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Eleventh Circuit Conference

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REMARKS

of

LEWIS F. POWELL, JR.

ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

ELEVENTH CIRCUIT CONFERENCE



Savannah, Georgia

May 8-10, 1983





It has become fashionable, even for Supreme Court Justices, to talk about workload. As District and Court of Appeals Judges know as much about this subject as we do—perhaps a good deal more in some respects—I will try to be restrained in what I say on the subject.

At the ABA meeting in San Francisco last summer, Byron White, John Stevens and I—independently and without foreknowledge of the other talks—each suggested reforms. Since then, Justices Brennan and O'Connor also have joined in.

The Chief Justice's Proposal

At the ABA February meeting the Chief Justice made a specific recommendation. Though this audience is familiar with it, I think the proposal merits a brief discussion. An Act of Congress would establish a temporary special court associated with the United States Court of Appeals for the Federal Circuit. Its members would be drawn from a panel made up of two judges from each of the 13 Circuits, a total panel of 26. In turn, this court would sit in panels of, say, seven or nine members drawn from the larger panel. Its membership would rotate at relatively short intervals so that its members would not be in Washington for extended periods of time.

I note parenthetically that if my wife Jo is typical, the spouses of judges serving on the special court would find the cultural advantages—and the beauty of the city—a pleasant interlude, provided—of course—they were free to join their judges.

The special court's jurisdiction would be defined, probably limited to resolving conflicts among the Circuits. It is estimated that this would relieve the Supreme Court of perhaps 35 to 50 argued cases each Term. This would be a significant benefit to my Court. In view of the complexity and difficulty of the 183 argued cases this Term, we cannot—in my opinion—give each of them the meticulous care and consideration that they merit.

Today, the 9th of May, we have more than a hundred argued cases not yet disposed of. The crunch for the remain-

der of the Term is likely to result in opinions of inferior quality, even though the judgments will have been maturely considered. This tends also to increase the amount of separate writing by Justices, as the time for working out differences will be limited. Eliminating the necessity to resolve circuit conflicts, therefore, would be welcomed.

A further benefit of the Chief Justice's suggestion is that conflicts among the Circuits probably would be resolved more promptly. Often we decline to take a case where the conflict is new, and we think it may be resolved at the Circuit Court level. We also have a self-serving phrase: We characterize a conflict as "tolerable"—for the time being. This leaves doubt as to what the law is, and produces additional litigation.

My understanding is that a bill has been introduced in the Judiciary Committees, though I have not read it. There are problems, of course, including a definition of what constitutes a "Circuit conflict". But I would not think these are insoluble.

I therefore support the Chief Justice's proposal. It is experimental. It would not—except in the most limited sense—create another tier of federal courts. The special court would be composed only of Circuit Judges, and no administrative bureaucracy would be created.

Bureaucratized?

So much for the Chief Justice's proposal. In my talk last summer I addressed primarily the question whether the litigation explosion threatens the judging function with being bureaucratized. I do not think it fair to say at this time that judging has reached this unhappy state.¹

¹See articles by Judge Rubin, Judge Edwards and Professor Vining: Rubin, *Bureaucratization of the Federal Court: The Tension Between Justice and Efficiency*, 55 *Notre Dame Lawyer* 648 (1980); Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 *Mich. L. Rev.* 259 (1981); Vining, *Justice, Bureaucracy, and Legal Method*, 80 *Mich. L. Rev.* 248 (1981).

I believe that the great majority of judges (state and federal) personally perform the essential judging functions and do so conscientiously. Typically, they work longer hours, with shorter real vacations, than even the busy practitioner. I estimated recently that for ten months in the year, I average at least 60 hours per week. This is considerably more than my chargeable hours ever were at the peak of a large and demanding law practice. Justices of my Court do have a respite in July and August, but even then most of us try to keep roughly abreast of the cert petitions and commence reading briefs for the new Term.

Professor Howard of Virginia has estimated that "the cost of legal services accounts for 2% of America's gross national product, more than the entire steel industry".² He expressed concern about the extent to which we are a "litigious" society. This needs no documentation to an audience of judges and lawyers. Civil filings in U. S. District Courts totaled 206,193 cases for the year ended June 30, 1982, a 14.2% increase over the prior year.

