# LegalTimes

LAW AND LOBBYING IN THE NATION'S CAPITAL

OCTOBER 4, 2004

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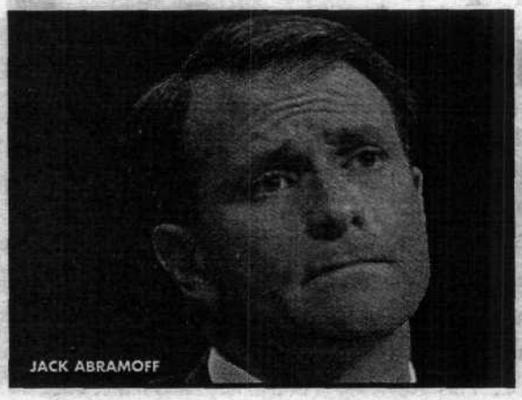
**Murder by Numbers:** The interim U.S. attorney for the District of Columbia is dedicating new resources to prosecuting homicides in the hope of keeping killers off the streets. **Page 8**



JACK ABRAMOFF

ROBERTO WESTBROOK



## In Plain Sight

Jack Abramoff was Greenberg Traurig's biggest lobbyist. Was the firm fooled about his dealings—or did it just ignore them?

BY KATE ACKLEY AND ANDY METZGER

As lobbyist Jack Abramoff sat silently in the witness chair last week, attempting to avoid self-incrimination by taking the Fifth, senators reached into the thesaurus to find insults strong enough to hurl at him.

He was, in their words, a "scumbag," "charlatan," and "crook" who—along with public relations executive Michael Scanlon—had hoodwinked millions out of Native American clients and manipulated tribal elections for personal financial gain.

But at Sept. 29's Senate Indian Affairs Committee hearing, the law and lobbying firm where Abramoff was a senior director, Greenberg Traurig, escaped without a scratch. In fact, Sen. John McCain (R-Ariz.) went out of his way to praise the firm for cooperating fully with the committee's investigation into Abramoff and Scanlon. And Sen. Tim Johnson (D-S.D.) portrayed the firm as a victim: "Credible law firms were taken advantage of," Johnson said.

But questions remain: How was a firm stacked with hundreds of legal and lobbying professionals unable to see what was going on with their flamboyant and controversial partner? And will Greenberg be able to use ignorance of Abramoff's activities as a defense against investigations and possible litigation?

Publicly, the firm's lawyers will say only that they complied with Senate subpoenas and, according to a statement by the firm's president and CEO, Miami-based Cesar Alvarez, are

SEE **GREENBERG,** PAGE 16

## U.S. Building New Prisons For Terrorists

Construction of Guantánamo Jails Signals Long-Term Plans for Base

BY VANESSA BLUM

GUANTÁNAMO BAY, Cuba—The government is building for the long haul in the war on terror.

The Defense Department plans to construct a permanent medium-security prison facility here as part of an effort to transform the U.S. naval base from a makeshift detention camp to a state-of-the-art penitentiary for terrorist agents the government considers too dangerous to set free.

The 200-bed compound, known as Camp Six, is expected to cost $24 million and will be the base's second permanent prison structure. The first, a 100-cell, super-max style facility known as Camp Five, opened in April.

Together, the two structures represent the future of Guantánamo Bay, which is

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**New Associates & Their Salaries**

**A Special Report See Page 31**

**A SINGULAR QUEST:** Rep. Richard Baker (R-La.) has been a persistent critic of Fannie Mae for a decade.

ROBERTO WESTBROOK

## The Man Who Makes Fannie Mae Squirm

And why Moody's, S&P, and Fitch should be nervous, too.

BY T.R. GOLDMAN

Richard Baker, Fannie Mae's lone congressional nemesis for much of the last decade, arrived late to a House Financial Services oversight hearing one Thursday morning last May.

The 56-year-old Louisiana Republican had missed his turn for an opening remark, so he strode quickly over to colleague Rep. Christopher Shays (R-Conn.) and quietly asked to borrow his time.

Then, talking without notes, and at a pace so rapid it galvanized the packed Rayburn hearing room, Baker let loose, inveighing, among other things, against Fannie Mae's implicit government support, which lets the giant financial institution borrow money around the world at rates just half a percentage point more than the U.S. Treasury.

"Why are they squealing?" he said, referring to Fannie Mae executives upset after the company's stock price had fallen. "Because they are worried about losing their profit, not about helping poor people get housing.

