



# Inquiry Concerning Judge No. 96

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## **EXAMINER'S PRESENTATION**

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# Overview

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- Compliance with Execution-Day Procedures as the relevant issue (slides 3-4)
- Findings as to conduct by TDS, then unknown to Judge Keller, cannot exonerate (slides 5-9)
- What Judge Keller knew, said, thought, did, decided, and failed to do (slides 10-18)
- Special Master's relevant findings and his omitted findings (slides 19-35)
- Appropriate conclusions from the record (slides 36-44)



# Execution-Day Procedures

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- “All communications regarding the scheduled execution shall first be referred to the assigned judge. The term ‘communications’ includes pleadings, telephone calls, faxes, e-mails, and any other means of communication with the Court.”

# Execution-Day Procedures (cont'd)

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- Although unwritten until two months later, Judge Keller admits that the long-standing Execution-Day Procedures were (i) “verbatim the same” as the subsequently written protocol and (ii) familiar to her (3 RR 156)
- Judge Keller admits that she knew the Execution-Day Procedures always used the word “shall” (3 RR 158) and that “shall” means “mandatory” instead of “may” (*id.*)
- Judge Keller admits that she knew the Execution-Day Procedures always used the words “all communications,” which (i) is “encompassing” and (ii) “includ[es] telephone calls” (3 RR 167)

# Causation - Irrelevant

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- This is not a tort case, where the comparative responsibility of several actors may be important to decide a percentage of responsibility.
- This is a review of a judge's conduct. A judge's accountability for ignoring a mandatory protocol should not be excused by saying "Richard would have been executed anyway" or "TDS was more responsible."
- A judge's conduct should be evaluated based upon what she knew, heard, said, thought, did, decided, and failed to do – not based upon what TDS, unknown to her at the time, may have done or not done.



# Relevance? Richard's Crimes

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- Judge Keller was unaware who was scheduled to be executed, or what his crimes or litigation history had been (3 RR 189-91)



# Relevance? TDS Choices

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- Judge Keller was unaware what type of papers, or what litigation choices or strategies, TDS had chosen (3 RR 190-92)



# Relevance? Computer Problems

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- Judge Keller was unaware of the reasons why “they were having trouble getting something in on time” (3 RR 191)



# Relevance?

## TDS's Hyperbole in the Media

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- On Sept 25, 2007, Judge Keller did not know what future media coverage or reports may exist
- Judge Keller's compliance with the Execution-Day Procedures would have completely prevented any legitimate criticism of the Court, of Judge Keller, or of the administration of justice

# What Judge Keller Knew

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- Judge Keller admits
  - she knew Sept 25, 2007 was an execution date (Answer ¶ 4)
  - she knew the execution was scheduled for 6pm (3 RR 174)
  - she knew the Supreme Court had granted certiorari that morning as to lethal injection (*Baze*) (Exam. Ex 4; 3 RR 173)
  - she knew a motion was expected, based on *Baze* (Exam. Ex 6; 3 RR 176)

# What Judge Keller Knew (cont'd)

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- Judge Keller admits
  - she knew the 4:45pm phone call was about a communication regarding the execution scheduled that day (3 RR 178, 181, 186)
  - she knew the caller wanted to file something (3 RR 181; 4 RR 14, 28)
  - she knew the caller was not ready to file by 5pm (3 RR 180, 182)
  - she knew the caller had requested to file after 5pm (Marty: 4 RR 112, 146)

# What Judge Keller Knew (cont'd)

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- Judge Keller admits
  - she knew the assigned judge remained available after hours (3 RR 157)
  - she knew she was not the assigned judge (3 RR 174, 178)
  - she knew the matter was important (3 RR 186-87)
  - she knew her decision could have life or death consequences (3 RR 179: “could not be undone”)