If this rate of increase continues, I have no doubt that the quality of judging will deteriorate—whether one characterizes it as bureaucratized or not. Simply creating additional judges—while no doubt helpful—will not solve the basic problem resulting from this rush of lawyers and litigants to resolve all sorts of rights and claims in court.

The Fundamental Need

As I stated in my talk to the Division of Judicial Administration last August, "the fundamental need is to reduce the rate of flow of cases into the district courts."³ This flow burdens the entire system. Action by Congress, long overdue, could go far to transfer much of this litigation to state courts, many of which are not overburdened.

²Howard, *A Litigation Society?*, *Wilson Quarterly*, Summer 1981, p. 98.

³*Are the Federal Courts Becoming Bureaucracies?* 68 *A.B.A.J.* 1370, 1371 (1982).

Almost 50,000 of the cases filed in District Court last year (ended June 30) were based on diversity jurisdiction—nearly 25% of total filings. As Erwin Griswold recently has said, this jurisdiction is an “anachronism” of the federal system.⁴ As a practicing lawyer, I welcomed the option of diversity jurisdiction, and the bar generally still opposes its elimination. I believe that most lawyers, however, when they understand that the quality and balance of our system of justice is at issue, will accept this necessary change.

As you know from what I have said previously at our Conferences, I consider the abuse of § 1983 to be intolerable. Some 16,000 state prisoner § 1983 suits were filed in the past year. The number increases each year.⁵ Congress should at least require exhaustion of state remedies—as the Fifth Circuit held in a constructive opinion by Judge Roney.⁶ I must acknowledge that courts, and particularly the Supreme Court, are primarily responsible for the extensions of § 1983 that have led to its abuse and misuse.

I also have mentioned here that appropriate congressional action is needed to curb repetitive recourse to federal habeas corpus jurisdiction to review state court criminal convictions. In my view, § 2254 review should be limited to cases of manifest injustice, where the issue is guilt or innocence.

Eliminating diversity jurisdiction, requiring exhaustion of state remedies in § 1983 prisoner cases, and limiting § 2254 review to cases of possible substantive injustice, could substantially reduce the flow of cases into the federal system.

⁴Griswold, Brendan F. Brown Lecture, Catholic University of America Law School, March 23, 1983, p. 14.

⁵The enactment of 42 U. S. C. § 1988, authorizing attorneys's fees to prevailing parties, has significantly encouraged § 1983 and other civil rights litigation.

⁶*Patsy v. Florida International University*, 634 F. 2d 900 (CA5 1981) (en banc), rev'd, — U. S. — (1982). As I have noted previously, the statute enacted by Congress in 1978, 42 U. S. C. § 1997e, “is a hedged and limited requirement for prior exhaustion and to date has been wholly ineffectual.” *Are the Federal Courts Becoming Bureaucracies?* 68 A.B.A.J. 1370, 1371 (1982).

These three sources of federal jurisdiction constitute nearly 40% of all district court civil filings.

Other Reforms

There is reason to believe that pressures at the Court of Appeals level, at least in most Circuits, are as demanding as those at the Supreme Court. Modification of federal court jurisdiction, as has been suggested, would materially benefit all federal courts. An additional reform at the Court of Appeals level that merits serious consideration is authorizing discretionary review of District Court judgments in most cases.

I also think, as often has been suggested, that additional specialized courts should be created. I know of no reason why it would not be desirable to have a United States Court of Tax Appeals the decisions of which would be final, with limited exceptions. Professor Griswold has suggested a United States Court of Criminal Appeals, with jurisdiction to review appeals from state courts in criminal cases and decisions of federal District Courts in habeas corpus proceedings. There are precedents for specialized courts. They have obvious advantages that the addition of more judges to the traditional federal courts simply do not offer.

In sum, though all of the foregoing are familiar suggestions, it seems to me that each has sufficient merit to justify thoughtful and prompt consideration by the organizations of our profession, by the Judicial Conference, and certainly by Congress.