"I have simply just had it," he continued, according to a transcript of his remarks provided by a lobbyist who attended the hearing. "There is nobody that can convince a rational person that the explicit guarantee, the implicit

SEE **BAKER,** PAGE 13

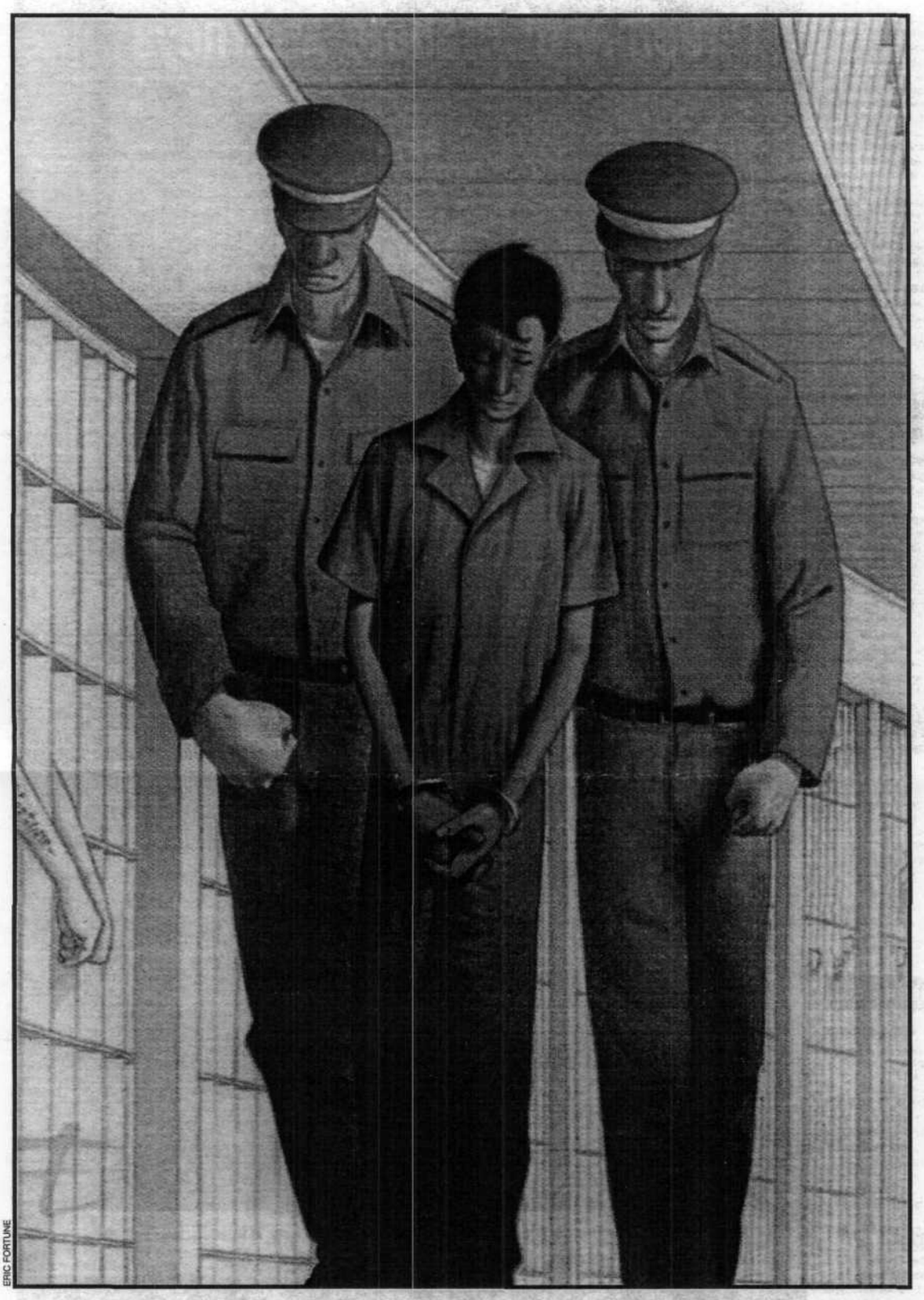
## First Monday

As the Supreme Court opens its new term: Sen. Orrin Hatch weighs the threat to the U.S. sentencing guidelines. And ex-Sen. Joseph Tydings debates the juvenile death penalty with Virginia Attorney General Jerry Kilgore. Points of View, **Page 58**

# Points of View

Commentary and Analysis





ERIC FORTUNE

# Too Young to Die?

Supreme Court weighs whether Constitution bars execution of juvenile killers.