# What Judge Keller Heard

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- That Marty was calling, asking for direction (Marty: 4 RR 83)
- That “they” asked “to hold the Court open because of what happened today” (Marty: 4 RR 80)
- That “they wanted to file something but they were not ready” (3 RR 177; Marty: 4 RR 78)



# What Judge Keller Said

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- “No” (3 RR 184)
- “Why” (3 RR 184)
- “No” (3 RR 184)
- “We close at 5pm” (3 RR 184-85)
- That there’s no reason the clerk’s office should stay open for these people who can’t file on time (3 RR 188; 4 RR 14, Marty: 4 RR 84-87, 137)



# What Judge Keller Thought

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- Dislike of “tactics” of “purposely delayed filings” (Marty: 4 RR 86-87)
- That last-day filings “tend to be voluminous and meritless” (4 RR 14-15)
- That “they had all day” (4 RR 12, 14)



# What Judge Keller Did

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- Twice said “no,” during 4:45pm conversation
- Addressed and disposed of the communication from TDS
- Called back at 4:59pm to make sure nothing had been filed
- Was silent Sept 26, when judges expressed surprise that nothing had been filed



# Judge Keller Did *Not* Know ...

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- Whether Ed Marty knew all the details of the Execution-Day Procedures, and especially the requirement to first refer all communications regarding the scheduled execution to the assigned judge (3 RR 160; 4 RR 4)
- Whether Abel Acosta knew the Execution-Day Procedures and the requirement to first refer all communications regarding the scheduled execution to the assigned judge (3 RR 159-60)



# What Judge Keller Failed To Do

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- Comply (and require Marty's and Acosta's compliance) with the Execution-Day Procedures:
  - “All communications regarding the scheduled execution shall first be referred to the assigned judge.”



# Special Master's Role

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- Rule 10(h): furnish “findings of fact based on a preponderance of the evidence”
- Not a proper role to recommend for or against imposition of sanctions



# Findings of Improper Conduct

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- ❑ “certainly exhibited poor judgment” (Special Master, p. 9)
- ❑ “should have been more forthcoming” (p. 11)
- ❑ “not exemplary of a public servant” (p. 15)
- ❑ “should have directed the TDS communication to Judge Johnson” (p. 15)
- ❑ “her judgment ... was highly questionable” (p. 16)
- ❑ “a valid reason why many in the legal community are not proud of Judge Keller’s actions” (p. 16)
- ❑ absence of formal rule or statute “does not absolve her of her responsibility to ensure that the courts remain just and fair” (p. 16)



# Omitted Findings

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- What did Judge Keller – by her own admission – know, hear, say, think, do, decide and fail to do?
  - See slides 10-18 above

# Omitted Findings (cont'd)

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- What, if anything, did Marty tell Judge Johnson?
  - Findings:
    - “Marty should have referred the question to Judge Johnson” (Special Master, p. 8 & n. 3)
    - Judge Keller used “poor judgment ... in failing to notify Judge Johnson” (p. 9)
    - Judge Keller “should have been more forthcoming with Marty that he should, at a minimum, notify Judge Johnson” (p. 11)
    - Judge Johnson “learned ... by reading the newspaper that [next] weekend” (p. 12)
  - Special Master, pp. 10-11 & n. 4: “has little bearing”

# Omitted Findings (cont'd)

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- Are Marty and Acosta “subject to [Judge Keller’s] supervision or control?”
  - Marty says: “immediate reporting responsibilities” to Judge Keller (4 RR 62)
  - Although Judge Keller denies any supervisory role (4 RR 3-4) ...
  - ... she admits she knew that Marty “was loyal to me” (4 RR 3)
  - ... she admits that Marty is a “chain-of-control kind of guy” (3 RR 186)

# Willful?

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- Intentional:
  - This was not inadvertent conduct
  - Judge Keller intended to address and dispose of the communication, rather than to refer it to the assigned judge



