stated that he would appear and urge the [American Law] Institute to favor abolition."[9]

Nuremberg was, of course, a capital case—the August 1945 London Agreement and IMT Charter that Jackson and his Allied counterparts had negotiated authorized "death" or any other punishment the IMT determined to be just.[10] During 1945-1946, as chief U.S. prosecutor Jackson built cases and then prosecuted Nazi war criminals at Nuremberg, he believed that the defendants were guilty of conspiracy, waging aggressive war, committing war crimes and committing crimes against

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[8] *Minutes of Chief Prosecutor's* [sic] *Meeting on Monday – 1 July 1946 at 5:15 in Room 117 – Palace of Justice, Nuremberg, Germany* [sic], at 13 (author unknown, quoting Justice Jackson; also present at this meeting were Thomas J. Dodd, Lt. William E. Jackson, Sir Hartley Shawcross, Sir David Maxwell Fyfe, Col. Harry J. Phillimore, Monsieur Charles Dubost and General Roman A. Rudenko), *in* Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 98, Folder 5.

[9] MODEL PENAL CODE & COMMENTARIES (Official Draft and Revised Comments), pt. II (Definition of Specific Crimes) §§ 210.0-213.6 at 114 (1980). I thank Professor Roger S. Clark of Rutgers University for telling me of this Wechsler comment and providing the citation.

[10] *See* CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Art. 27 (Aug. 8, 1945), *available at* http://avalon.law.yale.edu/imt/imtconst.asp. The IMT Charter is part of the London Agreement, signed by Jackson and his Allied counterparts on behalf of the United States Government, the Provisional Government of the French Republic, the Government of the United Kingdom, and the Government of the Union of Soviet Socialist Republics. *See* http://avalon.law.yale.edu/imt/imtchart.asp.

humanity, and that they deserved death as much as—more than—any criminal charged with a capital crime.

Yet Justice Jackson at Nuremberg never argued that any defendant deserved the death penalty. Other Nuremberg prosecutors did so argue, with vigor. Jackson, by contrast, respecting the role distinction that separates prosecutor from judge, left all consideration of possible death penalties—the agonizing and straining that he believed was inherent in human death penalty judging—to the IMT.[11]

[11] Justice Jackson's July 26, 1946, closing argument at Nuremberg—all about each defendant's guilt, nothing about punishment—is available at http://avalon.law.yale.edu/imt/07-26-46.asp.