DUTY & THE DEATH PENALTY

LEO E. STRINE, JR.*

I. INTRODUCTION

My personal convictions about the rule of law have influenced me in dealing with one of the more troubling subjects I have confronted in my 21 years of continuous service as an official in state government: the death penalty.

Like many other states, Delaware law provides for the imposition of capital punishment for certain murders.[1] I will not go into a deep discussion of all the reasons why I do not favor capital punishment. Although many compassionate and ethical citizens favor the death penalty, I do not agree with them. I believe that our society is wrong to descend to the murderer's level, by taking his life when he has been captured and caged. More and more citizens are coming around to this view: my native state, Maryland, recently abolished the death penalty, and our own state Senate has passed legislation to the same effect.[2]

But this essay is not about why I oppose the death penalty. Rather, it will be about how anyone privileged to wield some aspect of public authority must subordinate his own personal beliefs to his specific public duties. My involvement in implementing my state's death penalty laws has required me to participate in acts that I find morally disturbing. That hardly makes me unique. It is doubtless true of hundreds of state employees who have played a

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*Chief Justice, Delaware Supreme Court; Adjunct Professor of Law, University of Pennsylvania Law School; Austin Wakeman Scott Lecturer in Law, Harvard Law School; Senior Fellow, Harvard Program on Corporate Governance; Adjunct Professor of Law, Vanderbilt University School of Law; and Henry Crown Fellow, Aspen Institute. This essay was adapted from a speech delivered at Widener Law School on January 13, 2014, as part of the Ruby R. Vale Distinguished Speaker Series.

[1] Thirty-two states still permit the death penalty, along with the federal government and the military. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Aug. 28, 2014); *see also* DEL. CODE ANN. tit. 11, § 4209(e)(1) (2014) ("In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following [twenty-two] aggravating circumstances which shall apply with equal force to accomplices convicted of such murder . . . .").

[2] Erin Cox, *O'Malley to sign death penalty repeal next week*, BALT. SUN (Apr. 25, 2013), http://articles.baltimoresun.com/2013-04-25/news/bal-death-penalty-repeal-to-be-signed-next-week-20130425_1_death-penalty-repeal-western-maryland-state-executions; Doug Denison, *Senate Approves Death Penalty Repeal Bill*, NEWS J., Mar. 26, 2013, http://www.delawareonline.com/article/20130326/NEWS/130326023/Senate-approves-death-penalty-repeal-bill.

role in implementing the capital punishment statute since executions resumed with regularity.[3]

We live in a republic where it is increasingly common for those holding public offices to feel the need to "be on the record" about everything, to distance themselves from anything remotely controversial, to speak before knowing the facts, and to create doubts about whether they are true to the oath that they took to perform the specific constitutional and legal roles they assumed. A President or Governor is not a judicial officer. A congressman or state senator is not a cabinet secretary. A judge is not a legislator or a cabinet secretary. Each branch of government has a constitutional purpose. Even within each branch, different officials have different roles and duties. If a public officer acts with fidelity to her oath, she must approach the decisions she makes from the particular perspective required of her specific office, and that often requires the holder to put aside her own view of what should be law or policy, and to implement the law or policy that has been set by those entrusted to do so by law.

The example that is set by public officials who are true to their oaths is one that, in the long run, fosters respect for our government because it shows that public officials are committed to the larger idea of government by the people and for the people, under the laws made by their elected representatives.[4] By contrast, when public officials use their offices as a way of advancing their own personal political preferences when that is not the function of their office, they erode respect for our government. Instead of the public understanding that government officials recognize that their foremost duty is to follow the law faithfully and apply it in a neutral and nonpartisan way to all citizens, the public rightfully becomes cynical that all aspects of government, including the management of agencies entrusted with executing the laws and the resolution of cases by the judicial branch, are infected with partisanship and that duty to law is secondary to using power for partisan and personal advantage. Instead of legitimizing our government, by recognizing that what we share is larger

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[3] In 1972, the United State Supreme Court's decision in *Furman v. Georgia* led to a de facto moratorium on application of the death penalty. *See* Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam). The concurring opinions of Justice Stewart and Justice White, which controlled the Court's decision, held that the death penalty was being applied in an arbitrary way, and this violated the Eighth Amendment. *See id.* at 309-10 (Stewart, J., concurring); *id.* at 312, 314 (White, J., concurring). Four years later, in *Gregg v. Georgia*, the Supreme Court affirmed that it accepted the use of the death penalty by states if the statutes "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Gregg v. Georgia, 428 U.S. 153, 206 (1976).

[4] This commitment to following laws by officials is essential to what John Rawls called "formal justice." As Rawls put it: "Formal justice in the case of legal institutions is simply an aspect of the rule of law which supports and secures legitimate expectations. One kind of injustice is the failure of judges and others in authority to adhere to the appropriate rules or interpretations thereof in deciding claims." JOHN RAWLS, A THEORY OF JUSTICE 59 (1971). Elsewhere, Rawls described "formal justice" as "justice as regularity," and noted that "[i]f deviations from justice as regularity are too pervasive, a serious question may arise whether a system of law exists as opposed to a collection of orders designed to advance the interests of a dictator . . . ." *Id.* at 236.

than what divides us, public officials who put their personal policy beliefs ahead of their legal duties corrode our effectiveness as a society, weaken our ability to find sensible solutions to difficult problems, and compromise our ability to remain the world's leading nation.

As in all things now in the United States, there are of course shades of grey. Many public positions require the holder to bring to bear in important ways his own policy judgment. But usually this judgment is bounded in critical ways by the law, and in particular, by the role in the policy process that the official holds. In particular, I believe it is the duty of any citizen who agrees to serve our republic in a specific office to carry out the duties of that specific office with fidelity. Although there are some who will blithely assume that the fact that generations of elected officials have determined that particular offices should exist does not mean that those offices have any important purpose, I tend to assume the opposite. The fact that generations of diverse leaders have considered the performance of certain duties to be important weighs heavily in favor of assuming that they have value. And for a government or any complex organization to function, everyone who has a role must carry out her role and not usurp the roles of others. Certainly, there are areas of shared responsibility. But to take an example close to me, I wear a robe and am a judge on the job. I was appointed by the Governor of Delaware, and confirmed by the state Senate, to play a judicial role and to decide cases that are brought before me. When I deal with statutes, I do not write them; rather I am supposed to apply them to the cases before me, using traditional tools of judicial interpretation to give effect, not to my own preferences, but to what the statute-writers intended.[5] This does not mean that reasonable minds cannot disagree about the legislature's intent, but that for a judge to be acting in good faith, he must be genuinely seeking to apply the legislature's intent, and not to substitute his own.[6] By our Constitution, it is clear that judges like me play a different role from the 62 individuals elected to Delaware's General Assembly, or in the federal system, from the 535 voting members of Congress.

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[5] "The goal of statutory construction is to determine and give effect to legislative intent." LeVan v. Independence Mall, Inc., 940 A.2d 929, 932 (Del. 2007) (citation omitted). The federal courts follow the same principle. *See, e.g.*, Flora v. United States, 357 U.S. 63, 65 (1958) ("In matters of statutory construction the duty of this Court is to give effect to the intent of Congress . . . .").

[6] As the Supreme Court of the United States put it in *Tennessee Valley Authority v. Hill*:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978).

The public's skepticism about our federal judiciary in particular is growing and, regrettably, is not without a reasoned basis.[7] The public is right to suspect that many high-profile decisions are difficult to rationalize as the product of neutral judicial decisionmaking that shows respect for prior precedent, applies traditional modes of interpretation in a balanced way, and that does not lightly interfere with the decisions of the legislative and executive branches. Opinions about statutes are filled with personal asides about the judge's view of the wisdom of Congress's judgment, instead of focusing solely on the relevant question of what Congress intended and whether what Congress did was within its authority. Without apparent hesitation, settled precedent from recent Supreme Courts and from generations of prior courts are swept away, because from the more distant perspective of the twenty-first century, current judges can discern original constitutional principles that 200 years of their predecessors were not intelligent enough to discern. That for 200 years, elected lawmakers had acted in reliance upon these prior understandings and that the shape of both our Constitution and statutory laws would be different if the judicial decisions had been different, is not an apparent concern. Although each of us may have his own views about whether it has been judges of the right or the left who are most responsible for the public's perception that the federal judiciary has become another arena for partisan politics, I hazard that this is an area where one can find a healthy "bipartisan" sample to demonstrate that the public's increasing cynicism is not without basis.

For today, therefore, my point is that any public official has an overriding duty: to be faithful to the office she holds and to set an example of fidelity. In my personal experience with the death penalty as an official of Delaware, the particular office I held affected my duties and, specifically, the extent to which my own normative views regarding the propriety of capital punishment could influence my decisions. In each role, I was essentially the same moral person, in the sense that my views on the death penalty have not changed materially over the last twenty years. But as you will see, in only one of the offices that I have been privileged to hold have my personal views about the death penalty been an appropriate consideration for my decisions in my official capacity as a state official.

