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USA: Death and democracy

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The majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country.

US Government, 1994¹

In the early hours of 9 May 2007, Philip Ray Workman was taken from his prison cell and killed by lethal injection in Tennessee's execution chamber. He had been on death row for the past quarter of a century. His execution went ahead despite evidence that a key state witness had lied at the 1982 trial and that Lieutenant Ronald Oliver, the police officer Workman was convicted of killing, may have been accidentally shot by a fellow officer.²

The executions of Philip Workman and the 1,074 other men and women put to death in the USA since judicial killing resumed there in 1977 have been justified as democracy in action. In explaining the USA's continuing use of the death penalty to the United Nations Committee Against Torture in 2005, for example, the US government stated that "a majority of the people in a majority of the states, and of the country as a whole, have chosen through their democratically elected representatives to provide the possibility of capital punishment for the most serious of crimes".³ The people want the death penalty, the argument goes. If they did not, they could vote for politicians and legislators who would bring about abolition. Of course, this argument assumes a fully informed electorate fully engaged on this issue, and an elected class fully responsive to public opinion.

An opinion poll in February 2007 indicated that 66 per cent of people in Tennessee support a moratorium on executions to allow consideration of the fairness and reliability of the state's capital process.⁴ A recent study conducted under the auspices of the American Bar Association, which takes no position on the death penalty *per se*, found that "Tennessee's death penalty is plagued with serious problems" and recommended a moratorium on executions while the system was subjected to review.⁵ On 2 May, the House Judiciary Committee of the Tennessee legislature approved a bill that would establish a commission to examine the death penalty system. Still, Philip Workman's execution was allowed to go forward.

Workman's case revealed a particular aspect of this "democratic" killing when, as has happened in other cases, it divided a federal court.⁶ In 2000, the US Court of Appeals for the

¹ Initial report of the USA to the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/81/Add.4 (24 August 1994).

² Amnesty International Urgent Action, <http://web.amnesty.org/library/Index/ENGAMR510802007>.

³ Second Periodic Report of the USA to the Committee Against Torture, 6 May 2005.

⁴ See <http://www.abanet.org/moratorium/assessmentproject/tennessee/survey.pdf>.

⁵ An Analysis of Tennessee's Death Penalty Laws, Procedures, and Practices. March 2007, <http://www.abanet.org/moratorium/assessmentproject/tennessee/finalreport.pdf>.

⁶ See also *USA: The experiment that failed – A reflection on 30 years of executions, January 2007*, <http://web.amnesty.org/library/Index/ENGAMR510112007>.

Sixth Circuit split seven votes to seven on whether to grant him a hearing on new evidence supporting his claim of innocence (Workman needed a majority to prevail; the 7-7 tie meant that he lost). The seven judges voting for a hearing had all been appointed by Democratic presidents.⁷ The seven voting against had all been appointed by Republican presidents.⁸

Federal judges in the USA are appointed by the President with the advice and consent of the Senate. The political support for the death penalty in the White House and Congress over recent decades has unsurprisingly meant the appointment of few if any federal judges who were publicly opposed to executions. The main distinction between “liberal” and “conservative” judges in relation to the death penalty has thus tended to be one of their greater or lesser support for regulation of the capital process, rather than opposition to executions *per se*. The end result of a conservative/liberal judicial divide can have the appearance of political decision-making by federal judges.