# Yes

BY JOSEPH D. TYDINGS

On the morning of Oct. 13, the U.S. Supreme Court will hear arguments in *Roper v. Simmons*, a case about the constitutionality of executing individuals who commit crimes as teenagers. The Court should abolish this ill-considered practice. Because of their diminished capacity, juvenile defendants—like mentally retarded defendants—cannot fully exercise their Fifth Amendment, Sixth Amendment, and 14th Amendment rights in capital proceedings, and thus it should be unconstitutional to put them to death.

## EVOLVING STANDARDS

Two years ago, the Supreme Court took a second, hard look at the execution of mentally retarded defendants. In a comprehensive and well-articulated opinion in *Atkins v. Virginia*, the Court reversed its 1989 ruling in *Penry v. Lynaugh*. In *Atkins*, the Court held that the execution of mentally retarded persons violated the Eighth Amendment stricture against "cruel and unusual" punishments. The Court found that in the 13 years since it had decided *Penry*, a "national consensus" had formed against executing the mentally retarded.

*Simmons* came to the U.S. Supreme Court on certiorari from the Missouri Supreme Court. Missouri's highest court, applying the philosophy and decision in *Atkins*, found that a national consensus against the juvenile death penalty had developed and concluded that offenders under 18 should not be executed. The state of Missouri appealed that ruling to the U.S. Supreme Court.

In *Simmons*, the Supreme Court will decide whether evolving standards of decency have progressed to the point in this country where we no longer find it acceptable to execute those whose crimes were committed before they reached the age of 18.

Fifteen years ago, the Supreme Court was asked to examine the same issue that is before it today. In that case, *Stanford v. Kentucky*, the Court held that, notwithstanding an Eighth Amendment ban on the execution of offenders 15 years old or younger, 16- and 17-year-old offenders were not similarly protected and could be executed.

## DIFFERENT FROM ADULTS

Juveniles have long been treated differently from adults in our nation's legal systems. American civil and criminal law recognizes a need to protect those under 18 as well as to restrict their behavior. As the Supreme Court observed in *Thompson v. Oklahoma* (1988), "It would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment."

It is not just common sense and centuries of human parenting experience—raising, caring for, and preparing children for life—that tells us that juveniles differ significantly from adults in many ways.

In *Simmons*, neurologists, psychiatrists, psychologists, and other knowledgeable experts have submitted amicus briefs detailing the developmental differences between juveniles and adults. It turns out that those qualities that we have always anecdotally associated with adolescence—impulsivity, bad judgment, careening emotions, and poor communication skills—are the result of real physical differences in juvenile brains.

## DIMINISHED CAPACITY

In the 1989 *Atkins* case, the Supreme Court noted that the mentally retarded have developmental limitations that prevent them from fully exercising their constitutional rights and from receiving the heightened constitutional protections that are required in a capital trial. Juveniles share many of the same limitations that severely erode, if not completely remove, the important constitutional rights guaranteed by the Fifth, Sixth, and 14th amendments that are available to adults.

The diminished capacity of juveniles materially impairs their ability to communicate with and assist their counsel, as well as their ability to make crucial trial decisions—such as whether to ask for a jury trial or whether to request a lawyer before signing the prosecutor's proposed confession.

As academic research has found, many adolescent defendants, because of their relationship with authority and their developmental process, either do not perceive their attorney as being on their side or fail to give their attorney information about the charges against them out of mistrust. Juveniles' immature communication skills almost always interfere with and reduce their ability to assist counsel.

Too many juveniles have neither the experience nor the judgment to communicate with and inspire the loyalty and the zeal of overworked, undercompensated, court-appointed defense counsel.

Juveniles are far more likely to falsely confess than adults, as academic research has found. Particularly at risk are those most likely to be a capital defendant: the indigent, school dropouts, and those with no family to turn to. For example, as Steven Drizin and Richard Leo have noted in a 2004 article in the *North Carolina Law Review*, "one of the most common reasons cited by teenage false confessors is the belief that by confessing, they would be able to go home."

The Court in *Atkins* noted that the mentally retarded "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." The same can be said of juveniles. Juvenile defendants in capital trials face a jury composed of individuals who are most certainly not their peers. Adults often fear juvenile offenders merely because they are juveniles, as the Coalition for Juvenile Justice has reported.