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[7] *See, e.g.*, *Few Conservatives View the Roberts Court as Conservative: Supreme Court's Favorable Rating Still at Historic Low*, PEW RESEARCH CTR. (Mar. 25, 2013), http://www.people-press.org/files/legacy-pdf/3-25-13%20Supreme%20Court%20Release.pdf [hereinafter *Favorable Rating*] (finding that only 52% of the public has a favorable view of the U.S. Supreme Court); Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1 (noting that three-quarters of the public think that Justices' decisions are sometimes influenced by their personal and political views).

II. THE DEATH PENALTY AND SERVING AS AN OFFICIAL IN THE EXECUTIVE BRANCH

I have participated in implementing the death penalty in three distinct roles. I undertook the first of these roles some 21 years ago at the age of 28, when I was honored to be asked by Delaware's then Governor-elect (and now U.S. Senator) Tom Carper to be his counsel.

To accept Governor Carper's offer in good faith, I had to be sure that I could, in good conscience, be true to the duties I would owe to the Governor and the State of Delaware. I knew that Delaware's law called for the death penalty in certain circumstances. I knew this law was not likely to be repealed, especially because it had just been amended to eliminate the requirement that the jury recommendation in favor of a death sentence be unanimous.[8] I also knew that in 1992 the State had recently executed the first prisoner in 46 years[9] and that a string of executions was likely in Governor Carper's first term.

I thus began with the fundamental question of whether Delaware's embrace of the death penalty rendered my state illegitimate to me. That is, was my state's willingness to impose the death penalty so repugnant to my sense of morality that I could not, in good conscience, serve as counsel to the Governor, our most important constitutional officer whose foremost duty is to "take care that the laws be faithfully executed."[10]

The question of legitimacy is an important one. Most of us would, I am sure, like to think that we would have had the courage to refuse to serve the Nazi government in Germany if we were German in the 1930s. But what of our own nation before the Civil War, when slavery was law of the land? Or until 1920, when half of our population was disenfranchised?[11] Or until 1965, when black people's right to vote was finally secured?[12]

I do not lightly raise the question of the basic legitimacy of our nation and state until those dates, because a polity that is so clearly not based on the consent of all the governed is hard to respect.[13] We, of course, are fortunate

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[8] 68 Del. Laws ch. 189 (1991) (amending DEL. CODE ANN. tit. 11, § 4209 (1990)); Lawrie v. State, 643 A.2d 1336, 1346 (Del. 1994) ("Under the revised procedure set forth in the post-1991 version of Section 4209 of Title 11, a unanimous jury verdict is no longer a requirement for the imposition of the death penalty.").

[9] *Delaware Carries Out First Execution Since '46*, N.Y. TIMES, Mar. 15, 1992, at 17.

[10] DEL. CONST. art. III, § 17. The Governor's oath, as with all public officials in Delaware, symbolically requires him to swear to "uphold and defend the Constitutions of [his] Country and [his] State." DEL. CONST. art. XIV, § 1.

[11] U.S. CONST. amend. XIX, cl. 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

[12] Voting Rights Act, 42 U.S.C. § 1973(a) (1965) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .").

[13] Our nation is based on this very principle, of course:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are

to live in a time of greater inclusiveness, as the gladdening developments regarding tolerance and equal rights for our gay citizens exemplify. From the safe perspective of the enlightened future, we can engage in lively (and often arrogantly superior and smug) debates about whether abolitionists who nonetheless served our nation in the government during the antebellum era were putting personal ambition ahead of morality.[14]

But analogous questions of conscience will persist as long as humanity does. No generation avoids the moral mirror test and all public officials must assess for themselves whether they accept the basic legitimacy of their government and can faithfully implement the laws it promulgates.

Whether my decision on this score about my state's support for the death penalty can be viewed as a rationalization for personal ambition on some level is something I leave to others. But I concluded that I could help the Governor carry out my state's capital punishment laws faithfully, without offending my own sense of conscience. Although I did not support the death penalty, I recognized that our statute carefully limited eligibility to very serious crimes involving the taking of a human life.[15] I also recognized that the courts took good faith efforts to make sure that the death penalty was only imposed in proper cases,[16] and that the constitutional and statutory rights of defendants

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> Life, Liberty and the pursuit of Happiness.—That to secure these rights, *Governments are instituted among Men, deriving their just powers from the consent of the governed.*

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added). This idea has origins, among other places, in Locke and Rousseau. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 95, at 168 (Thomas I. Cook ed. 1947) (1689) ("Men being . . . all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own Consent."); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 123 (Victor Gourevitch trans., 1997) (1762) ("[E]very man being born free and master of himself, no one may on any pretext whatsoever subject him without his consent.").

[14] *See generally* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 123-25 (1975) (discussing how northern antislavery judges faced a dilemma in enforcing slave laws and justified it to themselves on the ground that law was entirely formal). *But see* Ronald Dworkin, *The Law of the Slave-Catchers*, TIMES LITERARY SUPPLEMENT, Dec. 5, 1975, at 1437 (reviewing COVER, *supra*, and arguing that the northern judges should have seen that the Fugitive Slave Act of 1850 was unconstitutional).

[15] DEL. CODE ANN. tit. 11, § 4209(e)(1)(a)-(v) (2014) (limiting the imposition of the death penalty to cases where the jury, acting unanimously, or the judge finds at least one precisely defined aggravating factor to exist "beyond a reasonable doubt"); *see also id.* § 4209(d)(1) (requiring a balancing of these aggravating factors against any mitigating factors); *id.* § 4209(c)(3)(a)(2) (directing the judge to give the jury instructions to "weigh all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense").

[16] In the years before I became Governor Carper's counsel, the Supreme Court of the United States continued to accept capital punishment but enforced certain protections by prohibiting death sentences for certain crimes or for defendants with certain characteristics. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of first-degree murder for an offense committed when the defendant was fifteen years old); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the sentence of death for the crime of rape of an adult woman was a grossly disproportionate punishment, and hence "cruel and unusual punishment" under the

were respected, including their right to be treated equally, without regard to race or sex.[17] Having never fallen off a turnip truck, I was not immune to the realities of living in an imperfect society, and recognized that, for example, problems of racial bias are hard to eradicate entirely from any important social setting, including the criminal justice system. But I recognized the depth of commitment on the part of our society to overcome its tarnished history, and the particular commitment of Delaware courts to carefully review all cases for racial bias and for any disrespect of the rights of any defendant.[18] As a more general matter, I also recognized that support for capital punishment for those who commit intentional murder was widespread, and by no means limited to

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Eighth Amendment). Since my time serving the Governor, the use of the death penalty has been limited further by the United States Supreme Court. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that execution of individuals who were under 18 years of age at time of their capital crime is prohibited by Eighth and Fourteenth Amendments); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment).

In Delaware courts, the death penalty underwent a similar, narrowing trajectory in the years before I took office as counsel to Governor Carper. For example, in *Sanders v. State*, the Delaware Supreme Court contemplated the use of the death sentence on mentally ill defendants, and found that the imposition of the death penalty following a guilty-but-mentally-ill verdict, where the jury had not been instructed concerning significance of its verdict, "would run afoul of the requirement of proportionality," would "make no measurable contribution to acceptable goals of punishment," and hence was "nothing more than the purposeless and needless imposition of pain and suffering." Sanders v. State, 585 A.2d 117, 134, 136 (Del. 1990) (citing *Coker,* 433 U.S. at 597). In *Rush v. State*, the Delaware Supreme Court ruled that a death penalty could not be imposed after a jury is given an *Allen* or "dynamite" charge, whereby a deadlocked jury is told to deliberate further to avoid the expense of a retrial. Rush v. State, 491 A.2d 439, 448 (Del. 1985) (citing Allen v. United States, 164 U.S. 492 (1896)). And, in *Whalen v. State*, the Delaware Supreme Court reversed a death penalty on the grounds that the jury was not permitted to consider whether the victim was "elderly" and "defenseless" as statutory aggravating circumstances, because these terms were unconstitutionally vague. Whalen v. State, 434 A.2d 1346, 1360 (Del. 1981).

