MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI	**AE 084E** **DEFENSE RENEWED MOTION FOR THE RECUSAL OF COL JAMES POHL AS JUDGE OF THIS MILITARY COMMISSION** **MOTION TO DISQUALIFY, OR IN THE ALTERNATIVE REQUESTING RECUSAL OF, COL JAMES L. POHL AS MILITARY JUDGE IN THIS CASE** 31 March 2014

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.

2. Relief Requested: The defense requests that the Colonel James L Pohl recuse himself as Judge of this Military Commission.

3. Overview:

"Judges, like Ceaser's wife, should always be above suspicion. An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding impropriety itself." *United States v. Miller*, 28 M.J. 615 (A-F. Ct. Mil. Rev. 1988)(*en banc*). Previously, the defense requested that Colonel James L. Pohl recuse himself as the Judge of this Military Commission. AE084. The defense argued an inherent conflict existed, which created the type of apparent conflict that the Supreme Court has held requires recusal. During the hearing on that motion, the defense inquired who "owned," in the military sense, Colonel Pohl. Colonel Pohl refused to address the issue head on. New evidence has surfaced that arguably answers this question. Memorandum from Bruce MacDonald to Chief, Personnel, Plans & Training dated 2 April 2010 (Attachment A). The

Convening Authority, who referred the case as capital, personally sought out Colonel Pohl and affirmatively requested that Colonel Pohl be placed on a yearly contract past his Army retirement in order to continue to preside over these military commissions. The relationship between Colonel Pohl and the Convening Authority—with the "broad scope of prosecutorial power traditionally afforded the convening authority"—demonstrates a clear conflict that requires him to recuse himself from the case. *Vanover v. Clark*, 27 M.J. 345, 347 (C.M.A. 1988).

4. Facts:

On 21 November 2008, the Convening Authority, Susan Crawford, appointed Colonel Pohl as Chief Judge of the Military Commissions. This appointment gave Colonel Pohl the authority to preside over military commissions, and to detail to each commission "certified military judges, nominated for that purpose by the Judge Advocates General of each of the military departments." Rule for Military Commission 503(b)(1).

On 10 April 2010, the Convening Authority, Bruce MacDonald, personally lobbied the Army to retain Colonel Pohl on retiree-recall status. (Attachment A) He was renewed on 30 September 2011, after Mr. MacDonald referred this case to this military commission. Colonel Pohl's retiree-recall status has been renewed each year thereafter. The request by the Convening Authority that Colonel Pohl be put in retired recall status was never disclosed to the defense, which discovered it only recently after it was produced in response to a third-party's request pursuant to the Freedom of Information Act.

5. **Argument**

In *Weiss v. United States*, 510 U.S. 163, 180 (1994), the Supreme Court rejected a Due Process challenge to the lack of fixed terms for military judges because the "applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the

effects of command influence, sufficiently preserve impartiality so as to satisfy the Due Process Clause." In so holding, the Court relied on the fact that "Article 26 places military judges under the authority of the appropriate Judge Advocate General rather than under the authority of the convening officer…Article 26 also protects against unlawful command influence by precluding a convening authority or any command officer from preparing or reviewing any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties." This was important because the relationship between the Convening Authority and a military judge raises the significant specter of improper command influence over the cases the Convening Authority places before the military judge. The new evidence demonstrates not only did the Convening Authority appoint Colonel Pohl as Chief Judge, he specifically lobbied for Colonel Pohl to remain on a year-to-year contract with the Army and commented on his effectiveness as a military judge. This coziness not only implicates the very concerns the Supreme Court raised in *Weiss*, the Convening Authority and Colonel Pohl hid this relationship from counsel and the public.

The letter from the Convening Authority to the Chief, Personnel, Plans and Training Office of the Office of the Judge Advocate General of the Department of the Army is nothing if not a report concerning the effectiveness, fitness, or efficiency of a military judge relating to the judicial duties of COL Pohl. As such, it represents the clearest form of command influence. This command influence calls into question every ruling made by Colonel Pohl and especially those rulings refusing to dismiss the case or rulings in which Colonel Pohl has acquiesced in legal positions asserted by the Convening Authority.

For example, an ongoing issue has been whether the defense may seek resources *ex parte*. In July 2013, Colonel Pohl ruled authoritatively that the defense could seek resources *ex parte*.

A.E. 114C at 6-7. Yet when the defense acted upon that ruling, Colonel Pohl effectively rescinded the ruling in A.E. 114C without explanation. A fair minded outsider could easily conclude that Colonel Pohl came to understand that his ruling was not liked by the Convening Authority, that his continued service could be in jeopardy if he did not change, and so the ruling was changed without notice to the defense. It is the perception that all is not right that haunts this commission. This perception can only be cured if Colonel Pohl fulfills his duty and recuses himself from this Commission. *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 340 (C.M.A. 1988)("It follows that a military judge—whether at the trial or appellate level—who fails to uphold the independence and integrity of his court is guilty of dereliction of duty and has violated the Uniform Code."). "Moreover, the general mandate expressed in the Manual for dealing with challenges against the military judge is a *liberal policy* in favor of sustaining the challenge." *United States v. Conley*, 4 M.J. 327, 329 (C.M.A. 1978)(emphasis added).