# Willful?

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- Judge Keller's responsibilities required her "to abide by the Execution-Day Procedures" (Keller: 4 RR 6)
- Her disposing of the communication ignored and circumvented the Execution-Day Procedures

# Willful: Case Law

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- Older cases: an element of “bad faith”
  - *In re Thoma*, 873 S.W.2d 477, 489-90 (Tex. Rev. Trib. 1994)
  - *In re Bell*, 894 S.W.2d 119, 126 (Tex. Spec. Ct. Rev. 1995)

# Willful: Case Law (cont'd)

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- More recent cases: “willful” means the judge “intend[ed] to engage in conduct for which she or he is disciplined, whether or not she or he has specific intent to violate the canons”
  - *In re Barr*, 13 S.W.3d 525, 534-35 (Tex. Rev. Trib. 1998); *accord, id.* at 539
  - *In re Davis*, 82 S.W.3d 140, 148 (Tex. Spec. Ct. Rev. 2002) (“as long as he intended to engage in conduct for which he is disciplined, he is guilty of a willful violation of the Code”)
  - *In re Hecht*, 213 S.W.3d 547, 586-87 (Tex. Spec. Ct. Rev. 2006) (McClure, J, concurring)

# Persistent?

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- Judge Keller said “no” twice during the 4:45pm conversation with Marty. She did not insist on compliance with the Execution-Day Procedures.
- At 4:59pm she called Marty to assure that nothing had been filed. She did not take steps to assure compliance with the Execution-Day Procedures.
- In her 6:22pm call with Marty, while Richard was still alive, she did not insist upon the Execution-Day Procedures.

# Persistent? (cont'd)

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- Judge Keller's silence on Sept 26 showed her refusal to disclose or admit her improper circumvention of the Execution-Day Procedures
- Judge Keller: Given the same circumstances, I would do nothing different today (4 RR 28-29)
  - The Special Master mistakenly assumed that her testimony about her attitude "cannot be true" (Special Master, p.15)
- Persistent: "firm," "obstinate," "pertinacious," "stubborn"?

# Incompetence?

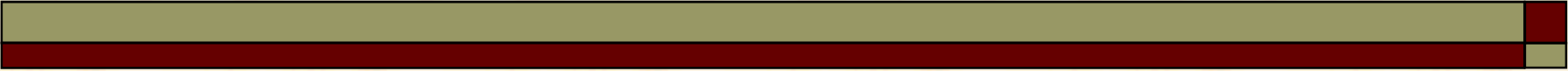
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- The constitutional question is not “incompetent,” but “incompetence”
- Judge Keller’s Sept 25, 2007 noncompliance with the Execution-Day Procedures was, at a minimum, gross carelessness in the discharge of her duties; and hence, incompetence in the performance of that duty of her office

# Incompetence? (cont'd)

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- Consistent statutory definition: “gross carelessness in the discharge of official duties”
  - Gov’t Code § 24.021(2) (district judges)
  - Gov’t Code § 665.052(b)(2) (state officers and employees)
  - Local Gov’t Code § 21.022(2) (municipal officials)
  - Local Gov’t Code § 87.011 (county officers)



# Canon 3.B.(8)

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- “A judge shall accord to every person ... the right to be heard according to law. ... A judge shall require compliance with this subsection by court personnel subject to the judge’s direction and control.”



# Canon 3.B.(8) (cont'd)

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- Judge Keller admits Tex.R.App.P. 9.6 requires parties to direct communications only through the clerk (3 RR 196)
- Thus, Rule 9.6 makes it ordinary and proper to direct inquiries first to the clerk's office
- Any communication on execution day is required immediately to be directed to the assigned judge
- Judge Keller's instructions failed to assure that the inquiry would be promptly referred to the assigned judge

# Canon 3.B.(8) (cont'd)

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- In turn, Tex.R.App.P. 9.2 authorizes a judge to accept a filing. On execution day, the Execution-Day Procedures require that all such communications be directed to the assigned judge.
- Judge Keller admits that Rule 9.2 gives an opportunity to a litigant to try to persuade the judge to accept the filing. (3 RR 193)
- That limited right to a hearing according to law – the right to urge the assigned judge to accept a late filing – was curtailed by Judge Keller when she addressed and disposed of the communication on Sept 25, 2007.