[17] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause forbids prosecutors from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant); Powers v. Ohio, 499 U.S. 400, 415, 416 (1991) (modifying *Batson* to hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges regardless of whether the defendant and the excluded jurors are same race). Soon after *Batson*, in *McCleskey v. Kemp*, the Supreme Court of the United States held that if the legislature had "enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect, it would have violated the Equal Protection Clause of the Fourteenth Amendment." McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

[18] *See, e.g.*, Dawson v. State, 608 A.2d 1201, 1205-06 (Del. 1992) (vacating the death sentence after the Supreme Court of the United States held that the Superior Court committed a constitutional error by admitting a stipulation that a gang called the "Aryan Brotherhood" operated in Delaware's prison system, but which did not link this gang to the defendant, and finding that the State had not demonstrated beyond a reasonable doubt that the constitutional error was harmless); DeShields v. State, 534 A.2d 630, 646 (Del. 1987) (considering statistical evidence of racial bias in jury verdicts in death penalty cases); Hooks v. State, 416 A.2d 189, 196 (Del. 1980) (considering whether the state used peremptory challenges towards a "purposeful, deliberate exclusion of black people") (quoting Johnson v. State, 312 A.2d 630, 631 (Del. 1971)).

white males.[19] And plenty of the murderers in line for execution were white males.[20] Finally, even the length of time the post-sentencing review process took exemplified a good faith attempt to ensure that no actually innocent person was executed.[21] Like any system implemented by humans, the chance for a mistake existed, but both the depth and length of the process have the effect of limiting the chance for error. So too did the careful sentencing balancing called for by the statute itself.[22] In closer cases about guilt, death sentences were more unlikely because the potential for a plea in the first instance was greater, and so was the chance that the remedial calculus would tilt toward life. Thus, in overwhelming proportion, death penalty cases involved defendants who indisputably, inexcusably, and intentionally took the life of another human being. As much as I oppose the death penalty, the idea that my fellow citizens would embrace a view that murderers could warrant losing their own life after a fair trial was not one so repugnant to my sense of conscience as to make me consider my state illegitimate. I could thus serve.

But by serving, I meant to fulfill, with genuine fidelity, the role I had taken on. One does not serve a polity faithfully by taking on a duty and retaining a self-granted license to renounce that duty when it requires implementing a law of the polity with which one disagrees.[23] After all, the idea of a government of laws is nothing if not the idea that we are all entitled to be governed, not by the whim of any official with momentary power, but in accordance with the duly enacted laws of our society.[24] If any government official can at any time

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[19] Between 1985 and 1999, a majority of both blacks and whites supported the death penalty for murder. Lydia Saad, *Racial Disagreement Over Death Penalty Has Varied Historically*, GALLUP (July 30, 2007), http://www.gallup.com/poll/28243/racial-disagreement-over-death-penalty-has-varied-historically.aspx. According to a survey in January 2012, 68% of whites and 40% of blacks support the death penalty. *Continued Majority Support for Death Penalty*, PEW RESEARCH CTR. (Jan. 6, 2012), http://www.people-press.org/files/legacy-pdf/1-6-12%20Death%20penalty%20release.pdf.

[20] Of the sixteen people executed in Delaware since 1992 (when I became counsel), eight have been white males, seven have been black males, and one has been a Native American male. *Death Row Executions*, STATE OF DELAWARE, http://doc.delaware.gov/deathrow/executions.shtml (last visited Nov. 11, 2014) [hereinafter *Death Row Executions*]. I note that the state's classification system only records "race," and not Hispanic origin, as those terms are used in the 2010 U.S. Census. *See* CENSUS BUREAU, 2010 U.S. CENSUS FORM, *available at* http://www.census.gov/schools/pdf/2010form_info.pdf. The state currently has nine black males and seven white males on death row. *Death Row*, STATE OF DELAWARE, http://doc.delaware.gov/deathrow/inmates.shtml (last visited Nov. 11, 2014).

[21] The forty-six prisoners executed in the United States in 2010 had waited an average of 178 months (nearly 15 years) between sentencing and execution. Tracy Snell, *Capital Punishment, 2010 — Statistical Tables*, BUREAU OF JUSTICE STATISTICS tbl. 8 (Dec. 2011), http://bjs.gov/content/pub/pdf/cp10st.pdf.

[22] *See supra* note 15 and accompanying text (describing the balancing of these aggravating factors against any mitigating factors required by DEL CODE ANN. tit. 11, § 4209 (2014)).

[23] As Rawls says: "[O]ur natural duty to uphold just institutions binds us to comply with unjust laws or policies, or at least not to oppose them by illegal means as long as they do not exceed certain limits of injustice." RAWLS, *supra* note 4, at 354. For a judge, complying with a law with which one disagrees means enforcing it as well as following it.

[24] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will

decide not to do his duty because he does not personally support the law he is required to faithfully implement, then every government official can do that, and no exercise of executive authority has any genuine legitimacy.[25] If a government official feels that strongly, she should be bold and selfless enough to resign or to refuse to serve, and to advocate for a change in the law.[26] But that official cannot usurp the constitutional authority of the elected legislature by covertly undermining the implementation of laws she disfavors.

When I accepted the role of being Governor Carper's counsel, I understood it was his conscience and sense of justice that would determine whether a death sentence was commuted. Knowing the Governor, I harbored no doubt that Tom Carper would have been willing to commute a murderer's death sentence in a compelling case. But I also knew that he believed that the death penalty was an appropriate sentence for intentional murder, and that he would be reluctant to interfere with the implementation of a death sentence that had been imposed by a judge of our Superior Court on the recommendation of a jury, especially given the exacting scrutiny that our judiciary gives to capital cases. In other words, unlike me, Governor Carper supported, as a matter of policy, our state's death penalty statute.

As his counsel, I owed him a duty to serve his policy wishes faithfully, so long as they were within the bounds of the law.[27] Obviously, it was my job to work with the Attorney General to provide the Governor with advice about what the law required, but within the discretion afforded by the law, it was my job to advance the policy decisions he made. That did not mean, of course, that I would have no chance to influence those decisions. Tom Carper is and was a leader strong enough to seek out the views of diverse advisors,

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certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). Marshall's definition of "government of laws" focuses on process, but the phrase "government of laws" can also have a normative content. *See, e.g.*, FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 165 (1960).

[25] *See* RAWLS, *supra* note 4, at 355.

[26] A judge who refuses to enforce a law is refusing to comply with the law. Rawls argues that, in a "nearly just society"—which is the most we can hope for, perfect justice being impossible—it is necessary to comply with unjust laws, "or at least not to oppose them by illegal means as long as they do not exceed certain limits of injustice." RAWLS, *supra* note 4, at 354. In a nearly just society, laws are made through a democratic, majoritarian, political process that respects basic liberties. Citizens have a duty to support the constitution of a nearly just society, and because this constitution requires some form of democratic majority rule, "opinions of justice are bound to clash." *Id.* at 354-55. If, in a nearly just society, people pick and choose which laws to follow, the democratic regime becomes unworkable. Because I believe that we live in a republic that is, in Rawls's terms, nearly just, I consider that a judge has a duty to enforce a specific law that he regards as unjust. And, as I have discussed, I do not believe that the death penalty, in the form it is applied in Delaware, breaches the Rawlsian "limits of injustice" at which point it might be permissible for a judge not to enforce it.

[27] A lawyer has a duty "zealously to protect and pursue a client's legitimate interests, within the bounds of the law." MODEL RULES OF PROF'L CONDUCT pmbl. (2012); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.09(2) (2006) ("An agent has a duty to comply with all *lawful* instructions received from the principal . . . .") (emphasis added). For a discussion of these principles as applied to government lawyers, see Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1335 (2009).

welcoming, nay demanding, a give and take on tough issues, and encouraging his advisors to tell it to him straight. But in the end, Governor Carper was the Governor, it was he who bore the ultimate responsibility, and it was his judgment that the people bargained for with their votes.

Not only that, even Governor Carper did not have unbounded discretion to apply his conscience in addressing the state's implementation of its death penalty statute. By the Delaware Constitution, the Governor as Executive has a fundamental duty to see that the laws are in fact executed.[28] The Department of Correction is headed by a Commissioner who serves at the pleasure of the Governor.[29] That Department is charged with the horrible and anguishing responsibility of actually carrying out a death sentence. The Department cannot refuse to do that at the Governor's discretionary order.

Under the Delaware Constitution, once a prisoner has exhausted his appeal and habeas review options, the Governor can only act unilaterally to stay an execution in one limited way. He may grant a reprieve of no more than six months.[30] To do anything more than that, the Governor must receive an affirmative recommendation of the Board of Pardons to commute the death sentence.[31] Absent the Board of Pardons' recommendation, the Governor has no power to commute a death sentence.

Given the limitations on the Governor's authority, my role as Governor's Counsel in executions was minor, especially when compared to the correctional officers who must prepare the condemned for his fate, escort him there, and impose the penalty. But, I had a role nonetheless. To ensure that a prisoner was not executed when some legitimate authority—such as a court—had ordered a stay or commutation, procedures are in place to make sure that communication with key courts, the Attorney General's Office, and the Governor are open at all times. For each execution during the time I was Counsel, therefore, I was on a live phone line to the prison and a warden would provide me with updates about the stage of the process we were in. The tone was dignified and solemn. But, the culmination of the process involved something that could not but bring home to me that I was playing a part in the killing of another human. The final safeguard before the

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[28] DEL. CONST. art. III, § 17 ("He or she shall take care that the laws be faithfully executed.").