The regulations insulating military judges from the Convening Authority that passed constitutional muster in *Weiss* are rooted in the Military Justice Act of 1968. The Act included substantial revisions to the UCMJ, aimed at ensuring the independence of military judges, who were then called law officers. When "Congress exchanged the titled 'law officer' for 'military judge'…it certainly intended that military judges would be subject to [the first Canon of Judicial Conduct], which is applicable to all other judges throughout the United States." *Carlucci*, 26 M.J. at 336. That cannon, "requires that judges uphold the independence and integrity of their courts." *Id.* "The Act codified the concept of the field judiciary, which had been pioneered by the Army in 1958 and was adopted later by the other services, by providing that 'the military judge of a general court-martial shall be designated by the Judge Advocate General, or his

designee,' but the detail itself was still the responsibility of the convening authority." *United States v. Newcomb*, 5 M.J. 4, 9 (C.M.A. 1978)(Cook, J. concurring); *United States v. Gordon*, 7 M.J. 869, 872 (A.C.M.R. 1972)("'Select' and 'detail' are not coextensive terms."). And "as a result of congressional concern about the possible use 'of an effectiveness, fitness, or efficiency report' to influence the action of court members, Article 37 of the Code, was amended to prohibit consideration of 'the performance of duty of any' person 'as a member of a court-martial' in preparing such a report on that person." *United States v. Murphy*, 26 M.J. 454, 457 (C.M.A. 1988)(Everett, C.J. concurring and dissenting in part).

In the Military Commissions Act, Congress incorporated the provisions designed to ensure judicial independence found in Article 26, UCMJ, into 10 U.S.C. § 948j. Instead of tasking the Service Secretaries as under the UCMJ, § 948j tasks the Secretary of Defense with prescribing regulations for the manner in which military judges are detailed to military commissions. Aside from this change, § 948j closely parallels Article 26, UCMJ, including its prohibition on the Convening Authority evaluating the fitness and performance of a military judge sitting as a military commission. 10 U.S.C. § 948j(f). The Secretary of Defense repeated this prohibition in R.M.C. 502(c)(5). Importantly, nothing in either the Rules for Military Commission or the Regulation for Trial by Military Commission authorize the Convening Authority to select and designate the Chief Judge. And even if the Secretary of Defense intended to return military justice to its status in 1967, such a system would violate the contrary congressional intent reflected in the UCMJ and MCA and Due Process under *Weiss*.

The independence of judges is equally robust in Article III courts. In an Article III court, the judge presiding over a capital case would have the guarantees of judicial independence that the Founders enshrined in the Constitution. These guarantees are designed to prevent any judge

from having a personal stake in the outcome of any case to come before him or her. Article III judges are appointed by the President. Article III judges are individually confirmed by the Senate. Article III judges have life tenure absent extreme, illegal behavior. Article III judges' salary can never be lowered. In every district with more than one district judge, which is now every district within the continental United States, the selection of a judge for a particular case is random. If two cases are related, a party can make a motion to have them heard by the same judge or otherwise joined. But whether such a request is granted is something that can be litigated on the record by the opposing party, and is subject to appeal. *Ligon v. City of New York*, 736 F.3d 118 (2d Cir. 2013) (staying a district court injunction and ordering the case transferred to another judge where "the appearance of impartiality surrounding this litigation was compromised by the District Judge's improper application of the Court's 'related case rule[.]'").

In short, significant institutional and practical safeguards ensure that the only vested interest an Article III judge is likely to have is in the institutional integrity of the judicial system and the pride in not to be reversed on appeal. If those safeguards break down and a judge happens, by chance, to have or appear to have some personal interest in the case, he or she is legally obligated to recuse. 28 U.S.C.A. § 455. *Ligon*, 736 F.3d at 123-124 ("The goal of section 455(a) is to avoid not only partiality but also the appearance of partiality. ... [I]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.") (quotations ommitted). If an allegation of bias and prejudice is alleged, 28 U.S.C. § 144 applies. In either event, if a judge declines a recusal request, that decision is subject to interlocutory appeal. *Cobel v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003).

A. Colonel Pohl's selection was not random.

We now know beyond cavil that Colonel Pohl's selection to be on retiree-recall status so

that he could preside over this military commission, and receive the significant increase in pay that accompanies that responsibility, was not random. It was shepherded through the bureaucracy by the Convening Authority at a time when the Convening Authority was considering the charges this very case. Indeed, at the time of the Convening Authority's lobbying efforts in 2010, the Attorney General had publicly announced that this would likely be the first and possibly only high-value detainee trial to proceed, insofar as the September 11th case was still slated for prosecution in federal court.