Juveniles also lack the same opportunities that adults have to show mitigating factors at trial. Their lack of fully developed communication and reasoning skills often make it difficult for them to understand and identify, much less articulate, such factors for their attorneys.

The argument is often made that a defendant's youth itself can and should be argued as a mitigating factor. In *Simmons*, however, the prosecutor used Christopher Simmons' age to argue the exact opposite. The prosecutor argued for the death penalty because the defendant was a juvenile. He said to the jury: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary, I submit. Quite the contrary."

As the Missouri Supreme Court noted, juveniles also "have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history, than is true of adult offenders." Thus, juveniles also face the risk that the death penalty will be imposed in spite of factors that may call for a less-severe penalty.

## JUSTICE AT RISK

The constitutional dangers a juvenile charged with capital crimes faces mirror those faced by a mentally retarded defendant. Indeed, the ways in which juveniles' developmental limitations affect their access to proper procedural protections exactly tracks the erosion of rights of the mentally retarded that the Court outlined in *Atkins*.

Both juveniles and the mentally retarded have deficiencies in their reasoning faculties, in their judgment faculties, and in their ability to control impulses. These characteristics of juveniles, like the characteristics of the mentally retarded, "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards," to use the words of the *Atkins* Court.

These special characteristics of juveniles devastate the protections that the Constitution should provide. The death penalty is unconstitutional without elevated procedural protections. As applied to juveniles, this punishment violates the Fifth Amendment, Sixth Amendment, and 14th Amendment procedural rights that are guaranteed to adults.

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*Joseph D. Tydings, a former U.S. senator, is a partner at the D.C. office of Dickstein Shapiro Morin & Oshinsky. He represents the Coalition for Juvenile Justice, an amicus curiae supporting Christopher Simmons before the Supreme Court.*

# No

BY JERRY KILGORE

In the fall of 2002, innocent people were picked off by gun fire in Virginia, Maryland, and the District of Columbia. No place was safe; the killings were seemingly random; citizens were prisoners in their own homes. When the murderers were finally captured, it turned out that one of them was 17 years old.

Virginia was awarded the first trials for John Allen Muhammad and his teenaged accomplice, Lee Boyd Malvo. Prosecutors sought the death penalty for both killers. Muhammad and Malvo were found guilty, yet—despite the magnitude and vileness of their crimes—only Muhammad was sentenced to die.

Though many believe that capital punishment is the only appropriate penalty for Malvo, the actual outcome of his case does destroy one argument: that this country needs a bright-line rule prohibiting the execution of anyone for crimes committed under the age of 18.

Jurors are fully capable of taking into account possible mitigating factors—level of maturity, comprehension of consequences, and ability to act with sufficient culpability—in deciding whether to execute teenage killers tried as adults. Which criminals deserve capital punishment should depend on an individualized consideration of the facts and circumstances of the particular cases.

The Missouri Supreme Court's conclusion that capital punishment for all those under 18 is unconstitutional was simply wrong. And the U.S. Supreme Court should make that clear when it decides the appeal of *Roper v. Simmons*.

## THEY ARE NOT CHILDREN

I will not, in this discussion, use the term "juveniles" to refer to the criminals at issue in *Roper v. Simmons*. To do so is to pretend that there is no meaningful difference between a 10-year-old, a 13-year-old, and a 17-year-old just days away from his or her 18th birthday.

It is wrong to insist that the Constitution requires us to treat them all the same for purposes of the death penalty. It is wrong to engage in an abstract debate about the diminished capacity of "juveniles" while refusing to confront the reality of the crimes that have been plotted, committed, and covered up by 16- and 17-year-old killers. It obfuscates the difference between young children we all agree ought not be executed and those on the very edge of statutory adulthood. Christopher Simmons and his amici rely on such obfuscation to contend that no one under 18 should ever be executed for any crime. Their position ignores the reality of how mature, capable, and cold some 16- and 17-year-olds can be.

The U.S. Supreme Court recognized this not long ago. In *Stanford v. Kentucky* (1989), the Court held that imposing capital punishment on 16- and 17-year-olds is constitutional. The challengers failed to establish that there existed a national consensus against the death penalty for people of this age. Nothing in *Stanford*, in the Court's death penalty jurisprudence since,

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*Jerry Kilgore is the attorney general of Virginia. He joined an amicus brief supporting the state of Missouri before the Supreme Court in* Roper v. Simmons.