[29] DEL. CODE ANN. tit. 29, § 8902(a) (2014) ("The Commissioner shall be appointed by the Governor, with the advice and consent of the Senate, and shall serve at the pleasure of the Governor.").

[30] DEL. CODE ANN. tit. 11, § 4209(f) (2014) grants the Governor the power to stay executions pending judicial review of conviction. Once judicial review is exhausted, the Governor, acting on his own, may grant a reprieve of up to six months. DEL. CONST. art. VII, § 1 ("The Governor shall have power to remit fines and forfeitures and to grant reprieves, commutations of sentence and pardons, except in cases of impeachment; but no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted except upon the recommendation in writing of a majority of the Board of Pardons after full hearing . . . .").

[31] DEL. CONST. art. VII, § 1 (limiting the Governor's pardoning power such that " . . . no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon the recommendation in writing of a majority of the Board of Pardons after full hearing . . .").

Department of Correction would begin the execution process involved the warden confirming with the Governor's Office that it should go ahead. As I remember it, that request always came in these words, "Mr. Strine, may we proceed?" I said yes to that question 7 times between 1993 and 1998.[32] At the end of each of these calls, a human being was dead. The feelings I and my colleagues had after these calls are hard to put into words. We were not present at the scene, so that made for abstraction. And, it was midnight (for reasons I will soon explain), which added to the clinical, numb, and hazy but nonetheless deeply disturbing nature of the experience.

Going home and getting up the next day to know that the prior day involved a killing, and realizing that I was not incapable of laughing or even enjoying the day made me feel guilty. The fact that most people in the community did not seem to have even focused on the reality that our state had killed a human in the darkness of early morning was also disquieting.

Three of the executions stick with me for different reasons, each in its own way illustrating the range of emotions that executions can evoke.

The first was the execution of Andre Deputy on June 23, 1994.[33] I remember that one not so much for anything involving Mr. Deputy specifically but for the absurd juxtaposition of the truly profane and the sacred. In June 1994, a bipartisan group of legislators instigated by track owners, who wanted a monopoly to print money through an exclusive license to operate slot machines in Delaware, had agreed to stop funding the state's education reform initiative, which had been started by Governor Castle and deepened by Governor Carper. This was a cynical pressure tactic to get Governor Carper to drop his opposition to slots. Not stopping there, this bipartisan group moved to stop worthy legislation on other fronts like ethics reform if the tracks did not get slots. These legislators weren't kidding and the mood in Legislative Hall was ugly. Governor Carper made the hard decision to agree to slots if he got his education budget and his legislative agenda passed intact and in its entirety, and if state taxpayers got a *much* higher share of the slots take than the tracks and their legislative allies had proposed.[34]

By this time, the decision had been made that executions would occur at a time least unsettling and least dangerous to prison guards and prisoners. The concern about daytime executions was that prisoners were about their business as inmates and could be understandably upset and restless when one of their fellow inmates was to be killed. Honestly, I also think many death penalty supporters did not want to face, or have the public face, the full reality of being complicit in a killing, whether the person killed was a murderer or not.

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[32] These seven times were March 3, 1993 (James Allen Red Dog); August 31, 1993 (Kenneth DeShields); June 23, 1994 (Andre Deputy); March 17, 1995 (Nelson Shelton); January 25, 1996 (Billy Bailey); January 30, 1996 (William Flamer); and April 19, 1996 (James Clark, Jr.). *See Death Row Executions*, *supra* note 20.

[33] Andre Deputy was sentenced to death following a murder conviction for his part in the brutal slayings of an elderly Harrington, Delaware, couple in 1979. *See id.*

[34] *Cf.* Terry Conway, *Slots Machines Help Revive Delaware Park*, PHILA. BUS. J. (Apr. 26, 1999), http://www.bizjournals.com/philadelphia/stories/1999/04/26/focus3.html?page=all (discussing the origins of the battle over slot machines in Delaware).

The move toward lethal injection was a similar move, as motivated by a desire to reduce opposition to the death penalty as it was to alleviate pain to the condemned. Regardless of reason, though, all executions since 1994 have been done in between the hours of 12:01 a.m. and 3:00 a.m.[35]

So, as midnight on the evening of June 22, 1994 grew near, and Mr. Deputy's execution was imminent, my colleague (now Secretary of State) Jeff Bullock and I were negotiating with the tracks to increase the state's share of slot machine revenues. At around 11:30 p.m., I had to break, handle the execution, and then return to the task of haggling with track operators about cutting up the take from bettors, many of whom I knew would be ill-positioned to waste their limited resources in rigged games that they could not realistically hope to win over time. All in all, not my most edifying day of public service.

And, proving that virtually any human endeavor has its comic side, was the execution of James Allen Red Dog in March of 1993. Red Dog was one nasty, cruel, son-of-a-bitch, a vicious killer by any standard.[36] And I shall never forget his last words. As I was on the phone, I had the prison official ask him his last words, Mr. Red Dog very audibly said words to this effect: "To my friends and supporters, I thank you very much. To the rest of you, you can kiss my ass."[37] As I noted, a warden would narrate what was going on for me. Thus, after Mr. Red Dog spoke these memorable words, a solemn, deadpan voice repeated them: "To my friends and supporters, I thank you very much. To the rest of you, you can kiss my ass."

Without doubt, though, the memory I will never erase involved the execution of Bill Bailey. In 1979, Bailey had brutally murdered Gilbert and Clara Lamberston, who were 80 and 73 years old, respectively.[38] He was sentenced to death in 1980, when the State's method of execution was hanging.[39] Bailey took every option he could to overturn his sentence, and it was not until 1996 that his options were exhausted.[40] As a matter of principle,

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[35] In April 1994, Governor Carper signed into law legislation that mandates executions be carried out between the hours of 12:01 a.m. and 3:00 a.m. 69 Del. Laws ch. 206 (1994) (codified at DEL. CODE ANN. tit. 11, § 4209(f)).

[36] James Allen Red Dog was sentenced to death following the murder of a 30-year-old motel night auditor. On the same night as that murder, Red Dog also abducted and repeatedly raped a Wilmington woman. *Death Row Executions*, *supra* note 20; Reid Kanaley, *He Cursed the Witnesses to Death: Murderer James Red Dog Is Executed in Delaware*, PHIL. INQUIRER, Mar. 4, 1993, at B1.

[37] Kanaley, *supra* note 36.

[38] *See Death Row Executions*, *supra* note 20; *see also* Gary Tuchman, *Delaware Holds First Hanging Since 1946*, CNN (Jan. 25, 1996), http://www.cnn.com/US/9601/hanging.

[39] Before 1986, the method of execution in Delaware was hanging. *Death Row Fact Sheet*, STATE OF DELAWARE, http://doc.delaware.gov/deathrow/factsheet.shtml (last visited Dec. 27, 2014); *see* DEL. CODE ANN. tit. 11, § 4209(f) (2014) ("Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death . . . .") (codifying 65 Del. Laws ch. 281, § 1 (1986)).

[40] Bailey appealed his conviction to the Delaware Supreme Court in 1983. His conviction and sentence were affirmed. Bailey v. State, 490 A.2d 158, 167 (Del. 1983) (affirming conviction); Bailey v. State, 503 A.2d 1210, 1214 (Del. 1984) (affirming sentence). In 1991, Bailey sought post-conviction relief in state court for ineffective assistance of counsel. His motion was denied. State v. Bailey, Nos. IK79-05-0085R1 through IK79-05-0088R1, IK79-07-

Bailey would not take any steps to cooperate in his own execution, and he refused to elect to die by lethal injection.[41] Because the State could not switch the method of execution after the fact, the Department of Correction had to build a gallows and, to quote my boyhood hero, our Vice President, "literally not figuratively," learn how to hang a man. This may sound easy, but it is not, and our correctional officers wanted to do the grim job as humanely as possible. To be as clear as this topic demands I be, if you drop the prisoner too far, you will decapitate him. If you do not drop him far enough, his neck will not break, and he will just strangle slowly. The Department wanted to drop him far enough that it would kill him quickly and cause him the least pain.

Careful study and visits to other states ensued. A gallows was built out back of one of the prison buildings, tucked largely out of sight, amidst what seemed to me to be the trash collection part of the premises. It felt as if the execution would occur in a setting akin to a junk yard or poorly maintained industrial park. Given the unusual nature of this execution, the Chief Deputy Attorney General and I toured the gallows. The time of year was cold, wet, and icy.[42] The stairs of the gallows were steep, narrow, and wooden, with a handrail. Not a good scene for a struggle, and a place where it was easy to envision a painful slip and fall.