# Canon 3.B.(8) (cont'd)

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- Judge Keller's duty under the Canon was to accord the right to be heard according to law. Her duty under the Canon was also to "require compliance" by those staff subject to her direction and control.

# Appropriate Conclusions from the Evidentiary Record

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- Constitution, Art. 5, Section 1-a(6)A:
  - Incompetence on Sept 25, 2007 in performing this duty of her office: complying with the mandatory Execution-Day Procedures
  
- Constitution, Art. 5, Section 1-a(6)A:
  - Willful or persistent conduct on Sept 25, 2007 that is clearly inconsistent with the proper performance of this duty of her office: complying with the mandatory Execution-Day Procedures

# Appropriate Conclusions (cont'd)

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- Constitution, Art. 5, Section 1-a(6)A:
  - Willful or persistent conduct on Sept 25, 2007 that casts public discredit on the judiciary or the administration of justice

# Appropriate Conclusions (cont'd)

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- Constitution, Art. 5, Section 1-a(6)A:
  - Willful or persistent violation of Canon 3.B.(8), by the failure – both (i) by Judge Keller and (ii) by staff subject to her direction and control – to accord Richard the right to be heard as to a requested late filing



# Your Honor

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- The citizens' respect for the judicial system, and the administration of justice, is the centerpiece of our civilization. To remove the dueling field and the lynch mob, we have developed a judiciary with the highest standards of fairness and impartiality. Our judges do, and must, comport with the highest standards of integrity and ethical conduct. For that reason, we cease addressing a judge as Ms., Mr., or Mrs., and instead respect a judge as "Your Honor."

# Accepting Accountability?

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- Judge Keller's counsel began the trial before the Special Master by saying that Judge Keller believes in, and follows, the rule of law (2 RR 23)
- A judge cannot choose to disregard at her whim established mandatory procedures of her Court
- The citizens' respect for the death penalty is premised on a deep faith and trust that procedures will be so carefully administered as to prevent risks of erroneous or premature executions



# Accepting Accountability? (cont'd)

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- Of all the Court's obligatory procedures, none are more important than the procedures safeguarding against erroneous or improvident execution
- The Execution-Day Procedures are a method to assure that no delay or misdirection might occur in last-minute communications regarding the scheduled execution
- The Execution-Day Procedures' mandatory "shall" and its encompassing "all communications" are safeguards to ensure that the Court remains open up to the moment of execution, in case any issue – slight or great – needs attention before the irreversible event

# Accepting Accountability? (cont'd)

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- ❑ Judge Keller chose to address and dispose of an important telephonic communication regarding the scheduled Richard execution
- ❑ She circumvented the important procedures designed to safeguard the availability of an open court
- ❑ She prevented appropriate and timely handling by the duly assigned judge, Judge Johnson
- ❑ The facts establishing Judge Keller's failure to comply with the Execution-Day Procedures come from her own testimony

# Accepting Accountability? (cont'd)

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- Judge Keller's June 4, 2010 "Response":
  - "It cannot be emphasized enough that the Examiner's objections are based on a fiction" (p. 2)
  - "Now, the Examiner would have this Commission act as an Orwellian Ministry of Truth – that is, the body responsible for the official falsification of history" (pp. 5-6)
  - "[T]he Examiner's investigation produced, at best, conflicting, and at worst, fabricated and false testimony collected in an unfair manner" (p.16)
  - "The Examiner's version of reality is severely misguided" (p. 40)



# Accepting Accountability? (cont'd)

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- Judge Keller: Given the same circumstances, I would do nothing different today (4 RR 28-29)