Capital Cases

As capital cases accumulate, they add a new dimension to the problem of repetitive litigation. I will address this only in the most conclusory terms. *Gregg v. Georgia* decided that capital punishment is constitutional. Some 37 states have authorized it. Murders continue, many of incredible cruelty and brutality, as mindless killings increase in much of the world. We now have more than 1,000 convicted persons on

death row, an intolerable situation.

Many of these persons were convicted five and six years ago. Their cases of repetitive review move sluggishly through our dual system. We have found no effective way to assure careful and fair and yet expeditious and final review.

So far this Term, we have granted and heard arguments in four capital cases, and have agreed to hear a fifth next Term. We have received 28 applications for stays of execution, about half of which have come at the eleventh hour.

The most recent example is the *Evans* case from Alabama. Evans was found guilty and sentenced to die in 1977. No one seriously suggested his innocence or that under existing law capital punishment was not a merited sentence. Resourceful counsel, six months after federal habeas seemed to have been exhausted, sought a stay of execution from me as Circuit Justice. Filing of the application was delayed for two months after Evans' motion for a new sentencing hearing was denied. Filed late on April 19, it reached my Chambers on the morning of the 20th, 40 hours before scheduled execution time.

With the concurrence of six others members of the Court, I denied the application at 5:45 p.m., on April 21. Approximately twenty minutes later, and with no notice to us, the same counsel filed a new petition for a writ of habeas corpus in the District Court for the Southern District of Alabama. The petition raised numerous grounds resolved in the prior habeas proceedings, and also purported to identify "new" grounds. This belated filing occurred less than seven hours before scheduled execution time. After careful consideration by all nine of us, we granted the state's application to dissolve and vacate the stay.

Counsel offered no explanation for the timing of these applications.

I was reminded of the statement of a panel of your Court in *Brooks v. Francis*, in the Per Curiam opinion of January 12, 1983.⁷

⁷The panel was composed of Judges Hill, Kravitch, and Henderson.

“Once again . . . a panel of this court is confronted at the eleventh hour with numerous and extensive papers submitting an application for a stay of the execution of the death penalty. The members of the panel have put aside all other court business and have sought to address the application, motions, supporting memoranda, responses, and more fulsome documents heretofore submitted to the district court.”

Perhaps counsel should not be criticized for taking every advantage of a system that irrationally permits the now familiar abuse of process. The primary fault lies with our permissive system, that both Congress and the courts tolerate.

Apart from the need for legislation that would inhibit unlimited filings under §2254, I make only modest suggestions that lie within the discretion of state and federal courts. In view of the reasonable certainty of recourse both to state and federal collateral review, capital cases could well be put on an accelerated schedule of appellate consideration—particularly within the state system. I noted that your panel in *Brooks v. Francis*, after granting a stay, properly directed the clerk to “expedite the appeal.”

Courts themselves often contribute to the slowness of the process. When a prisoner is on death row, his interest—as well as that of the state—demands that judges at all levels expedite their consideration and decision of capital cases.

Another constructive step is illustrated by the commendable admonition to counsel, by Judge Hand of the Southern District of Alabama, in the first §2254 review in the *Evans* case. He insisted that counsel identify explicitly “each and every ground . . . that can be asserted . . . to attack the constitutionality of the Alabama death statute or the incarceration of John Louis Evans III. If counsel . . . declines to follow [this order] . . . they will thereby be presumed to have

deliberately waived the rights to any such proceedings on any such actions in the future.”⁸

It also may be desirable to require that counsel, when applications for stays of execution seem to be filed belatedly, support the application with a sworn explanation of the reasons for the delay, and that such reasons be included in the record to inform appellate judges in the event of review.

I do not wish to be misunderstood. No lawyer or judge would suggest a rush “to judgment” in capital cases. As our opinions have made clear, no higher duty exists in the judging process than to exercise meticulous care where the sentence may be, or is, death. It is one thing, however, to exercise this sort of care, and quite another to permit the process of repetitive review to draw out for years the resolution of issues that have, or should have, been resolved earlier.

This malfunctioning of our system of justice is unfair to the hundreds of persons confined anxiously on death row. It also disserves the public interest in the implementation of lawful sentences. Moreover, it undermines public confidence in our system of justice and the will and ability of the courts to administer it. Unless the courts—and Congress—discharge their respective duties to move effectively to address this problem, the legislatures of the several states should abolish capital punishment.