The evening of the execution went normally, in keeping with the growing banality of the Delaware death penalty process. Early in these pre-execution calls, there were typically long periods of silence until close to the time when the execution was to be imposed right after midnight. But on this occasion, as I recall it, the warden came on the line a good 15 minutes before that time, and told me that Mr. Bailey was safely to the top of the gallows already, and asked me whether the execution could proceed. I grasped all of the reasons why, and they were compelling. For the reasons I described, the prison officials feared that Mr. Bailey might struggle on the steep steps to the gallows. It was a cold, wet night.[43] They wanted to get him to the top without incident before the witnesses were brought in. But once they had done that, another

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0202R1, and IK79-07-0203R1, 1991 WL 190294 (Del. Super. Ct. 1991), *aff'd*, 609 A.2d 668 (Del. 1992) (unpublished table decision). In 1993, Bailey petitioned the District Court in Delaware for federal habeas corpus review. Bailey v. Snyder, 855 F. Supp. 1392, 1396 (D. Del. 1993). The court denied his petition. *Id.* at 1413. Bailey's case was then appealed to the United States Court of Appeals for the Third Circuit, where it was combined with that of another death row prisoner from Delaware, because the two cases raised overlapping legal issues. Flamer v. Delaware, 68 F.3d 736, 740 (3d Cir. 1995) (en banc). The Third Circuit, en banc, affirmed the district court's denial of the writ, and the United States Supreme Court declined to hear the suit. *Id.*, *cert. denied*, 516 U.S. 1088 (1996).

[41] John Carlin, *The Heart To Grieve for All America's Billy Baileys*, INDEP., Jan. 24, 1996, at 9 ("I'm not a dog," he said. "I'm not going to let them put me to sleep.").

[42] The execution took place on January 25, 1996. *Death Row Executions*, *supra* note 20.

[43] The low temperature on January 25, 1996 (presumably reached between the hours of midnight and 3 a.m.) was 30 degrees Fahrenheit and there were 0.04 inches of rain or melted ice. NAT'L CLIMATIC DATA CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, http://www.ncdc.noaa.gov/cdo-web/datasets/GHCND/stations/GHCND:USC00072730/detail (last visited Nov. 29, 2014).

human impulse came into play. However brutal the crimes Mr. Bailey had committed in 1979 were, it was now 1996, and he had lived in the care of these prison officials for 17 years. At this stage, Mr. Bailey was a man they knew was facing imminent death by a gruesome means. The prison officials wanted to let him get it over with, and they wanted to be done with it themselves. Every compassionate, feeling, human part of me wanted to let them go ahead. But they and I knew the problem. The judicial order did not allow Bill Bailey to be executed at any time the State wanted. It provided that "you . . . between the hours of 12:01 a.m. and 3:00 a.m., shall be taken to some convenient place of private execution within the prison enclosure and then and there, in the presence of ten witnesses . . . shall be hanged by the neck until you are dead."[44] The warden and I discussed that, and I said that the execution could not proceed for a quarter of an hour, until 12:01.

The succeeding minutes were among the longest of my life. To his credit, Mr. Bailey made things as easy as possible on the prison officials, and stood, with dignity and without struggle, in the freezing night air on that shabby edifice of death and waited quietly to be dropped to a neck-snapping death. Although I could not give any other instruction lawfully, I could not help but feel responsible for every extra agonizing second of anxiety, fear, and anguish that every person on the top of that gallows experienced that evening.

III. EXECUTIVE CLEMENCY AND THE DEATH PENALTY

After I left Governor Carper's service and became a Vice Chancellor on the Court of Chancery, I had a respite from criminal law. Having been engaged with important criminal justice issues during my first eight and a half years of public service, I was now in a job that involved only civil cases.[45] An occasional prisoner suit came, but they were not post-conviction habeas proceedings. Then, in 2011, I was honored to be selected by Governor Markell and confirmed by the Senate to become Chancellor.

With the loss of the "Vice" in my title came a return to criminal justice issues in a major way. Under the Delaware Constitution, the Chancellor is one of the five members of the Board of Pardons.[46] As mentioned, the Board of Pardons is the body that has the constitutional authority to recommend that the Governor pardon crimes or commute sentences, and the Governor may

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[44] Modified Sentence Order, State v. Bailey, IK79-05-0087, IK79-05-0088 (Del. Super. Ct Dec. 11, 1995) (on file with the *Widener Law Review*).

[45] During the interregnum from public service I spent as a corporate litigator, I served as a junior lawyer on a team at Skadden, Arps led by Thomas Allingham II that represented *pro bono* a prisoner, James Riley, on death row in Delaware. After a decade of painstaking effort, Mr. Allingham and his team secured a ruling from the United States Court of Appeals for the Third Circuit, sitting en banc, that overturned Mr. Riley's death sentence, and ultimately Mr. Riley was sentenced to life. *See* Riley v. Taylor, 277 F.3d 261, 294 (3d Cir. 2001) (en banc) (vacating death sentence and remanding for retrial); *see also* Riley v. State, 867 A.2d 902 (Del. 2004) (unpublished table decision) (affirming the Superior Court's imposition of a life sentence on retrial).

[46] DEL. CONST. art. VII, § 2 ("The Board of Pardons shall be composed of the Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer, and Auditor of Accounts.").

only commute a death sentence upon the affirmative recommendation of the Board of Pardons.[47]

The role I had on the Board of Pardons is categorically distinct from that I had as Governor's Counsel. As Governor's Counsel, I was helping a Governor who was duty-bound to execute our state's laws faithfully, including our death penalty statute. Also as Governor's Counsel, I was an aide to the Governor in bringing to bear his own conscience on applications for pardons and commutations. By contrast, as a member of the Board of Pardons, I was authorized to bring my own conscience and judgment to bear on the applications for mercy we received.[48] The Board of Pardons and the Governor's concomitant power to grant pardons and commutations are an equitable supplement to our core criminal justice system. By Constitution, our state has authorized the Governor, with the recommendation of the Board, to relieve a criminal of the stigma of a crime through a pardon.[49] By Constitution, our state has also authorized the Governor, with the recommendation of the Board, to alleviate, by a grant of commutation, the punishment imposed by our criminal laws.

Each member of the Board of Pardons must bring to bear her own sense of when it is appropriate that these tools of mercy be deployed. But I can safely say that I participated in no session of the Board of Pardons where the Board acted as a super-appellate court focusing on whether the courts made mistakes in the applicants' cases. Quite to the contrary, the Board viewed its role as constitutionally distinct and as involving the members' application of his own conscience and sense of justice to the applicant's current circumstances, accepting as a basic premise that the conviction was justly imposed and that the sentence meted out was within the discretion of the court.[50] To put it bluntly, the Board of Pardons does not exist to determine whether the courts got it wrong. That is the role of appellate review.

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[47] For a recent discussion of the history and functioning of the Board of Pardons, *see* Lt. Gov. Matthew Denn, *Clemency in the State of Delaware: History and Proposals for Change*, 13 DEL. L. REV. 55, 56-61, 63 (2012).

[48] *See* State v. Sullivan, 740 A.2d 506, 507-08 (1999) (Ridgely, President J.) ("[T]he Constitution imposes no standards constraining the Board of Pardons or the Governor concerning the grant of clemency . . . ."). Several courts have found that the Governor must bring his conscience to bear on pardons decisions. *See, e.g.*, Montgomery v. Cleveland, 98 So. 111, 114 (Miss. 1923) ("[N]o authority other than [the Governor's] judgment and conscience can determine whether it is proper to grant or refuse the pardon . . . ."); People v. Howard, 865 N.E.2d 472, 484 (Ill. App. Ct. 2007) ("[The] exercise of the [pardon] power can be controlled only by [the Governor's] conscience and his sense of public duty."), *rev'd on other grounds*, 909 N.E.2d 724, 731-32 (Ill. 2009). That logic extends to the Board of Pardons, who must make the pardon recommendation to the Governor.

[49] DEL. CONST. art. VII, § 1 ("The Governor shall have power to . . . grant reprieves, commutations of sentence and pardons, except in cases of impeachment; but no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted except upon the recommendation in writing of a majority of the Board of Pardons after full hearing . . . .").

[50] Akhil Reed Amar has noted the importance of conscience in the President's exercise of his constitutional power to pardon prisoners for federal crimes:

The Board of Pardons is an expression of our state's embrace of a concept close to the heart of those of us who have served on the Court of Chancery: that of equity, of the idea that there are circumstances in which the strict application of the law should be tempered in the interests of justice.[51] Our Constitution applies this concept in the commutations context by allowing convicted criminals to seek a reduction in the harshness in their sentences. That power extends to asking the Board to recommend that a death sentence be commuted to a term in prison.