What is unknown, and what must be flushed out through an evidentiary hearing, is how this all came to pass. What was Colonel Pohl's role in this process? Was he an innocent bystander unaware of the desire of the Convening Authority to select him or was he lobbying for the position? What has his role been since referral? What communications have there been between the Convening Authority and the Army bureaucracy? Who rates or approves Colonel Pohl's performance? Those are all questions to which thorough answers must be provided. The failure to reveal his earlier role and the continued silence and "stonewalling" by the Convening Authority only raises further suspicions that all of this smoke is caused by a fire.

Colonel Pohl was hand-selected as Chief Judge by the Convening Authority. The Convening Authority uses no binding or even known criteria to decide who is appropriate for this role. As Colonel Pohl has acknowledged, the Convening Authority serves substantially the same role as a U.S. Attorney. The Convening Authority's selection of COL Pohl as chief judge and Colonel Pohl's selection of himself to preside over this case, therefore, presents a situation where a judge was hand-selected by the same government official whose duty is to ensure the successful prosecution of this very case.

As the Supreme Court recognized in *Weiss*, the Convening Authority does not, either

directly or indirectly, choose or rate the performance of the military judge of a court-martial. In courts-martial, a given military judge's service in a given case is, in the usual course, determined by the regional command in which a particular case arises. COL Pohl's service on this case, however, is a result of his choosing himself for that role after being recruited by the very individual who initiated the prosecution of these cases.

When this issue first arose, it was prior to discovery of the proof that the Convening Authority played a significant role in COL Pohl's selection for retiree-recall status. COL Pohl did not volunteer the information. Instead, he chose to remain silent when asked and led the court to believe that the defense team's suspicions were wholly unfounded:

LDC [MR. KAMMEN]: Here, of course, our position is different in two respects. You don't receive campaign contributions. You receive pay. And we believe, Your Honor, and because of the silence in the record, it is unclear who is responsible for continuing your contract year to year. But let me address this as the military people ----

MJ [COL POHL]: Just to clarify that, it is a matter of public record that decisions on this are made by the Department of the Army.

LDC [MR. KAMMEN]: I'm sorry?

MJ [COL POHL]: It is a matter of public record that decisions of continued service are made by the Department of the Army.

LDC [MR. KAMMEN]: That is a big organization, Your Honor. Who within the Department of Army? That's the mystery, that we don't know. What criteria do they use? Is it somebody General Martins can call? Is it somebody the Convening Authority can call?

MJ [COL POHL]: The standard is you can call anybody.

LDC [MR. KAMMEN]: That is true, but we don't know who it is. And because we don't know who it is, because we don't know what criteria he or she will use, given what happened to Colonel Brownback, there can be no question that a reasonable person can believe that if a judge in your position does not please the bureaucracy, the Department of the Army, that they will have this contract withdrawn. That is exactly what happened to Colonel Brownback.

And, you know, we can all shrug and say no, this is different ----

MJ [COL POHL]: I shrug because you interpret facts a certain way, and that's fine, that is your

job; you are an advocate. But that doesn't mean necessarily I believe those are even the accurate facts or should be interpreted that way, you say I shrugged.

LDC [MR. KAMMEN]: But under Massey versus Caperton, if it is a plausible and not a crazy interpretation, recusal is warranted.

MJ [COL POHL]: I got you.

Unofficial/Unauthenticated Transcript, 17 July 2012, pages 905-958.

B. COL Pohl's independence is inhibited by his pecuniary interests and the fact that the Convening Authority solicited the army to grant him retirement recall status.

COL Pohl has no life tenure or salary protection. Indeed, he does not even enjoy the job security that active duty military officers would enjoy in a similar position. Active duty military judges in courts-martial are, of course, selected and supervised not by convening authorities, but instead by the service JAGs. *See* 10 U.S.C. § 826 (Article 26). Because COL Pohl is under a retiree-recall status, his contract is up for renegotiation every year. As a consequence, he serves at the pleasure of the Army and, we now know, the endorsement of the Convening Authority. His ultimate vulnerability to the good graces of the very government that is seeking to prosecute, convict and execute Mr. Nashiri creates an irreconcilable conflict of interest that requires recusal and offends due process, if left unremedied.

"It is elementary that a fair trial in a fair tribunal is a basic requirement of due process." *Weiss v. United States*, 510 U.S. 163, 178 (1994) (internal quotation omitted). And it goes without saying that "[a] necessary component of a fair trial is an impartial judge." *Id.* (citations omitted). In *Tumey v. Ohio*, 273 U.S. 510, 524 (1927), for example, the Supreme Court held that due process is denied if the officer deciding a case has "the slightest pecuniary interest" in the outcome. The leading federal case on comparable circumstances held that "we think recusal is required when, at the very time a case is about to go to trial before a judge, he is in negotiation

albeit preliminary, tentative, indirect, unintentional, and ultimately unsuccessful-with a lawyer or law firm or party in the case over his future employment. This would be clear enough if the negotiation were with only one side of the case, for a judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case." *Pepsico v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985) (Posner, J.).