# Leave Death Penalty Decision to States' Reasonable Choice

**KILGORE,** FROM PAGE 59

or in the facts supports the Missouri court's contrary conclusion.

As Justice Antonin Scalia explained in *Stanford,* the U.S. Supreme Court's analysis here must be governed by two overarching considerations: the text of the Eighth Amendment—which bars cruel and unusual punishment—and the deference owed "to the decisions of the state legislatures under our federal system."

Emboldened by the U.S. Supreme Court's 2002 decision in *Atkins v. Virginia* banning execution of the mentally retarded, the Missouri Supreme Court decided that the high court would today hold that executions for offenses committed at the age of 16 or 17 are prohibited by the Eighth Amendment. But nothing in *Atkins* supports withdrawing from the states and their citizens the power to decide whether a 16- or 17-year-old who is not mentally retarded ought to be executed. The power to engage in individualized consideration—consideration that is necessarily more accurate and reliable than broad generalizations about large groups of human beings—properly lies with state legislatures, local judges, and local juries.

## FULLY CAPABLE KILLERS

In *Atkins,* the Supreme Court relied upon the definition of diminished capacity that attends the term "mental retardation." Its decision to exempt mentally retarded murderers from the death penalty rested, at bottom, on a judgment that such offenders are, by virtue of their limited cognitive abilities, less blameworthy. That clinical diagnosis simply does not reach 16- and 17-year-olds.

The vast majority of 16- and 17-year-olds know how wrong it is to kill another human being. They are fully capable of developing intelligent and frightful schemes for getting even with people who have made them angry. They can control themselves, even in the face of injustice or cruelty, and reject the option of responding with horrible violence. Also, the vast majority of 16- and 17-year-olds are as articulate, able to reason, and persuasive as they will ever be as adults.

The simple fact is that the conditions that attend mental retardation cannot be attributed to every individual of a particular age. Nor does turning 18 flip a switch that suddenly renders an individual more culpable than he or she was the day before. The absolute prohibition sought by the respondents in *Simmons* just doesn't make any sense.

My primary concern is that capital punishment remain an option when a cold-blooded 16-year-old carries out a grisly gang-ordered murder. The 16-year-old who decides to shoot a complete stranger on the street as a part of a ritual gang initiation should have to make that choice knowing that his community may put him to death. He should not be able to kill secure in the knowledge that he is shielded from the ultimate punishment simply because he is some number of days away from his 18th birthday.

The death penalty should be available in that case until the people of Virginia or any other state, through their elected representatives, decide that execution is no longer a proper punishment.

## NO NATIONAL CONSENSUS

Constitutional determinations of what constitutes cruel and unusual punishment are dependent upon the "evolving standards of decency" analysis adopted by the Supreme Court in *Trop v. Dulles* (1958). In both *Stanford* and *Atkins,* the Court agreed that in that analysis, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Such deference to the reasonable choices of the states ought to be the rule unless and until the unconstitutionality of that choice is beyond serious question.

> Turning 18 does not flip a switch that suddenly renders an individual more culpable. An absolute bar on executing 16- and 17-year-olds just doesn't make sense.

Indeed, in *Penry v. Lynaugh* (1989), two affirmative legislative acts over the span of three years was not enough to establish the national consensus necessary to declare executions of the mentally retarded as cruel and unusual. In 2002, the Supreme Court relied in *Atkins* upon the affirmative action of the 14 states since *Penry* to prohibit the execution of the mentally retarded. The Court emphasized that "it is not so much the number of these States that is significant, but the consistency of the direction of change," noting in particular "the complete absence of States passing legislation reinstating the power to conduct such executions."

The same evidence simply does not exist on the question of executing 16- and 17-year-olds. Since the Court's decision in *Stanford,* only four state legislatures have acted to increase the age of killers subject to the death penalty. In addition, state legislatures can hardly be said to be moving with consistency of direction against the execution of 16- and 17-year-olds. The clearest example of movement toward, rather than away from, permitting their execution occurred in Virginia. In 2000, Virginia's legislature expressly amended its law to allow execution of violent criminals who were 16 years old or older at the time of their crimes.

An additional consideration in determining national consensus is the frequency with which the punishment is imposed. Thankfully, it is relatively rare that 16- and 17-year-olds commit vile murders. It would be ironic indeed if that fortunate fact rendered the death penalty unavailable as a matter of constitutional law.

The amicus brief filed by Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia describes just how sinister and sophisticated some young murderers have been. There is no basis for treating them differently from their 18-year-old friends. ■

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