When Robert Gattis applied for a commutation in January 2012, I did not approach his application by putting my own conscience and sense of justice aside, and focusing solely on whether his death sentence had been imposed consistent with our Constitution. In my own judgment, that would have itself involved an abdication of legal duty. The courts of Delaware and the United States were entrusted to review his sentence for conformity with law. What the Delaware Constitution, by its creation of the Board of Pardons and its grant of the commutation power to the Governor, required was that the Board and Governor played their role in our system of law, a system that provided an equitable safety valve in the form of the commutation process.

Therefore, I understood my role to be to review Mr. Gattis's current circumstances, including the full record regarding his prior behavior and life, and to use my own conscience and sense of justice in determining whether to recommend the grant of a commutation. By constitutional design, I had only one vote. Four other important state officials—three of whom were elected by our citizens, and the fourth of whom serves at the pleasure of the Governor with the Senate's consent—would also have a say.[52] By this design, any commutation had to command the support of three state officials with a high degree of accountability and sensitivity to the views of our citizens.

> Assuming that the pardon issues in good faith—that it springs from the president's conscience and not, for example, from a bribe—no court could ever properly undo the pardon. Nor should any member of Congress think it appropriate to impeach and convict the president for the good-faith exercise of a power that was precisely designed to focus one honorable man's conscience and to invite him in the name of that conscience to just say no to bodily punishment.

AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 429 (2012); *see also* U.S. CONST. art. II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

[51] The executive power of clemency has been likened to a court's power to do equity. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES 397 (4th ed. 1803) (describing the ruler who grants clemency as "holding a court of equity in his own breast"). The analogy to a court of equity suggests a departure from law, a court that is not "tied to rules," but rather is a court of conscience. *Cf.* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 60, 67 (4th ed. 1918) (noting that equity arose out of the "arbitrary and harsh nature of the common law," and that a court will do equity when the law fails to provide "justice"); Denn, *supra* note 47, at 66-67.

[52] The Lieutenant Governor, the Auditor of Accounts, and the State Treasurer are elected. The Secretary of State is appointed by the Governor and confirmed by the Senate.

Mr. Gattis's case was a hard one. He had gone to the house of a former girlfriend, Shirley Slay, and put a bullet into her head from only inches away.[53] His crime followed years of stalking and brutality toward her, and threats to her family. Gattis had been given many chances to learn his lesson and he never did. Nor did he seize chances for treatment to address his mental health issues.[54]

When Mr. Gattis was prosecuted, he lied about the crime and forced his lawyers to make totally implausible arguments that would not endear him to the jury or the judge. But his lawyers did the best they could and put on evidence about the horrible circumstances in which Mr. Gattis was raised, circumstances in which he was a victim of serious physical and emotional abuse.[55]

In prison, Mr. Gattis was no angel, but he was a productive member of the prison community, and no guard viewed him as a threat. He had come some way toward becoming a responsible person, and he had taken steps to establish a relationship with his sons. In a very begrudging way, he also accepted more responsibility for his crime.

Without betraying any confidences about my fellow members' views, each of us viewed the case as a difficult one for various reasons. Mr. Gattis's passionate advocates crossed some lines they should not have, by minimizing the inexcusable nature of his crimes and the years of abuse and terror he inflicted on his victim before killing her, and by ignoring Mr. Gattis's failure to admit that he intentionally killed Ms. Slay. Indeed, it was not until two and a half weeks before his execution was scheduled to take place that Mr. Gattis finally admitted that he intentionally shot Ms. Slay, some twenty-two years after the fact.[56]

His advocates also relied upon new accusations of sexual abuse that Mr. Gattis leveled against dead family members. Although Mr. Gattis had tried to use his abusive childhood as a mitigating factor to avoid a death sentence from the get-go, he came up with new stories about child sexual abuse as the

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[53] For the facts, see State v. Gattis, 1992 WL 358030, at *3-4 (Del. Super. Ct. Oct. 29, 2009).

[54] *See* State's Ans. in Opp'n, *In re* Robert Allen Gattis, at 23 (Jan. 6, 2012) (on file with author) ("He [Gattis] had, either through the military, through medical intervention, or by court order, opportunities to seek assistance for his issues. He chose time and again not to avail himself of these chances."); *see also Gattis*, 1992 WL 358030, at *8 (noting that "Gattis had been ordered to undergo mental health counseling and substance abuse evaluation and treatment" as part of his probation for a previous crime).

[55] *See Board of Pardons Recommendation to Governor Markell Regarding Clemency of Robert Gattis*, STATE OF DEL. (Jan. 15, 2012), http://news.delaware.gov/2012/01/15/board-of-pardons-recommendation-regarding-clemency-of-robert-gattis [hereinafter *Board of Pardons Recommendation*].

[56] Mr. Gattis claimed that Ms. Slay had been killed by a bullet that discharged from his gun accidentally up until the filing of his petition for clemency on January 3, 2012. He first admitted that he intentionally murdered Ms. Slay in his hearing before the parole board on January 5, 2012. Mr. Gattis was due to be executed on January 20, 2012. Pet. for Commutation of Death Sentence at 1, 11 (Jan. 3, 2012) (on file with author); State's Ans. in Opp'n, *supra* note 54, at 9.

potential for being executed turned to an imminent probability.[57] Everyone on the Board, I think, rightly feared that the serious issue of child sexual abuse would risk trivialization if commutation applicants started routinely coming up with impossible to corroborate stories of distant sexual abuse by deceased persons as a way of arguing for a different sentence. The Board is not an investigative body and is ill-positioned to peer into events so distant.

It is not appropriate to go into all the considerations that went into the Board's recommendation. By tradition, the Board speaks as a unit and not individually, and we agreed to respect that tradition in this case by putting out a single explanatory decision. That decision reads in substantial part as follows:

> By a four to one vote, the Board is recommending that Mr. Gattis's death sentence be commuted, provided that he agrees to spend the rest of his natural life in prison with no further appeals for relief.
>
> . . .
>
> The crimes committed by Mr. Gattis were horrific and we find no fault in how this case was handled by the prosecutors and judges involved. We also believe that the family of the victim has good reasons to argue that the sentence of death should be imposed.
>
> State prosecutors and the Slay family are correct to harbor suspicions about some of the testimony on Mr. Gattis's background. The Board weighed heavily that Mr. Gattis did not come forward with the full extent of his sexual abuse until 2009 despite having used elements of a child abuse defense twenty years earlier. In considering the full record, we accept that if even half of what has been submitted about Mr. Gattis's childhood is true, he was victimized physically, emotionally, and sexually by family members who owed him a duty of care. There is evidence in the record that Mr. Gattis complained to medical professionals of mental illness and involuntary violent impulses over a year before Ms. Slay's murder. Although Mr. Gattis knew right from wrong and was guilty of first degree murder, we, in the exercise of conscience required of us as members of this Board, believe that these are sufficiently mitigating facts to warrant consideration for clemency.

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[57] *See Board of Pardons Recommendation*, *supra* note 55 (noting that "[t]he Board weighed heavily that Mr. Gattis did not come forward with the full extent of his sexual abuse until 2009 despite having used elements of a child abuse defense twenty years earlier."); *see also Statement of Governor Jack Markell Regarding the Commutation of Sentence of Robert Gattis*, STATE OF DEL. (Jan. 17, 2012), http://news.delaware.gov/2012/01/17/statement-of-governor-jack-markell-regarding-the-commutation-of-sentence-of-robert-gattis (stating that "[e]ven if one were to discount certain of the allegations of sexual abuse recently alleged by Mr. Gattis (as the Board did), the fact remains that Mr. Gattis's family background is among the most troubling I have encountered.").