⁸ Unpublished order of April 20, 1979 (reprinted in App. 55, *Hopper v. Evans*, O. T. 1981, No. 80-1714).

THE CHIEF JUSTICE'S PROPOSAL

AT THE ABA FEBRUARY MEETING / THE
CHIEF JUSTICE MADE AN IMPORTANT
RECOMMENDATION. THOUGH THIS AUDIENCE IS
FAMILIAR WITH IT, / I THINK THE PROPOSAL
MERITS A BRIEF DISCUSSION.

AN ACT OF CONGRESS WOULD ESTABLISH
A TEMPORARY SPECIAL COURT / ASSOCIATED
for administration
WITH THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT. / ITS MEMBERS
WOULD BE DRAWN FROM A PANEL MADE UP

two judges

OF TWO JUDGES FROM EACH OF THE 13
CIRCUITS, / A TOTAL PANEL OF 26. / IN TURN,
THIS COURT WOULD SIT IN PANELS OF, SAY,
SEVEN OR NINE MEMBERS DRAWN FROM THE
LARGER PANEL.

ITS MEMBERSHIP WOULD ROTATE AT
RELATIVELY SHORT INTERVALS / SO THAT ITS
MEMBERS WOULD NOT BE IN WASHINGTON FOR
EXTENDED PERIODS OF TIME.

IF MY WIFE JO IS TYPICAL, THE SPOUSES
OF JUDGES SERVING ON THE SPECIAL COURT
WOULD FIND THE CULTURAL ADVANTAGES—AND

*the beauty of the
City—*

THE BEAUTY OF THE CITY—A PLEASANT
INTERLUDE, / PROVIDED—OF COURSE—THEY
WERE FREE TO JOIN THEIR JUDGES.

THE SPECIAL COURT'S JURISDICTION WOULD
BE DEFINED, / PROBABLY LIMITED TO RESOLVING
CIRCUIT CONFLICTS. IT IS ESTIMATED THAT
THIS WOULD RELIEVE THE SUPREME COURT OF
PERHAPS 35 TO 50 ARGUED CASES EACH
TERM.

THIS WOULD BE A SIGNIFICANT BENEFIT TO
MY COURT. IN VIEW OF THE COMPLEXITY / AND
DIFFICULTY' OF THE 183 ARGUED CASES THIS
Term,

TERM, WE CANNOT—IN MY OPINION—GIVE EACH OF THEM THE METICULOUS CARE AND CONSIDERATION THAT THEY MERIT.

Of the 183 argued cases, we have brought down only 73 — leaving 110 cases not yet disposed of.

THE CRUNCH FOR THE REMAINDER OF THE TERM/IS LIKELY TO RESULT IN OPINIONS OF INFERIOR QUALITY,/EVEN THOUGH THE JUDGMENTS WILL HAVE BEEN MATURELY CONSIDERED. THIS TENDS ALSO TO INCREASE

the amount of separate writing by justices as the time

THE AMOUNT OF SEPARATE WRITING BY JUSTICES, /AS THE TIME FOR WORKING OUT DIFFERENCES WILL BE LIMITED.

ELIMINATING THE NECESSITY TO RESOLVE CIRCUIT CONFLICTS, THEREFORE, WOULD BE WELCOMED.

A FURTHER BENEFIT OF THE CHIEF JUSTICE'S SUGGESTION /IS THAT CONFLICTS AMONG THE CIRCUITS PROBABLY WOULD BE RESOLVED MORE PROMPTLY. OFTEN WE DECLINE TO TAKE A CASE WHERE THE CONFLICT IS NEW, /AND WE THINK IT MAY BE

resolved

RESOLVED AT THE CIRCUIT COURT LEVEL.

WE ALSO HAVE A SELF-SERVING PHRASE:

WE CHARACTERIZE A CONFLICT AS

“TOLERABLE”—FOR THE TIME BEING.

THIS LEAVES DOUBT AS TO WHAT THE
LAW IS, AND PRODUCES ADDITIONAL
LITIGATION.