In fact, the prospective influences at play in *Pepsico* were far less pernicious than those here. In *Pepsico*, a retiring federal judge had enlisted the services of a professional headhunter, who unbeknownst to him, had contacted various law firms for possible employment. Two of the firms the headhunter had contacted represented each of the opposing parties in a case before him. The judge in *Pepsico*, therefore, did not even know that one or both of the parties could be holding his future livelihood in their hands. But as the Supreme Court has long held, it "does not depend upon whether … the judge actually knew of facts creating an appearance of impropriety so long as the public might reasonably believe that he or she knew." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). "The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary." *Pepsico*, 764 F.2d at 461. COL Pohl's service on this case is under the shadow of this very scenario. Even apart from the pernicious influence of those in the government who directly control COL Pohl's livelihood, there are more subtle pressures that would rationally inhibit COL Pohl from ruling in ways that would make Mr. Nashiri's continued prosecution by a military commission unviable. In *Connally v. Georgia,* 429 U.S. 245 (1977) *(per curiam)*, the Supreme Court invalidated a system in which justices of the peace were paid for the issuance but not for nonissuance of search

warrants. The Court reasoned that this presented yet "another situation where the defendant is subjected to what surely is judicial action by an officer of a court who has 'a direct, personal, substantial, pecuniary interest' in his conclusion to issue or to deny the warrant." *Id.* at 250.

Similarly, Colonel Pohl's continued employment depends on his presiding over active cases. If his docket becomes empty, the rationale for re-upping his contract year after year becomes less defensible from the vantage of governmental expenditures. This gives him a rational and compelling disincentive to dismiss any case, or to rule in a way which makes it clear that a traditional Article III court is a better forum for this trial. For example if Colonel Pohl were to hold that the prosecution could not call sixty-six hearsay witnesses or that evidence of torture could not be secret the very reasons for a military commission would evaporate and the political forces might conclude that an Article III court was preferable. But if that happened, Colonel Pohl could rationally conclude he was putting himself out of a job.

Should Colonel Pohl's docket shrink, he reasonably knows that the additional income he draws from his service as a military commission judge will end shortly thereafter. Colonel Pohl's financial interest and the fact that his employment can be terminated should he rule adversely to the prosecution create at least a perception of bias, if not actual bias. "The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary." *Pepsico*, 764 F.2d at 461.

In *Caperton v. Massey Coal*, 556 U.S. 868 (2009), the Supreme Court held that a judge should be disqualified when his campaign received significant contributions from one of the litigants. The Supreme Court said, "Under our precedents there are objective standards that

require recusal when 'the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.' … Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal." *Id*. at 872 (*quoting Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Court noted the continuing vitality of *Tumey v. Ohio*, 273 U.S. 510 (1927), which held that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. Clearly the threat of losing 25% of one's income represents such a direct pecuniary interests warranting disqualification or recusal.

Moreover, the Court in *Caperton* noted that recusal is warranted not simply when there is a "direct pecuniary interest," but also when there are "interests that tempt adjudicators to disregard neutrality." *Id*. at 878. The government is therefore mistaken when it argues that defense must show actual bias. Rather, in order to show a violation of due process, the defense is "not required to decide whether in fact [the judge] was influenced." *Id*. at 879. The proper constitutional inquiry is "whether sitting on the case … 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'" *Id*.

The objective standard the Court laid down is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47; *Caperton*, 566 U.S. at 884. Under that standard, COL Pohl must be disqualified or recused. Any realistic appraisal of psychological tendencies or human weaknesses clearly supports a finding that the loss of 25% of his income is sufficient to create the risk of deference to the bureaucracy that needs a conviction and a death sentence. That realistic appraisal of human nature coupled with COL Pohl's demonstrated

deference to the bureaucracy that can end his employment every September clearly demonstrates that need.

In light of the fact that many observers in the United States and the world hold firmly that the military commissions regime is organized only to convict and kill the accused while protecting the individuals who tortured Mr. Al-Nashiri from scrutiny, Colonel Pohl's continued involvement demonstrates to those critics the flawed nature of the military commissions regime. Accordingly, he should demonstrate the integrity of the process a commitment to the traditions of military justice and judicial independence and recuse himself.

C. COL Pohl Must Recuse Himself From Any Consideration Of Motions To Compel Production of Evidence and From the Required Evidentiary Hearing On This Motion.