> Three other factors, not specific to the Gattis case alone, also weigh heavily in the decisions of Board members. For all four of us, we are concerned that our death penalty statute permits the imposition of death on the basis of a non-unanimous verdict. In the Gattis case, two jurors who heard the trial in its entirety twenty years ago, both of whom were prepared to impose the death penalty if appropriate, would not do so.
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> Second, some of us share a concern about the disparity in the sentences that are meted out in serious murder cases. In our time on the Board of Pardons, we have considered other clemency requests arising from domestic disputes that resulted in brutal murders similar in some respects to the case before us. Though the crimes of Mr. Gattis are more serious, in those other cases, persons convicted not only were permitted to live but will likely one day be released from prison. The sentencing disparity in these cases has become too great and offends a moral sense of proportionality.
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> ….
>
> We also take into account the reality that Mr. Gattis is not an unusually problematic prisoner, although he is far from a model one. Within the structured setting of a prison, one thing emerges indisputably from the record: Mr. Gattis does not pose a threat of violence within the prison setting and is not regarded as dangerous by the Department of Correction. He appears to be viewed as a constructive prisoner by some of the correctional employees who have worked with him over the years, and is not a security threat.
>
> The recommendation for clemency was a very close call for several of us. One factor that made the decision so difficult is that Mr. Gattis did not take full responsibility for intentionally killing Ms. Slay until earlier this month, leaving doubt as to his contrition. Given that, and to ensure that the Slay family and the public do not have to go through this painful process again, we condition our recommendation for mercy, on the following: 1) Mr. Gattis shall forever drop all legal challenges to his conviction and sentence, as commuted; 2) Mr. Gattis shall forever waive any right to present a future commutation or pardon request . . . .[58]

I want to focus on one point made in the Board's decision. My position on the case was distinct in one sense from that of my fellow members. I felt obliged to state this distinct position to explain why I supported a commutation because it was critical to my vote. But I did not want my fellow members to have to bear the brunt of my position. Thus, we considered whether we should put out individual explanations of our votes. In the end, we agreed that a single statement would be best, but the statement would

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[58] *Board of Pardons Recommendation*, *supra* note 55.

indicate the key reasons that motivated particular members of the four of us who voted to recommend the commutation. My distinct position, the third of three factors that we collectively alluded to in justifying our recommendation to commute Mr. Gattis's death sentence, was noted as follows:

> [O]ne of us believes even more fundamentally that once a prisoner has been incapacitated and poses no threat of future harm to society, then there is no moral justification for taking his life. When the taking of life is not required as a matter of self-defense, that member believes that one cannot ethically or morally take that act.[59]

Now, I faced some criticism for not talking to the media about the decision, as if the courageous position was to talk to Action News. My reticence was not in any way designed to hide my position on whether Mr. Gattis's sentence should be commuted. My position on that was clear from the vote itself, given the dissenter's public statements. Rather, I believed that the Board's tradition of putting out its official position on applications and standing behind it without further comment makes sense, for a lot of reasons, including some involving personal security of the members, as you might understand. In the case of the *Gattis* commutation, some of us also viewed talking to the press about the decision as a complicating factor for the Governor, who had to make the ultimate call. But some members did talk to the press.[60] Therefore, I have since felt totally free to talk about the basis for my vote and have revealed that I was the "one," the guy who grounded his vote, in part, on an essential belief that killing an incarcerated inmate who is not considered a threat to his captors is wrong.

I am not at all uncomfortable revealing that, and I think it in keeping with my constitutional role on the Board of Pardons to bring my personal conscience and sense of justice to bear.[61] Questions like these are difficult. For example, I was extremely focused on whether Mr. Gattis was viewed by his captors as a threat to their personal safety. Perhaps the hardest case for a death penalty opponent is one involving the murder of a prison guard because, when an inmate kills his captor, the argument that he should get yet another chance to kill an innocent person obliged to protect society is at its weakest and the self-defense argument for society is at its zenith.[62] These

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[59] *Board of Pardons Recommendation*, *supra* note 55.

[60] *See* Ben Simmoneau, *Debate Rages in Delaware Ahead of Next Scheduled Execution*, CBS PHILLY (Jan. 16, 2012), http://philadelphia.cbslocal.com/2012/01/16/debates-rages-in-delaware-ahead-of-next-scheduled-execution.

[61] *See supra* note 48.

[62] For example, this is the only circumstance in which the Roman Catholic Church condones the use of the death penalty. In 1995, Pope John Paul II wrote in *Evangelium Vitae*:

> It is clear that . . . *the nature and extent of the punishment* must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society.

are deep moral questions about which persons of good faith can disagree. The Board of Pardons members are, by Constitution, expected and entitled to ask them and to use their answers as a guide in meting out decisions.[63] So, too, is the Governor, who has the profoundly important task of making the final decisions about these difficult matters. In the case of Robert Gattis, the Governor reflected on the case and made the tough decision to commute the sentence to life without parole.

IV. APPLYING THE DEATH PENALTY AS A JUDGE

I now move on to the third role in which I have had to be involved in the death penalty: as an appellate judge. After the *Gattis* case, I thought that my involvement with the death penalty would end for a while, but I was wrong. A few months after the *Gattis* commutation hearing, the Delaware Supreme Court asked me to participate in its review of the appeal of Derek Powell, who had been sentenced to death for killing a Georgetown, Delaware police officer, Chad Spicer, on September 1, 2009.[64] Under the Delaware Constitution, a member of the Court of Chancery can sit by designation on the state's Supreme Court in an appeal from another Court, if a member of the Delaware Supreme Court is unavailable.[65]

Mr. Powell sought to have his death sentence overturned. Having just voted to commute a death sentence based on my conscientious view that the death penalty is wrong for a safely incarcerated prisoner, could I sit as an appellate judge and do my job? For reasons I have explained, I do not consider Delaware's embrace of the death penalty as rendering it illegitimate. Although I do not support the death penalty statute, my job as a judge is not to apply the law faithfully only in cases where I personally favor the law. If every judge did that, there would not be genuine equity, because there would not be the rule of law applicable to everyone, there would simply be law according to the caprice of each judge.[66]

POPE JOHN PAUL II, EVANGELIUM VITAE: ON THE VALUE AND INVIOLABILITY OF HUMAN LIFE ¶ 56 (1995). The Pope went on to note that "[t]oday . . . as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent." *Id.*

[63] DEL. CONST. art. VII, § 1 ("[N]o pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon the recommendation in writing of a majority of the Board of Pardons *after full hearing* . . . .") (emphasis added).

[64] Powell v. State, 49 A.3d 1090, 1092-93 (Del. 2012).

[65] DEL. CONST. art. IV, § 12; DEL. SUPR. CT. RR. 2, 4.

[66] As Blackstone observed:

> And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will.

As an appellate judge in a death penalty case, my role would be to consider the legal arguments made by the parties, and in particular, to consider whether the trial judge was within his legal discretion in imposing the death penalty.[67] As a former trial judge, I take very seriously the difference between the judge who bears the duty to make the actual call about the facts of a case and determine how it should be decided and the more limited review of that decision by the appellate court. I appreciate when an appellate court respects how difficult a job a trial judge has in deciding how a particular case should come out, and stays within its functional role in our judicial system. The role of the appellate court is not to decide whether, in reviewing a criminal sentence, it would have imposed the same sentence as the trial judge. Rather, in our system, an appellate court reviews the record to ensure that the trial court accurately applied the law and that his sentence was within the range that the law permits for the crime in question.[68] So long as the trial judge imposed a sentence within his legal discretion and had a sound basis in the factual record to do so, the trial judge's decision must be affirmed.

The primary question in *State v. Powell* was whether the trial judge was correct in concluding that Powell's crime was of a nature that his sentence was proportionate. Powell's counsel argued that intentionally shooting a police officer in order to escape arrest was not a crime that should warrant the death penalty.[69] The record revealed that Powell was fleeing the scene of a crime where he had attempted to shoot a man he was engaged in a conspiracy to rob, and the police were pursuing him. The driver of the car that Powell was in testified at trial that he told Powell, "I'm ready to stop now," and Powell replied, "Well, if you stop the car, I'm going to shoot at the cops."[70] As was explained in Justice Jacobs's excellent decision in the case, the Supreme Court unanimously held, with me voting with my colleagues, that this crime was one that, under the proportionality review of our statute, was eligible for the death penalty. In particular, the Court took note of the fact that Officer Spicer, as

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4 WILLIAM BLACKSTONE, COMMENTARIES 440 (4th ed. 1803). Blackstone expressed his relief that equity had been made into a "regular science," such that "it may be known what remedy a suitor is entitled to expect . . . as readily and with as much precision in a court of equity as in a court of law." *Id.* at 441.

[67] *See* DEL. CODE ANN. tit. 11, § 4209(g), (h) (2014) (setting out the standard for review of the death penalty by the Delaware Supreme Court).

[68] This is true at both federal and state levels. *See* Gall v. United States, 552 U.S. 38, 46 (2007) ("As a result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable.' [It is] pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.") (citations omitted); Fink v. State, 817 A.2d 781, 790 (Del. 2003) ("This Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard.").

[69] The jury found that Powell committed the murder "for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody." State v. Powell, 2011 WL 2041183, at *13 (Del. Super. Ct. May 20, 2011) (quoting DEL. CODE ANN., tit. 11, § 4209(e)(1)(b) (2011)). Powell's counsel argued that Powell had acted less culpably than other murderers sentenced to death in Delaware, and that the death penalty should thus be vacated. Op. Br. 31-37, Powell v. State, 49 A3d 1090 (Del. Jan. 3, 2012) (Nos. 266, 2011 & 270, 2011).

