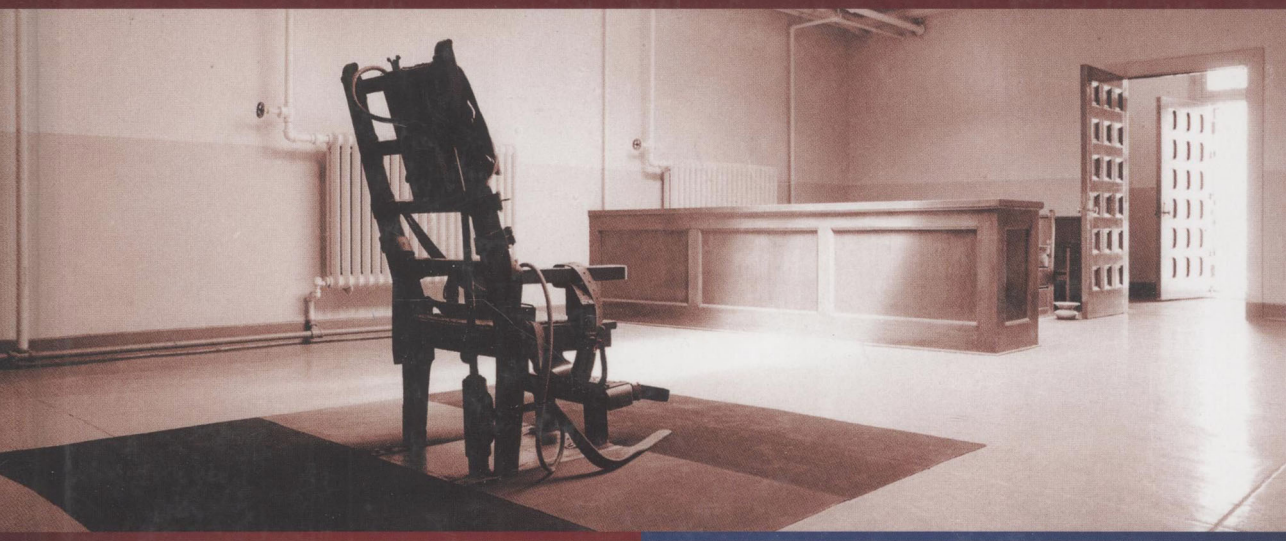
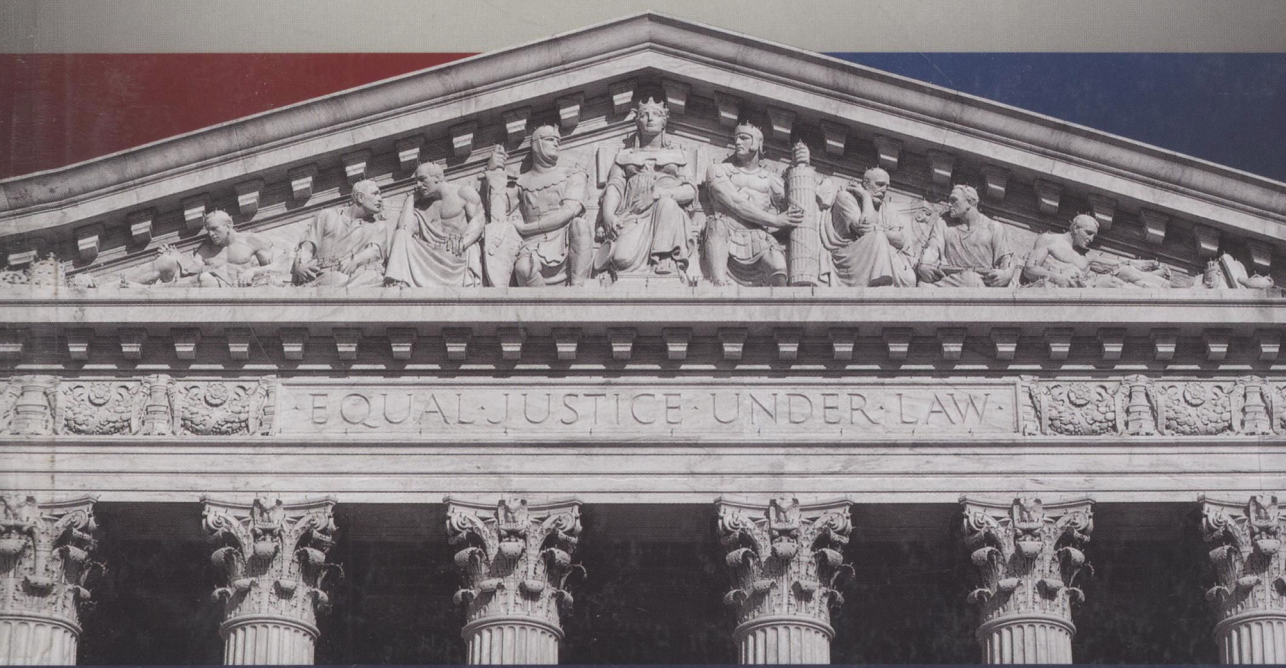
THE SUPREME COURT'S POWER IN AMERICAN POLITICS