The defense has requested both discovery on this issue and the production of witnesses. Under the procedures that Colonel Pohl has found to apply in this Commission, the prosecution has denied both discovery and production of witnesses. Accordingly, it falls to a judge to decide those issues. However, this presents the clearest conflict of interest. Colonel Pohl would have to approve production of evidence and witnesses who might well demonstrate the command influence that can undermine military justice and ultimately lead to him losing his retirement recall status. Yet, a decision not to approve production of the witnesses or evidence would properly be seen as stonewalling.

Article III courts have procedures to deal with such an issue:

Section 144 in full (emphasis added):

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, *such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding*.

The D.C. Circuit has confirmed that Section 144 requires the sitting judge to recuse himself immediately and the claims of bias/prejudice must be heard by another judge. *United States v. Barry*, 938 F.2d 1327, 1339 n.14 (D.C. Cir. 1991).

Of course, the Military Commission have no procedures designed for the consideration of such an issue because the framers of the Commission probably did not presume that one party, vested with prosecutorial discretion, would recruit the judge to preside over a Commission. Given the significance of the Convening Authority's solicitation of Colonel Pohl to be on retirement recall, the defense argues that this would be governed by the 144 standards and that Colonel Pohl cannot consider either the production of evidence or the evidentiary hearing that must be held in this matter. The defense has more than satisfied the "*liberal policy* in favor of sustaining the challenge." *United States v. Conley*, 4 M.J. 327, 329 (C.M.A. 1978)(emphasis added).

6. Oral Argument: Requested.

7. Witnesses:

a. Ms. Susan Crawford
b. Adm. Bruce McDonald
c. Mr. Paul L. Oostburg Sanz
d. LTG Dana Chipman

8. Conference with Opposing Counsel: The prosecution opposes this motion.

9. List of Attachments:

A. Letter from the Convening Authority soliciting that COL Pohl be given retirement recall status, dated 2 April 2010.

B. Stephen Bright, "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases (with Keenan)," Yale Law School, 1 January 1995 (78 pages)

/s/ Brian Mizer
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DAPHNE JACKSON, Capt, USAF
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/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

CERTIFICATE OF SERVICE

I certify that on 31 March 2014, I electronically filed the forgoing document with the Clerk of the Court and served the forgoing on all counsel of record on the date of filing.

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ATTACHMENT

A

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

April 2, 2010

MEMORANDUM FOR Chief, Personnel, Plans & Training Office
Office of the Judge Advocate General
Department of the Army

SUBJECT: Retired Recall, Colonel James L. Pohl

I request that Colonel James L. Pohl be placed in a retired recall status from 30 September 2010 until 30 September 2011. Colonel Pohl serves as the Chief Trial Judge for the Military Commissions and, at this juncture, is the most experienced military judge remaining in the commissions trial judiciary.

The loss of his expertise and leadership would be extremely detrimental to the commissions at this particular time. With the anticipated renewal of commissions trials, his experience, both as a sitting judge in several commissions cases and as chief judge, will be crucial in achieving a vibrant renewal of the trial process.

The extension is requested for 12 months to enable continuity of operations for the commissions trial judiciary.

POC at this organization is (b)(6)

Bruce MacDonald
Convening Authority
for Military Commissions

Printed on Recycled Paper

ATTACHMENT

B

1-1-1995

Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases (with Keenan)

Stephen B. Bright
Yale Law School

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JUDGES AND THE POLITICS OF DEATH: DECIDING BETWEEN THE BILL OF RIGHTS AND THE NEXT ELECTION IN CAPITAL CASES

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† B.A. 1989, Tufts University; J.D. 1995, Yale Law School.

> *The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty . . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.*
>
> —Justice John Paul Stevens,
> dissenting in *Harris v. Alabama*[1]

The thunderous voice of the present-day "higher authority" that Justice Stevens described is heard today with unmistakable clarity in the courts throughout the United States. Those judges who do not listen and bend to political pressures may lose their positions on the bench.

Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases—with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court. This raises serious questions about the independence and integrity of the judiciary and the ability of judges to enforce the Bill of Rights and otherwise be fair and impartial in capital cases.

California has the largest death row of any state in the nation.[2] In 1986, Governor George Deukmejian publicly warned two justices of the state's supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences.[3] He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases.[4] Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat.[5] He opposed the

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[1] 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

[2] NAACP Legal Defense & Educ. Fund, Inc., Death Row, USA 13 (Spring 1995) (fact sheet on file with the *Boston University Law Review*) [hereinafter Death Row, USA] (cataloguing the 407 persons on California's death row as of April 30, 1995).

[3] Steve Wiegand, *Governor's Warning to 2 Justices*, S.F. CHRON., Mar. 14, 1986, at 1.

[4] Leo C. Wolinsky, *Governor's Support for 2 Justices Tied to Death Penalty Votes*, L.A. TIMES, Mar. 14, 1986, at 3.