[70] Ans. Br. at 10, *Powell*, 49 A.3d 1090 (Nos. 266, 2011 & 270, 2011).

society's agent, had a duty to arrest Powell, that Officer Spicer was required to put the public's interest ahead of his own safety, and that Powell intentionally shot at Officer Spicer rather than surrender and face arrest for his prior acts.[71] Powell had already shot at one man that day. If a society is going to have a death penalty for first degree murder, the Court did not understand how it was unfairly disproportionate to apply to a person who intentionally shot at a law enforcement officer in order to escape justice.[72] To put it in plain terms, the decision to intentionally shoot at a law enforcement officer in order to escape arrest is a decision to shoot at society itself.[73]

In participating as a member of the Supreme Court, I considered whether I should append, as a short concurring opinion, a statement indicating that I personally opposed the death penalty. Many judges over the years have done this, and I respect their sincerity.[74] And some judges always *dissent* when faced with a death penalty case; and I respect their sincerity also.[75] But I did not add a concurrence, much less a dissent, for a reason that I believe is important. I do not view it as the role of a judge to comment on the wisdom of the positive law. The judge's application of the law is not a statement in any way of the judge's personal belief that the law is wise.[76] Had I therefore appended a statement of personal belief, I would have been doing something not true to the judicial role and unfair to my judicial colleagues. Many appellate judges who do not support the death penalty have affirmed death sentences because they believed that is what the law required, and it was their duty to apply the law, not their own personal preferences about what the law should be.[77] If

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[71] *Powell*, 49 A.3d at 1105, 1107.

[72] *Id.* at 1106-08.

[73] *See, e.g.*, Roberts v. Louisiana, 431 U.S. 633, 647 (1977) (Rehnquist, J., dissenting). In urging the Supreme Court to uphold mandatory life sentences for the killing of a police officer, Justice Rehnquist noted that:

> [p]olicemen are both symbols and outriders of our ordered society, and they literally risk their lives in an effort to preserve it. To a degree unequaled in the ordinary first-degree murder . . . the State therefore has an interest in making unmistakably clear that those who are convicted of deliberately killing police officers acting in the line of duty be forewarned that punishment, in the form of death, will be inexorable.

Id. Justice Rehnquist invoked Locke's social contract: "In all murder cases, and of course this one, the State has an interest in protecting its citizens from such ultimate attacks; this surely is at the core of the Lockean 'social contract' idea." *Id.* at 646.

[74] *See* Ori Lev, *Personal Morality and Judicial Decision-Making in the Death Penalty Context*, 11 J.L. & RELIGION 637, 648-64, 676-83 (1994) (discussing death penalty concurrences of U.S. Supreme Court Associate Justice Blackmun and North Carolina Chief Justice Exum).

[75] *See generally* MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL (1996) (discussing the "automatic" dissents of Supreme Court Justices William Brennan and Thurgood Marshall in cases addressing the constitutionality of the death penalty).

[76] *See supra* note 6.

[77] The dissenting opinions in Furman v. Georgia, 408 U.S. 238 (1972), which imposed a moratorium on the death penalty, and the majority and concurring opinions in Gregg v. Georgia, 428 U.S. 153 (1976), which lifted that moratorium, are examples of this. In *Furman*,

certain judges go around distancing themselves from the laws they apply, they unavoidably suggest that other judges who do not engage in such statements normatively support the substance of the law. The resulting incentive scheme is for all judges to regularly comment on the merit or lack of merit of the laws they are supposed to apply. In my view, that would be unseemly and out of keeping with the role of our judiciary. For example, if I had insisted, as was my right, to append a concurrence in *Powell v. State* about my own views of the death penalty, that would have put pressure on all my colleagues to do the same. What part of my contract with the state as a judge employed me to use judicial decisions as a megaphone for my own views about topics appropriately the subject of legislative debate?

In the case of the death penalty in particular, judges who oppose it are poorly positioned to use judicial opinions to claim that capital punishment is inconsistent with our basic constitutional design. Why? Because both our federal and state constitutions fundamentally accept and assume the existence of capital punishment. The Fifth Amendment to the United States Constitution provides that no person may be put to death unless indicted by a grand jury, and that no person shall be "twice put in jeopardy of *life* or limb," "nor deprived of *life*, liberty, or property, without due process of law . . ."[78] The Fourteenth Amendment, guaranteeing equal protections of the laws, and requiring states to respect the due process rights of citizens, did so by providing that "nor shall any State deprive any person of *life*, liberty, or property, without due process of law."[79] In other words, the key constitutional protection is that the death penalty cannot be imposed without due process of law. The idea that the Federal Constitution bars capital punishment *per se* is ruled out by any faithful reading of this text.[80] Similarly, the Delaware Constitution assumes the existence of the death penalty. Like its federal counterpart, it provides that no person may be "for the same offense twice put in jeopardy of *life* or limb,"[81] and also establishes that there is no right to bail for prisoners held "for capital offenses."[82] And, using a traditional synonym for "due process of law,"[83] it provides that no person shall "be

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Chief Justice Burger, Justice Powell, and Justice Blackmun all criticized the death penalty as a matter of policy, but in *Gregg*, they all voted to reinstate it. *See generally* James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment*, 107 COLUM. L. REV. 1, 23-26 (2007) (discussing *Furman* and *Gregg*).

[78] U.S. CONST. amend. V (emphasis added).

[79] U.S. CONST. amend. XIV.

[80] Some distinguished judges have engaged in contrived reasoning to avoid this conclusion. *See, e.g.*, *Gregg*, 428 U.S. at 229 (Brennan, J., dissenting) ("My opinion in *Furman v. Georgia* concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution.").

[81] DEL. CONST. art. 1, § 8.

[82] DEL. CONST. art. 1, § 12.

[83] *See, e.g., In re* Winship, 397 U.S. 358, 378 (1970) ("'Due process of law' was originally used as a shorthand expression for governmental proceedings according to the 'law of the land' as it existed at the time of those proceedings. Both phrases are derived from the laws of England and have traditionally been regarded as meaning the same thing.").

deprived of *life*, liberty or property, unless by the judgment of his or her peers or by the law of the land."[84]

For these and other reasons, I did not believe an appellate decision in a particular death penalty case was the place for a recitation of my personal beliefs about the death penalty. So I was silent, and the reader of the decision in *Powell v. State* would know only one key thing about me by reading that decision, which is that I embraced the lucid decision written by Justice Jacobs as a sound resolution of the case. The end result was that the sentence of death for Mr. Powell was affirmed. Thus, within the same year, the same person voted to commute a death sentence because he thought it was unjust, and voted to affirm a death sentence. The reason for the distinction is important. The same person was not in fact the same person. In the former case, the person was a member of the Board of Pardons, charged by the Delaware Constitution with applying his own conscience to the commutation application. In the latter case, the person was a member of the Delaware Supreme Court, charged by the state constitution with applying the law with fidelity and determining whether a death sentence was applied lawfully by a trial judge, based on the factual record before him.[85]

V. CONCLUSION

Although the coincidence in timing of these matters was unusual, I do not claim that my experiences illustrate any unique capacity for a disciplined approach to recognizing one's specific duty. As a judge on Delaware's bipartisan judiciary,[86] I am heartened to be part of a large group of public servants who work very hard to fulfill their distinct roles. I know that all of them have situations when they wish the law were other than it was and when it is personally difficult to be the human who, in the name of our state, imposes a sentence or a judgment on someone in a situation where the judge, if she had her druthers, would not.

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[84] DEL. CONST. art. 1, § 7 (emphasis added).

[85] After this lecture was originally delivered and before this article was published, I participated in the review of two more death penalty cases as an appellate judge. In the first, Ploof v. State, 75 A.3d 840, 868 (Del. 2013), I authored a dissenting opinion and voted to overturn the sentence. In the second, Cooke v. State, 97 A.3d 513, 518, 558 (Del. 2014), I authored the unanimous opinion that affirmed the sentence.[85] Consistent with my views on the appropriate role of an appellate judge, each of these decisions turned on the case-specific facts, and not on my personal opposition to the death penalty.

[86] *See* DEL. CONST. art. IV, § 3 ("[T]hree of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party . . . . [A]t any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.").

But it is that fidelity to duty that makes our system of government both more legitimate and accountable. When public officials recognize their duty to fulfill their specific role and put that duty ahead of self-interest, they promote the public's confidence and respect in their government, and thus in its legitimacy. As critical, when public officials respect the authority of those who are elected to make and execute the laws, they make those elected officials more accountable to the public and less able to duck responsibility. Rather than obscuring who is responsible, action that respects the lawmaking authority of the legislative branch and the executive authority of the executive branch makes citizens understand the importance of their right to vote and to petition their government to pass wise laws and repeal harmful ones.

Judges should not depart from the rule of law to impose their own views on a case, no matter how strongly they feel about the outcome. This principle applies in all matters, even ones of life and death. Fidelity to duty has a personal cost, but our experiment in self-government is a worthy one that has yielded great improvements in social justice, and I am confident that we will become an even more just society. But we cannot escape the need to do that the right way, by engaging in a vigorous debate about the just course of action and electing legislators who will make that course of action the law of our society.