A seminal article in 1992 examining the various notions of ‘political’ used to describe the US Supreme Court noted that:

“Different philosophical principles will inevitably dictate different results, so that different policy consequences will follow ineluctably from justices’ different jurisprudences. For example, those who see the fundamental role of the Court as the protector of the individual, particularly the unpopular individual, against the power of the state, will necessarily incline towards activism (defined here as a willingness to find unconstitutional the laws and actions of duly elected officials); those who defer to elected officials except where the most egregious breakings of the Constitution have taken place will naturally seem self-restrained”.⁹

Amnesty International is not suggesting either that US federal judges lack independence or that the system of appointing them is undemocratic. Voters, for example, would or could have known that President George W. Bush would likely appoint conservative judges if elected as President.¹⁰ Nevertheless, close votes on divided courts add to the arbitrariness or to a perception of arbitrariness of the death penalty. If whether a condemned inmate lives or dies depends on the balance of the jurisprudential philosophies of the various judges who happen to be overseeing his or her case, is that fair? Or to put it another way, if the legal issues in a capital case are so open to interpretation that courts are split down the middle, with perhaps a single vote tipping the balance, is this acceptable where an irrevocable punishment is concerned?

As Workman’s execution loomed in 2007, this phenomenon re-emerged. On 4 May, a three-judge panel of the Sixth Circuit rejected Workman’s appeal for a stay of execution to pursue his claim of innocence. Two of the judges ruled that he had “not met his burden of showing a likelihood of success” on the merits of his appeal. They emphasised society’s need for finality over the individual’s claims: “Nearly twenty-five years after Workman’s capital sentence and five stays of execution later, both the state and the public have an interest in finality...” These two judges were appointed to the Sixth Circuit by Republican Presidents George H.W. Bush and George W. Bush. The third judge, Judge Cole, appointed by

⁷ Five were appointed by President Clinton, two by President Carter.

⁸ Four had been appointed by President Reagan, three by President George H.W. Bush.

⁹ *Six definitions of ‘political’ and the United States Supreme Court*. Richard Hodder-Williams, *British Journal of Political Science*, Volume 22, No. 1 (1992).

¹⁰ See, for example, comments of Senator John Kerry, second 2004 presidential debate: “A few years ago, when he came to office, the President said – these are his words – ‘What we need are some good conservative judges on the courts.’ And he said also that his two favourite justices are Justice Scalia and Justice Thomas. So you get a pretty good sense of where he’s heading if he were to appoint somebody”. Available at <http://www.whitehouse.gov/news/releases/2004/10/20041009-2.html>.

Democratic President Bill Clinton, dissented from the refusal to stay the execution, rejecting his colleagues' reasoning.

Also on 4 May, a federal district court judge – appointed by President Clinton – issued a temporary restraining order until 14 May after Philip Workman's lawyers filed a motion to stop the execution under the state's newly revised lethal injection protocol, at least until it could be judicially reviewed. The judge pointed out that the government has “no interest in proceeding with an execution protocol which may ultimately be found to be unconstitutional”.

On 7 May, the same three-judge panel of the Sixth Circuit that had refused to stay Philip Workman's execution on his innocence claim vacated the restraining order on the grounds that Workman had little chance of success. Again, the two Republican-appointed judges emphasised the need for finality. They concluded by stating that “at some point in time, the State has a right to impose a sentence – not just because the State's interests in finality are compelling, but also because there is a powerful and legitimate interest in punishing the guilty, which attaches to the State and victims of crime alike. Twenty-five years after the imposition of this sentence, that time, it seems to us, has come”. Again, Judge Cole dissented:

“despite the extensive and detailed allegations Workman raises tending to show that Tennessee's new lethal-injection protocol will subject him to pain and suffering in violation of the Eighth Amendment; despite that Workman supports his allegations with testimony from physicians familiar with lethal-injection protocols, medical studies, and evidence from recent botched executions; despite the statements from federal courts across the United States expressing deep scepticism with similar lethal-injection protocols adopted by other states; and despite the deference that an appellate court owes to the judgment of a district court, the majority concludes that Workman's concerns are insufficiently compelling to warrant a brief five-day preservation of the status quo to determine whether his claims have merit...”

In contrast, the two judges in the majority described lethal injection as “the most humane method of execution”, praising the “democratic processes” that brought about its introduction in most of the USA's death penalty states:

“As modern sensibilities have moved away from hanging, the firing squad, the gas chamber and electrocution as methods of carrying out a death sentence, so too have the death penalty procedures of the States and Federal Government. While the Supreme Court has tolerated continuity rather than change in this area, the democratic processes to their credit have insisted on change.”