A BILL HAS BEEN INTRODUCED IN THE
JUDICIARY COMMITTEES, / THOUGH I HAVE NOT
READ IT. THERE ARE PROBLEMS, OF COURSE,
INCLUDING A DEFINITION OF WHAT
CONSTITUTES A “CIRCUIT CONFLICT”. / BUT I

do not think

^{do}
~~WOULD NOT THINK THESE ARE INSOLUBLE.~~

I THEREFORE SUPPORT THE CHIEF
JUSTICE'S PROPOSAL. IT IS EXPERIMENTAL.
IT WOULD NOT—EXCEPT IN THE MOST LIMITED
SENSE—CREATE ANOTHER TIER OF FEDERAL
COURTS. / THE SPECIAL COURT WOULD BE
COMPOSED ONLY OF CIRCUIT COURT JUDGES, /
AND NO ADMINISTRATIVE BUREAUCRACY WOULD
BE CREATED.

*

*

*

BUREAUCRATIZED?

IN MY TALK LAST SUMMER I ADDRESSED

As you know →
need us for
7 more fundamental
changes in justice.

James 206, 193
Cune ~~for~~ V
increase of
14%

8.

More fundamental changes

As you know - from what

I've said here & at the RBA

last summer - I think

more fundamental changes

in Fed. Ct. terms are needed.

The flow of cash into

the DCs is at the heart

of the overall problem.

~~If we just know, that~~

and findings in DC's for year

ended June '82 - 206,193 can

- increase of 14.2%

Discretionary items
above

Currently juris alone

was the basis of about 25%

of total DC filings.

There ~~was~~ ^{were} 5,000,000 state

patent petitions under 1983

- almost 80% of filings.

and 32254 continues

to be allowed.

* * *

major
There are three grounds

of Fed juris that merit

↖
reexamination (Congressional consideration)

x x x

I move now to a related but

special problem of ~~the~~

The Federal Circuit

Supreme Court of the United States
Memorandum

-----, 19-----

pp 8-19

inclusive

were summarized
in my speech
- & not read.

L.F.P.

77 Share with you, ¹²⁰⁰Thoughts on

CAPITAL CASES (*Her Execut*)

AS CAPITAL CASES ACCUMULATE, / THEY
5.22.54
ADD A NEW DIMENSION TO THE / PROBLEM OF
REPETITIVE LITIGATION. / I WILL ADDRESS THIS
ONLY IN THE MOST CONCLUSORY TERMS.

GREGG V. GEORGIA DECIDED THAT CAPITAL
PUNISHMENT IS CONSTITUTIONAL. / SOME 37
STATES HAVE AUTHORIZED IT. / MURDERS
CONTINUE, / MANY OF INCREDIBLE CRUELTY AND
BRUTALITY, / AS MINDLESS KILLINGS INCREASE -
IN MUCH OF THE WORLD.

WE NOW HAVE MORE THAN 1,000

one thousand
convicted persons

This is
CONVICTED PERSONS ON DEATH ROW, AN
INTOLERABLE SITUATION.

MANY OF THESE PERSONS WERE
CONVICTED FIVE AND SIX YEARS AGO, / THEIR
CASES OF REPETITIVE REVIEW / MOVE
SLUGGISHLY THROUGH OUR DUAL SYSTEM.

WE HAVE FOUND NO EFFECTIVE WAY TO
ASSURE CAREFUL AND FAIR / AND YET
EXPEDITIOUS AND FINAL REVIEW.

SO FAR THIS TERM, WE HAVE GRANTED
AND HEARD ARGUMENTS IN FOUR CAPITAL
CASES, AND HAVE AGREED TO HEAR A FIFTH

next Term.

NEXT TERM.

WE HAVE RECEIVED 28 APPLICATIONS FOR STAYS OF EXECUTION, / ABOUT HALF OF WHICH HAVE COME AT THE ELEVENTH HOUR.

11th Circuit

THE MOST RECENT EXAMPLE IS THE EVANS CASE FROM ALABAMA. EVANS WAS FOUND GUILTY AND SENTENCED TO DIE IN 1977. NO ONE SERIOUSLY SUGGESTED HIS INNOCENCE / OR THAT UNDER EXISTING LAW / CAPITAL PUNISHMENT WAS NOT A MERITED SENTENCE.