[5] Henry Unger, *Will Vote Against Grodin, Reynoso, Deukmejian Says*, L.A. DAILY J., Aug. 26, 1986, at 1.

retention of all three justices and all lost their seats after a campaign dominated by the death penalty.[6] Deukmejian appointed their replacements in 1987.

The removal and replacement of the three justices has affected every capital case the court has subsequently reviewed, resulting in a dramatic change. In the last five years, the Court has affirmed nearly 97% of the capital cases it has reviewed, one of the highest rates in the nation.[7] A law professor who watches the court observed, "One thing it shows is that when the voters speak loudly enough, even the judiciary listens."[8] The once highly regarded court now distinguishes itself primarily by its readiness to find trial court error harmless in capital cases. The new court has "reversed every premise underlying the Bird Court's harmless error analysis," displaying an eagerness that reflects "jurisprudential theory" less than a "desire to carry out the death penalty."[9]

The voice of "higher authority" has also been heard and felt in Texas, which has the nation's second largest death row.[10] After a decision by the state's highest criminal court, the Court of Criminal Appeals, reversing the conviction in a particularly notorious capital case, a former chairman of the state Republican Party called for Republicans to take over the court in the 1994 election.[11] The voters responded to the call. Republi-

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[6] Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, pt. 1, at 1 (describing how Rose Bird's "box score" of 61 reversal votes in 61 capital cases became a "constant refrain of the campaign against her," and how campaign commercials against the other two justices in the last month of the race insisted "that all three justices needed to lose if the death penalty is to be enforced"); *see also* Philip Hager, *Grodin Says He Was "Caught" in Deukmajian's Anti-Bird Tide*, L.A. TIMES, Nov. 13, 1986, pt. 1, at 3 (quoting defeated Justice Joseph R. Grodin saying that he was defeated in a "tide of opposition to the chief justice and frustration over the death penalty").

[7] Maura Dolan, *State High Court Is Strong Enforcer of Death Penalty*, L.A. TIMES, Apr. 9, 1995, at A1 [hereinafter Dolan, *State High Court Is Strong Enforcer of Death Penalty*]; *see also* Maura Dolan, *State High Court Steering a Pragmatic Legal Course*, L.A. TIMES, Sept. 8, 1993, at A5 (describing the court's high rate of death-sentence affirmation in mandatory review cases).

[8] Dolan, *State High Court Is Strong Enforcer of Death Penalty*, *supra* note 7, at A1 (quoting Professor Clark Kelso).

[9] Elliot C. Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. REV. 41, 85, 89 (1991).

[10] Death Row, U.S.A., *supra* note 2, at 9, 36 (stating that Texas had carried out 93 executions between the reinstatement of capital punishment in 1976 and April 30, 1995, and that 398 people remained on death row awaiting execution).

[11] Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32. The case was Rodriguez v. State, 848 S.W.2d 141 (Tex. Crim. App. 1993).

cans won every position they sought on the court.[12]

One of the Republicans elected to the court was Stephen W. Mansfield, who had been a member of the Texas bar only two years, but campaigned for the court on promises of the death penalty for killers, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases."[13] Even before the election it came to light that Mansfield had misrepresented his prior background, experience, and record,[14] that he had been fined for practicing law without a license in Florida,[15] and that—contrary to his assertions that he had experience in criminal cases and had "written extensively on criminal and civil justice issues"—he had virtually no experience in criminal law and his writing in the area of criminal law consisted of a guest column in a local newspaper criticizing the same decision that prompted the former Republican chairman to call for a takeover of the court.[16] Nevertheless, Mansfield defeated the incumbent judge, a conservative former prosecutor who had served twelve years on the court and was supported by both sides of the criminal bar.[17] Mansfield was sworn in to office for a six-year term in January 1995.[18] Among his responsibilities

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[12] John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUSTON CHRON., Nov. 10, 1994, at A29.

[13] Elliott & Connelly, *supra* note 11, at 32.

[14] *Id.* Before the election, Mansfield admitted lying about his birthplace (he claimed to be born in Texas, but was born in Massachusetts), the amount of time he had spent in Texas, and his prior political experience. *Id.*; Jane Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1 (reporting that Mansfield was unable to verify campaign claims regarding the number of criminal cases he had handled and had portrayed himself as a political novice despite having twice unsuccessfully run for Congress); *see also Do It Now*, FT. WORTH STAR-TELEGRAM, Nov. 12, 1994, at 32 (editorial calling for reform of the judicial selection system in Texas and for an immediate challenge to Mansfield's election because he had "shaded the truth of virtually every aspect of his career"); *Q & A with Stephen Mansfield; 'The Greatest Challenge of My Life,'* TEX. LAW., Nov. 21, 1994, at 8 (printing a post-election interview with Mansfield in which he "retracts" a number of statements made before and during the interview). Also discovered after the election was Mansfield's failure to report $10,000 in past-due child support when he applied for his Texas law license in 1992. *Child Support Allegations Threaten Judge Seat*, FT. WORTH STAR-TELEGRAM, Dec. 10, 1994, at 29.