Another way of looking at this is that the executing states have tried to stay one step ahead of the legal challenges to the method chosen to kill condemned prisoners: “Historically, challenges to execution methods have followed a fairly predictable Eighth Amendment path. When one method of execution became problematic, such as hanging, for example, states would sense constitutional vulnerability and switch to another method, such as electrocution or lethal gas. When those two methods established a record of serious botches, states switched to lethal injection.”¹¹ This is surely an example of what US Supreme Court Justice Harry Blackmun referred to as “tinkering with the machinery of death”, something he vowed in 1994, after two decades on the Court, he would no longer do. Nothing, he said, could save capital punishment from its inherent flaws. “Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation

¹¹ Deborah W. Denno. *The Lethal injection quandary: How medicine has dismantled the death penalty*. Fordham University School of Law (Working Paper), May 2007, available at <http://ssrn.com/abstract=983732>.

eviscerated,” he wrote, “I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed”.¹²

Was Justice Blackmun behaving “undemocratically”? Current Supreme Court Justice Antonin Scalia, for one, might say so – and indeed has written that in his view “the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases”.¹³ Justice Scalia also suggested that the “modern aversion to the death penalty” is the predictable but erroneous response to “modern, democratic self-government” in which, he says, private morality is equated with governmental morality. Few people, he wrote, “doubted the morality of the death penalty in the age that believed in the divine right of kings.”¹⁴ He maintains that if “the American people have determined that the good to be derived from capital punishment... outweighs the risk of error”, then it is “no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.”¹⁵

Late on 8 May, the US Supreme Court refused to intervene to stop Philip Workman’s execution. Did his subsequent killing – in the face of evidence that the fatal bullet that killed Lt Oliver may not have come from the condemned man’s gun – reflect the will of the people? The President of the state Fraternal Order of Police claimed that its members were supportive of the execution.¹⁶ Lt Oliver’s widow and his stepson and stepdaughter watched the execution. After Philip Workman had been killed, a spokesperson for the victims’ rights group, You Have the Power, spoke on behalf of the relatives and said that “This is not a happy night for anyone. However, for those who loved and cared for the victim there is at last some small sense of justice.”¹⁷

Justice, however, is in the eye of the beholder. Many people opposed the execution. Indeed, several jurors from Workman’s 1982 trial have said that they would not have voted for a first-degree murder conviction or a death sentence if they had been presented with the evidence that had emerged since the trial. In 2000, as a previous execution date loomed, the daughters of both Lt Oliver and Philip Workman united at a press conference to appeal for clemency. The former District Attorney of Shelby County, the office which prosecuted Philip Workman, also came forward in 2000 to oppose the execution because of the post-conviction evidence.

Whether or not Philip Workman’s execution represented US democracy in action, the state carried out a killing far more calculated than the shooting for which this man was being punished a quarter of a century later (even presuming he was guilty). Democracy can surely do better than this. As a Judge on the Constitutional Court of South Africa said more than a decade ago in the decision heralding the end of judicial killing in that country, “there is ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies”.¹⁸ The USA should join the 129 countries that have abolished the death penalty in law or practice.

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¹² *Callins v. James* (1994), Justice Blackmun dissenting.

¹³ *God’s justice and ours*. Antonin Scalia. *First Things* 123 (May 2002), pages 17-21.

¹⁴ *Ibid.*

¹⁵ *Kansas v. Marsh*, 26 June 2006, Justice Scalia concurring.

¹⁶ *Workman seeks to block autopsy*. *The Tennessean*, 8 May 2007.

¹⁷ *Tennessee executes Philip Workman by lethal injection*. Associated Press, 9 May 2007.

¹⁸ *The State v. T.Makwanyane and M Mchunu*, Constitutional Court of South Africa, 6 June 1995, Ackermann J., concurring.