



2001

Tragedy and Due Process

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Recommended Citation

J. Thomas Sullivan, *Tragedy and Due Process*, 3 J. APP. PRAC. & PROCESS v (2001).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol3/iss2/1>

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

TRAGEDY AND DUE PROCESS

The tragic events of September 11th affected the United States in a way perhaps never envisioned by even the most creatively pessimistic observers, short of the outbreak of nuclear, biological or chemical war. The terrorist attacks on New York and Washington struck at the very heart of our collective understanding of the order of things. Within the legal community these attacks represented something more than planned violence directed at victims randomly selected. Violence, by its nature, is antithetical to the rule of law; we rely, in fact, on the rule of law to save us from anarchy by deterring and punishing the actions of the violent.

Nevertheless, lawyers, like other citizens, now must deal with this new dynamic. Because we are committed to the rule of law, we maintain vigilant faith in the institutions of justice, however imperfect, as alternatives superior to deliberate infliction of terror and suffering. Within the legal community we search for evidence of the resilience of these institutions in the need to reaffirm our trust in the traditions of the law.

The evidence that sustains is often minor and anecdotal, but it is no less important to us as lawyers, because individual cases exemplify the principles to which we remain committed. I was particularly heartened by an incident related by Rob Owen,¹ a conscientious and highly skilled lawyer who primarily represents death row inmates in post-conviction

1. Rob Owen co-authored an essay that appeared in Volume 2, Issue 2 of this journal. See Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some*

matters. Rob and his co-counsel, Danalynn Recer, represented a Texas death row inmate, Jeffery Tucker, whose execution was scheduled for September 11th. The successor application for habeas relief was still pending in the Texas Court of Criminal Appeals as the date approached and the attorneys anticipated the need to file an application for stay of execution in the United States Supreme Court in the event the state court refused to grant a stay.

On the morning of the 11th, Rob had flown to Houston to be near the execution site, Huntsville, while conducting the final round of litigation. Upon landing, the plane was not brought to the gate; rather it remained stopped on the runway some distance from the terminal. Inside, passengers with cell phones were learning about the World Trade Center and Pentagon attacks. After passengers were finally permitted to leave the plane, Rob went to the offices of another death penalty lawyer in Houston, where he learned that Washington, D.C. was in a state of disarray following the attacks. His efforts to contact the Supreme Court Clerk's office met with no success. No one answered the Court's telephone that morning.

Concerned that his client might be executed without even the chance to seek a stay in the Supreme Court, Rob called the Capital Litigation Division of the Texas Attorney General's Office and the Court of Criminal Appeals to ask whether the Governor might take action in light of the apparent closing of the Supreme Court. The Governor's Office was concerned that an inmate might be deprived of legal process by the extraordinary circumstances of the day. The Governor granted a reprieve to permit the filing and consideration of the appropriate pleadings by the United States Supreme Court.

Governor Rick Perry has not generally been responsive to claims brought by Texas death row inmates in the clemency process. Nonetheless, he demonstrated on that day the sort of courage we expect of our elected officials, recognizing as he did the importance of ensuring access to the courts, even for an inmate whose prospects for success on the merits were

uncertain.² His willingness to act forthrightly in light of the temporary paralysis occasioned by the attacks illustrates in a small, but hardly insignificant, sense the power of our system of law.

Like the story Rob related, the lead essay in this issue is heartening. It is the text of a speech delivered by Chief Judge Judith Kaye of the New York Court of Appeals to the joint meeting of the Council of Chief Judges and Council of Appellate Lawyers at their October meeting in New York City. She talks, quite personally, of her response, and that of the New York judicial system, to the immediate needs that arose in the wake of the WTC tragedy. Although her remarks have also been published elsewhere, we believe it important to share her thoughts with you here because they demonstrate the resilience of the Bench and Bar in a time of crisis.

IN PASSING

The Journal is saddened to note the death of California Supreme Court Justice Stanley Mosk, a true giant of the state appellate bench. Justice Mosk will undoubtedly be remembered—and rightfully so—for many things, but we were especially grateful when he agreed to provide a short essay for the introductory issue of a new law review published at a small law school half a continent away.³

TRANSITIONS

Our staff is changing, and in an important sense, growing. UALR Law School Dean Charles W. Goldner made a significant commitment to *The Journal's* future when he authorized the hiring of a full-time executive editor. Nancy Bellhouse May, a graduate of Columbia Law School, comes to *The Journal* to serve as our executive editor after heading the intellectual property group at Wright, Lindsey & Jennings in Little Rock for most of her career.

2. Jeffery Tucker waived further appeals and accepted his sentence of death. He was executed on November 14th after apologizing to the victim's family and reciting the Lord's Prayer. *Arlington Man Who Got Sept. 11 Reprieve Is Executed*, <<http://www.DallasNews.com>> (Nov. 15, 2001).

3. Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25 (1999).

Professor Lindsey P. Gustafson, who served on a part-time basis as our first executive editor, remains as a faculty editor while continuing to teach in the legal writing program at the law school. She will also be spending time with her new baby daughter. Former UALR Dean Rodney K. Smith, during whose tenure *The Journal* was created, has moved to the University of Memphis, where he now serves as Herff Professor of Law. His continuing interest in *The Journal* is exemplified by his contributions to this issue, which included solicitation of articles on the Office of Solicitor General and the tribute to former Solicitor General Rex Lee. Rod's responsibilities at Memphis require him to redirect his energies, so this issue marks his last appearance as a member of *The Journal's* editorial board. His enthusiasm will be missed.

Finally, we welcome two contributing editors to our staff. D. P. Marshall Jr., a graduate of Harvard Law School and partner at Barrett & Deacon in Jonesboro, Arkansas, clerked for Judge Richard S. Arnold of the Eighth Circuit, and is now a member of the American Law Institute. Price, our first subscriber, will edit a regular feature, "From the Library," in which *The Journal* will re-print classic commentary on appellate advocacy and practice. Brent E. Newton, an editor of the law review at Columbia who clerked for Judge Carolyn King of the Fifth Circuit, now serves as an Assistant Federal Defender for the Southern District of Texas. Brent has been a regular contributor to *The Journal* and has taught for several years at the UALR-sponsored CLE programs that have generated funds for its creation and continuing publication.

JTS
Little Rock
December 17, 2001