[15] Williams, *supra* note 12, at A29.

[16] Elliott & Connelly, *supra* note 11, at 32. Mansfield received the support of victims' rights groups. *Id.*

[17] Elliott, *supra* note 14, at 1. Mansfield won 54% of the vote in the general election; his opponent, Judge Charles F. Campbell, received 46%. *Id.* Mansfield had previously won the Republican nomination for the seat, winning 67% of the primary vote in defeating John Cossum, a former state and federal prosecutor who was working as a criminal defense lawyer in Houston. Elliott & Connelly, *supra* note 11, at 32.

[18] Robert Elder, Jr., *The Conservative Era Begins: Mansfield, Keller, Owen Join High Courts*, TEX. LAW., Jan. 9, 1995, at 1.

will be the review of every capital case coming before the court on direct appeal and in postconviction review.

The single county in America responsible for the most death sentences and executions is Harris County, Texas, which includes Houston.[19] Judge Norman E. Lanford, a Republican, was voted off the state district court in Houston in 1992 after he recommended in postconviction proceedings that a death sentence be set aside due to prosecutorial misconduct, and directed an acquittal in another murder case due to constitutional violations.[20] A prosecutor who specialized in death cases, Caprice Cosper, defeated Judge Lanford in the Republican primary.[21] Lanford accused District Attorney John B. Holmes of causing congestion of Lanford's docket to help bring about his defeat.[22] In the November election, Cosper was elected after a campaign in which radio advertisements on her behalf attacked her Democratic opponent for having once opposed the death penalty.[23]

Judges in other states have had similar campaigns waged against them. Justice James Robertson was voted off the Mississippi Supreme Court in 1992. His opponent in the Democratic primary ran as a "law and order

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[19] By the end of February 1995, 37 persons sentenced to death in Harris County had been executed. Tamar Lewin, *Who Decides Who Will Die? Even Within States It Varies*, N.Y. TIMES, Feb. 23, 1995, at A1, A13. Another 114 persons sentenced to death in Harris County are awaiting execution on Texas' death row. Barry Sclachter, *Texas' Execution Record Defies Sole Answer*, FT. WORTH STAR-TELEGRAM, Feb. 12, 1995, at A10 ("Death sentences from courts in Houston's county, Harris, alone have accounted for more executions than the second-ranking state, Florida. It now has 114 inmates on death row."). Only 11 states besides Texas have over 100 persons under death sentence. Death Row, U.S.A., *supra* note 2, at 10-41.

[20] Lanford became the center of controversy after he ruled that there had been an illegal arrest and ordered the acquittal of a man accused of killing a police officer. Barbara Linkin, *Controversial Judge Lanford to Leave Bench*, HOUSTON POST, June 13, 1992, at A-25. Lanford was also criticized for sentencing a man convicted of child abuse to "10 years deferred adjudication." Critics said that Lanford should have sentenced the man more severely, but Lanford stated that the sentence was the result of a plea bargain that the prosecutor had developed. *Network Affiliates Feature Bush Interview*, HOUSTON POST, Mar. 10, 1992, at A-13.

[21] *Criminal Court Races Northcutt, Cosper, 4 Incumbents Deserve to Win*, HOUSTON POST, Oct. 24, 1992, at A-28; *District Judge, Criminal Courts*, HOUSTON CHRON., Oct. 25, 1992, at 11. Cosper was Harris County's chief appellate prosecutor in postconviction capital litigation prior to running for judge.

[22] The *Texas Lawyer* reported that "[c]ourthouse records, which show a dramatic increase in the number of cases on Lanford's docket in the months prior to the March 10 primary, lend credence to his claim that prosecutors stalled cases in a calculated effort to provide ammunition for the judge's opponent." Mark Ballard, *Gunning for a Judge; Houston's Lanford Blames DA's Office for His Downfall*, TEX. LAW., Apr. 13, 1992, at 1.

[23] Alan Bernstein, *Campaign Briefs*, HOUSTON CHRON., Oct. 26, 1992, at A14.

candidate" with the support of the Mississippi Prosecutors Association.[24] Among the decisions for which Robertson's opponent attacked him was a concurring opinion expressing the view that the Constitution did not permit the death penalty for rape where there was no loss of life.[25] Robertson's opponent exploited the opinion even though the U.S. Supreme Court had held ten years earlier that the Eighth Amendment did not permit the death penalty in such cases.[26] Opponents also attacked Robertson for his dissenting opinions in two cases that the U.S. Supreme Court later reversed.[27]

Robertson was the second justice to be voted off the court in two years for being "soft on crime." Joel Blass, whom the Governor had appointed to fill an unexpired term on the court, was defeated in 1990 for a full term by a candidate who promised to be a "tough judge for tough times" and to put criminals behind bars, and whom, like Justice Robertson's opponent, the Mississippi Prosecutors Association had endorsed.[28] Justice

