



Erwin Chemerinsky: It's no accident that judge who tossed death penalty has job for life

BY [ERWIN CHEMERINSKY](#)

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U.S. District Judge Cormac Carney's decision last week declaring unconstitutional California's death penalty is a powerful reminder of why federal judges are accorded life tenure. The framers of the Constitution thought it essential to have a federal judiciary that would enforce the Constitution even when it is unpopular to do so.

Article III of the Constitution provides that Supreme Court justices and the judges on the lower federal courts have their positions for life, unless they are impeached and removed by Congress, and their salary cannot be decreased during their terms of office. The goal was having judges who will decide cases based on their understanding of the law, not to please voters at the next election or legislators who will decide their pay.

It is hard to imagine that elected judges in Southern states would have declared unconstitutional state laws that required segregation of every aspect of life. How long would it have been until elected state court judges would have declared, as the Supreme Court did in *Brown v. Board of Education*, that separate can never be equal?

It is hard to imagine that many elected judges would declare the death penalty unconstitutional. There are too many instances of state judges losing their offices after handing down controversial rulings. Tennessee Supreme Court Justice Penny White was voted out of office simply for being part of the majority in a 4-1 decision to overturn a death sentence. Three members of the Iowa Supreme Court were voted out after they were part of a unanimous decision declaring unconstitutional that state's law prohibiting same-sex marriage.

In California, we cannot forget how three members of the California Supreme Court – Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso – were voted out of office in 1986 because they were perceived as too lenient in death penalty cases. Many studies have documented that state supreme court justices who face electoral review are far less likely to overturn death sentences than those in states where there are not judicial elections.

Judge Carney's decision was carefully reasoned and meticulously documented. He explained: "Since 1978, when the current death penalty system was adopted by California voters, over 900 people have been sentenced to death for their crimes. Of them, only 13 have been executed. For the rest, the dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding their actual execution. Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*. As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary."

He concluded that such an arbitrary punishment violates the Eighth Amendment's prohibition of cruel and unusual punishment.

Judge Carney's facts are unassailable. Countless factors – the process of direct review by the California Supreme Court, the lack of qualified attorneys to handle death penalty cases, the need for multiple levels of review – contribute to long delays and unpredictability in carrying out death sentences. The average delay between sentencing and execution in California is 25 years.

There is no fix for this. Short-circuiting appeals or proceeding without competent counsel increases the risk of executing innocent people or imposing the death penalty when there has been a serious constitutional

violation. The Supreme Court long has recognized that arbitrary punishments violate the Eighth Amendment, and Judge Carney's opinion shows, as many judges and law professors have concluded, that the California death penalty system is irreparably broken.

My hope is that Gov. Jerry Brown and Attorney General Kamala Harris will read Judge Carney's careful opinion and conclude that he is correct and choose not to appeal his ruling. I worry, though, that, especially in an election year, they will not make this choice. The matter will then go to the 9th U.S. Circuit Court of Appeals and, perhaps, the Supreme Court.

Hopefully, these judges and justices who have life tenure, will follow Judge Carney's lead and courage and conclude that the California death penalty is unconstitutional.

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