THE SUPREME COURT AND CAPITAL PUNISHMENT

JUDGING DEATH



MICHAEL E. PARRISH

The Supreme Court and Capital Punishment: Judging Death

Michael E. Parrish

CQ PRESS
A Division of SAGE
Washington, D.C.

CQ Press
2300 N Street, NW, Suite 800
Washington, DC 20037

Phone: 202-729-1900; toll-free, 1-866-4CQ-PRESS (1-866-427-7737)

Web: www.cqpress.com

Cover design: Matthew Simmons
Composition: C&M Digitals (P) Ltd.
Photo credits:
AP Images: cover, 65, 71, 129, 194, 208, 338, 349
The Granger Collection, New York: 20, 60
The Library of Congress: 22, 25

Text credits:
Page 87: © 1931 American Civil Liberties Union, and used with permission
Page 103: © 2001 Jenner & Block, LLP, and used with permission
Page 157: © 1972 H. L. Richardson and used with the author's permission
Page 158: © 1972 Anthony Amsterdam and used with the author's permission
Page 219: ©1997 Norman Mailer. Courtesy of Polaris Communications, Inc.
Page 270: © 1992 *San Francisco Chronicle* and used with permission

♾ The paper used in this publication exceeds the requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

Printed and bound in the United States of America

13 12 11 10 2 3 4 5

Library of Congress Cataloging-in-Publication Data
The Supreme Court and Capital Punishment: Judging Death / Michael Parrish.
p. cm. — (The Supreme Court's power in American politics series)
Includes bibliographical references and index.

ISBN 978-0-87289-773-1 (alk. paper)
1. Capital punishment—United States—History I. Title . II. Series.

KF9227.C2P37 2009
345.73'0773—dc22 2009020104

The Supreme Court and Capital Punishment

The Supreme Court's Power in American Politics Series

Melvin I. Urofsky, *Series Editor*

The Supreme Court and Capital Punishment: Judging Death
The Supreme Court and Congress: Rival Interpretations
The Supreme Court and Criminal Procedure: The Warren Court Revolution
The Supreme Court and Elections: Into the Political Thicket

For Peggy, Without Whom, Not.

Foreword

Scholars of the Supreme Court have long known that while a particular opinion may have powerful and even eloquent language in it, the words themselves mean nothing until translated into action. Chief Justice Earl Warren declared in *Brown v. Board of Education* (1954) that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal," but it took more than two decades of congressional and executive action before legalized segregation disappeared from the states. In *Gideon v. Wainwright* (1963) the Court expanded the right of counsel, but it meant nothing until the states actually implemented the ruling.

Most studies of the Court are doctrinal, in that they view the decisions of the Court in a particular area to see how they have developed, what rules have been created, what arguments and precedents are established. This is all legitimate and is primarily what we do in law schools. Historians and political scientists also tend to look at the impact that Court decisions have had on different groups and agencies. They want to know how the Court's decisions affected the actions of the states, the president, Congress, and other parts of society—how words translated into action.

The books in this series, while not ignoring doctrinal issues, focus more on how Court decisions are translated into practice. What does it mean, for example, in actual police work when a court says that officers must follow certain rules in gathering evidence or making arrests? What does it mean to a state legislature when the high court holds current schemes of apportionment to be unconstitutional? How does an administrative agency respond when courts have held that it has overstepped its authority?

In some areas, the responses have been simple if not always straightforward. For all of the furor raised by critics of the ruling in *Miranda v. Arizona* (1966), within a relatively short time police departments made the *Miranda* warning part of the routine for an arrest. On the other hand, decisions regarding school prayer and abortion have met with opposition, and the responses of state and local governments have been anything but simple or straightforward.

Judges, as well as senators and members of Congress, like the president take an oath of office to preserve, protect, and defend the Constitution. While the Constitution is quite explicit in some areas (such as the length of a term of office), the Framers deliberately wrote other provisions in broad strokes, so that the document could

grow and adapt to the needs of future ages. What specific meanings should be attached to various constitutional clauses is a task that lies not only with the courts, but on the other branches of the government as well. The meaning of the Constitution in our times is the result of the interaction of the three branches of our government.