RESOURCEFUL COUNSEL, / SIX MONTHS AFTER FEDERAL HABEAS, / SEEMED TO HAVE

remedies

been exhausted / sought

BEEN EXHAUSTED, / SOUGHT A STAY OF
EXECUTION FROM ME AS CIRCUIT JUSTICE.

FILING OF THE APPLICATION WAS DELAYED
FOR TWO MONTHS / AFTER EVANS' MOTION
FOR A NEW SENTENCING HEARING WAS
DENIED. FILED LATE ON APRIL 19, / IT
REACHED MY CHAMBERS ON THE MORNING OF
THE 20TH, / 40 HOURS BEFORE SCHEDULED
EXECUTION TIME.

WITH THE CONCURRENCE OF SIX OTHERS
MEMBERS OF THE COURT, / DENIED THE
APPLICATION AT 5:45 P.M., ON APRIL 21.^{st.}

*Approximately
20 minutes*

APPROXIMATELY TWENTY MINUTES LATER, AND
WITH NO NOTICE TO US, THE SAME COUNSEL
FILED A NEW PETITION FOR A WRIT OF
HABEAS CORPUS IN THE DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA.

THE PETITION RAISED NUMEROUS GROUNDS
RESOLVED IN THE PRIOR HABEAS
PROCEEDINGS, AND ALSO PURPORTED TO
IDENTIFY "NEW" GROUNDS.

THIS BELATED FILING OCCURRED LESS
THAN SEVEN HOURS BEFORE SCHEDULED
EXECUTION TIME. AFTER CAREFUL

consideration

CONSIDERATION BY ALL NINE OF US, / WE
7 to 2
GRANTED THE STATE'S APPLICATION TO
DISSOLVE AND VACATE THE STAY.

COUNSEL OFFERED NO EXPLANATION / FOR
THE TIMING OF THESE APPLICATIONS.

I WAS REMINDED OF THE STATEMENT OF A
PANEL OF YOUR COURT / IN BROOKS V.
FRANCIS, / IN ^{its} ~~THE~~ PER CURIAM OPINION OF
JANUARY 12, 1983.

I quote "ONCE AGAIN ... A PANEL OF THIS COURT
IS CONFRONTED AT THE ELEVENTH HOUR
WITH NUMEROUS AND EXTENSIVE PAPERS ↘

*submitting an
application*

SUBMITTING AN APPLICATION FOR A STAY
OF ~~THE~~ EXECUTION OF THE DEATH
PENALTY. / THE MEMBERS OF THE PANEL
HAVE PUT ASIDE ALL OTHER COURT
BUSINESS / AND HAVE SOUGHT TO ADDRESS
THE APPLICATION, / MOTIONS, / SUPPORTING
MEMORANDA, / RESPONSES, / AND MORE
FULSOME DOCUMENTS THERETOFORE
SUBMITTED TO THE DISTRICT COURT."

*End
Quote*

* * *
A PERHAPS COUNSEL SHOULD NOT BE
CRITICIZED / FOR TAKING EVERY ADVANTAGE OF
A SYSTEM THAT IRRATIONALLY PERMITS THE

*the now familiar
abuse of process.*

NOW FAMILIAR ABUSE OF PROCESS.

THE PRIMARY FAULT LIES WITH OUR
PERMISSIVE SYSTEM, / THAT BOTH CONGRESS
AND THE COURTS TOLERATE.

APART FROM THE NEED FOR LEGISLATION /
H/corpus
THAT WOULD INHIBIT UNLIMITED FILINGS UNDER
§2254, / I MAKE ONLY MODEST SUGGESTIONS
THAT LIE WITHIN THE DISCRETION OF STATE
AND FEDERAL COURTS.

IN VIEW OF THE REASONABLE CERTAINTY
OF RECOURSE / BOTH TO STATE AND FEDERAL
COLLATERAL REVIEW, / CAPITAL CASES COULD

~~will be~~ be
be

4. Courts themselves often contribute to the slowness of the process. When a prisoner is on death row, his interest - as well as that of the State - demands that judges at all levels expedite their consideration and decision of capital cases.