In this volume, *The Supreme Court and Capital Punishment* by Michael E. Parrish, we see how the Court has dealt with one of the most troubling aspects of the criminal justice system—the death penalty. The only thing that had differentiated the American colonies from the mother country prior to 1776 is that the colonies had a far more restrictive list of crimes for which a criminal could be put to death. But there is no question that at the time of the drafting of the Constitution and the Bill of Rights in the late eighteenth century, capital punishment was accepted in each of the states. Well into the nineteenth century, in both England and the United States, public hangings were part of normal life, a public ceremony to warn those of less than pure heart that should they stray off the path, a grisly ending awaited them.

In the past 150 years a great deal has happened, both in the United States and around the world, and at the beginning of the twenty-first century there are only a dozen or so nations that still employ capital punishment. Although there has been a serious debate about the efficacy of the death penalty as well as the fairness in its application to minorities and the poor, a majority of the Supreme Court as well as three-fourths of the American states still favor death as the appropriate sentence for heinous crimes.

The Supreme Court has been a central participant in this debate for the past four decades, and the question that has come before the bench is not whether imposition of death violates due process but whether the death penalty runs counter to the Eighth Amendment ban on cruel or unusual punishment. This debate has at least twice put a hold on executions all across the country, as the states waited to hear whether they could put condemned prisoners to death or how they might do it.

The constitutional dialogue involves many questions, as Professor Parrish shows, and while the answers are far from clear, they do bring into sharp relief some key issues. Jurists who advocate "original intent" argue that since capital punishment was accepted at the time of the ratification of the Eighth Amendment, it did not violate then or now the ban against cruel and unusual punishment. Opposed are those who believe in a "living Constitution" and those who claim that changing moral beliefs make the death penalty unacceptable in our time. While the latter group has managed to carve out certain categories, such as the mentally incompetent and children, from application, the originalists still prevail in their claim that there is nothing inherently unconstitutional about capital punishment.

In his discussion, Professor Parrish portrays the intensity of the issue through the eyes of the Court, the individual justices, the states, and, of course, the men and women who have been put to death after conviction for crimes, some of which can only be described

as heinous. But over the past forty years the imposition of the death penalty has changed, and the Court has slowly erected a series of obstacles to guarantee procedural fairness and to avoid the arbitrariness that often characterized how judges and juries imposed this punishment before 1970.

The debate, of course, is far from over, but as Parrish indicates, the basic issues have now been aired, and the questions that will confront the Court and the states in the years ahead is whether the answers will reflect what conservatives call original intent or what liberals describe as modern sensibilities.

Melvin I. Urofsky
May 2009

Summary Contents

Contents

Introduction

On June 29, 1972, in the case of *Furman v. Georgia* and its companions, a majority of the justices of the Supreme Court of the United States ruled that the existing death penalty laws in America constituted "cruel and unusual punishment" under the Eighth Amendment and were therefore unconstitutional.[1] The decision struck down the capital punishment regimes in thirty-nine states and the District of Columbia and spared the lives of over six hundred death row inmates. Each member of the majority (Justices William O. Douglas, Potter Stewart, Byron White, William Brennan, and Thurgood Marshall) wrote a separate opinion, and although they could not agree upon a single rationale for their collective conclusion, each found the existing state statutes to be defective because they vested too much discretion in juries and judges to determine who among those convicted of a capital crime would live or die.

Four members of the majority hoped that the *Furman* decision would lead either to the complete abolition of the death penalty in the United States (Douglas, Brennan, and Marshall) or generate revised statutes that so restricted discretion that only "the worst of the worst" offenders would suffer the supreme criminal punishment (Stewart). Justice White, on the other hand, believed that fine-tuning those eligible for the death penalty and narrowing discretion would restore public confidence in capital punishment and result in more executions, which had declined precipitously since 1966.

Four members of the Court, all appointed by President Richard Nixon and led by the new chief justice, Warren Burger, dissented. Each dissenter wrote an opinion as well. Among them was Justice Harry Blackmun, a close friend of the chief justice, a one-time general counsel to the Mayo Clinic, and a former federal appeals judge. Blackmun and Burger, who both hailed from the land of ten thousand lakes, had earned the sobriquet "the Minnesota Twins." Just a week before the *Furman* decision, Blackmun had authored an opinion reaffirming baseball's exemption from the federal antitrust laws in rhapsodic words, even reciting the classic poem "Casey at the Bat."[2] A year later, Blackmun would write the majority opinion in *Roe v. Wade* (1973), which struck down state criminal abortion laws and upheld a married woman's right to terminate a pregnancy during her first trimester.[3]

In his separate *Furman* dissent, Blackmun expressed deep personal opposition to capital punishment and recounted how such cases on the Eighth Circuit Court of Appeals had generated for him "an excruciating agony of the spirit." Were he a member of the legislature, he would do "all I could to sponsor and to vote for . . .