WELL BE PUT ON AN ACCELERATED SCHEDULE
OF APPELLATE CONSIDERATION, ^{- particularly} WITHIN THE
STATE SYSTEM. ~~FEDERAL COURTS COULD DO~~
~~LIKEWISE.~~

I NOTED THAT YOUR PANEL IN BROOKS V.
FRANCIS, AFTER GRANTING A STAY, DIRECTED
THE CLERK TO "EXPEDITE THE APPEAL".

ANOTHER ^{constructively} STEP IS ILLUSTRATED BY THE
COMMENDABLE ADMONITION TO COUNSEL, BY
JUDGE HAND OF THE SOUTHERN DISTRICT OF
ALABAMA, ^{H/C} IN THE FIRST §2254 REVIEW IN THE
EVANS CASE.

*Judge Hand
insisted*

Quote: "
HE INSISTED THAT COUNSEL IDENTIFY
EXPLICITLY "EACH AND EVERY GROUND ...
THAT CAN BE ASSERTED ... TO ATTACK THE
CONSTITUTIONALITY OF THE ALABAMA DEATH
STATUTE / OR THE INCARCERATION OF ^{*Evans,*} ~~JOHN~~
~~LOUIS EVANS, III.~~ *I* IF COUNSEL ... DECLINES
TO FOLLOW [THIS ORDER] ... THEY WILL
~~THEREBY~~ BE PRESUMED TO HAVE
DELIBERATELY WAIVED THE RIGHTS TO ANY
SUCH PROCEEDINGS / ON ANY SUCH ACTIONS, ^{*in any future*} ~~IN~~ *"*
~~THE FUTURE.~~ *End of quote*

IT ALSO MAY BE DESIRABLE, WHEN

Applications for

APPLICATIONS FOR STAYS OF EXECUTION SEEM
TO BE FILED BELATEDLY, TO REQUIRE THAT
COUNSEL SUPPORT THE APPLICATION WITH AN
AFFIDAVIT. IT SHOULD STATE THE REASONS
FOR THE DELAY, AND THESE SHOULD BE
INCLUDED IN THE RECORD TO INFORM
APPELLATE JUDGES IN THE EVENT OF REVIEW.

*As noted above in Evans - no
explanation was made.**
* * *

→ I DO NOT WISH TO BE MISUNDERSTOOD.

41 NO LAWYER OR JUDGE WOULD SUGGEST A
RUSH "TO JUDGMENT" IN CAPITAL CASES.

AS OPINIONS OF YOUR COURT AND OURS

*have made
clear*

HAVE MADE CLEAR, / NO HIGHER DUTY EXISTS
IN THE JUDGING PROCESS / THAN TO EXERCISE
METICULOUS CARE WHERE THE SENTENCE MAY
BE, OR IS, DEATH.

IT IS ONE THING, HOWEVER, TO EXERCISE
THIS SORT OF CARE, / AND QUITE ANOTHER TO
PERMIT THE PROCESS OF REPETITIVE REVIEW /
TO DRAW OUT FOR YEARS THE RESOLUTION
OF ISSUES / THAT HAVE, OR SHOULD HAVE
BEEN, RESOLVED / EARLIER.

THIS MALFUNCTIONING OF OUR SYSTEM OF
JUSTICE / IS UNFAIR TO THE HUNDREDS OF
persons

PERSONS / CONFINED ANXIOUSLY ON DEATH
ROW. ~~_____~~

IT ALSO DISSERVES THE PUBLIC INTEREST /
IN THE IMPLEMENTATION OF LAWFUL
SENTENCES. MOREOVER, IT UNDERMINES
PUBLIC CONFIDENCE IN OUR SYSTEM OF
JUSTICE, / AND IN THE WILL AND ABILITY OF
THE COURTS TO ADMINISTER IT.

- and Congress -
UNLESS THE COURTS [↑] DISCHARGE THEIR
respectively
[↑] DUTY TO MOVE EFFECTIVELY / TO ADDRESS THIS
PROBLEM, / THE LEGISLATURES OF THE SEVERAL
STATES SHOULD ABOLISH CAPITAL PUNISHMENT.

*#1 As always, a
privilege to
be with you.*