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[24] David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 15-20 (1992); *Death Penalty Caused Judge's Fall, Critics Say*, GREENWOOD COMMONWEALTH (Miss.), Mar. 13, 1992, at 3; *Incumbent Robertson Defeated*, GREENWOOD COMMONWEALTH (Miss.), Mar. 11, 1992, at 1; Carole Lawes & Beverly Kraft, *High Court Judge Coddled Criminals, Critics Say*, CLARION-LEDGER (Jackson, Miss.), Mar. 13, 1992, at 1B. The resolution of the prosecutors association asserted that Robertson's opponent "best represents the views of the law abiding citizens" and "will give the crime victims and the good, honest and law abiding people of this state a hearing that is at least as fair as that of the criminal in child abuse, death penalty, and other serious criminal cases." Case, *supra*, at 16 n.108.

[25] *Court's Ruling Morally Repugnant*, CLARION-LEDGER (Jackson, Miss.), July 2, 1989, *reprinted in On March 10, Vote for Judge James L. Roberts, Jr. for the Mississippi Supreme Court*, N.E. MISS. DAILY J., Mar. 7, 1992, Campaign Supp. at 6. The case was *Leatherwood v. State*, 548 So. 2d 389, 403-06 (Miss. 1989) (Robertson, J., concurring) (expressing the view that there was "as much chance of the Supreme Court sanctioning death as a penalty for *any* non-fatal rape as the proverbial snowball enjoys in the nether regions").

[26] Coker v. Georgia, 433 U.S. 584 (1977).

[27] Case, *supra* note 24; *see* Minnick v. State, 551 So. 2d 77, 101 (Miss. 1988) (Robertson, J., dissenting), *rev'd sub nom.* Minnick v. Mississippi, 498 U.S. 146 (1990); Clemons v. State, 535 So. 2d 1354, 1367 (Miss. 1988) (Robertson, J. dissenting), *rev'd sub nom.* Clemons v. Mississippi, 494 U.S. 738 (1990). Robertson's views were distorted in the campaign. Although in his dissenting opinion in *Clemons* Robertson had expressed the view that the trial court's instruction on the "heinous, atrocious or cruel" aggravating factor was unconstitutionally vague, *id.* at 1367-68 (Robertson, J., dissenting), a circular distributed during the campaign described his decision as "believing a defendant who 'shot an unarmed pizza delivery boy in cold-blood' had not committed a crime serious enough to warrant the death penalty." Case, *supra* note 24, at 18.

[28] Tammie Cessna Langford, *Two Vying for State's High Court*, SUN HERALD (Biloxi, Miss.), June 3, 1990, at B-1.

Blass expressed concern during the campaign that his opponent was misleading the public, explaining: "Neither a Supreme Court judge nor the whole court can send a person to prison."[29]

The voice of "higher authority" can also be heard in less direct, but equally compelling ways. As Justice Stevens observed in his dissent in *Harris v. Alabama*, some members of the United States Senate have "made the death penalty a litmus test in judicial confirmation hearings" for nominees to the federal bench.[30] Several challengers for Senate seats in the 1994 elections "routinely savaged their incumbent opponents for supporting federal judicial nominees perceived to be 'soft' on capital punishment."[31]

It is becoming increasingly apparent that these political pressures have a significant impact on the fairness and integrity of capital trials. When presiding over a highly publicized capital case, a judge who declines to hand down a sentence of death, or who insists on upholding the Bill of Rights, may thereby sign his own political death warrant.[32] In such circumstances, state court judges who desire to remain in office are no more able to protect the rights of an accused in a criminal case than elected judges have been to protect the civil rights of racial minorities against

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[29] *Id.* at B-5. Blass also raised the question of whether his opponent violated the canons of judicial ethics by promising to be tough on criminals. "The Supreme Court has the constitutional duty to see to it that every defendant gets a fair trial. It is not a question of guilt or innocence at that point, but a question of due process," Blass said. *Id.* Blass was handily defeated by an opponent who was not so constrained in his comments and who spent $114,913, compared to Blass's $48,533, in campaigning for a position that pays only $75,800 per year. *Id.*; *see also* Andy Kanenglser, *McRae Overwhelms Justice Joel Blass*, CLARION-LEDGER (Jackson, Miss.), June 6, 1990, at 4A; Tammie Cessna Langford, *McRae Unseats Blass*, SUN HERALD (Biloxi, Miss.), June 3, 1990, at A-1.

[30] Harris v. Alabama, 115 S. Ct. 1031, 1039 n.5 (1995) (dissenting opinion).

[31] *Id.*; *see also* Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26 ("Senate Republicans have given notice that they will challenge any . . . judicial nominees they consider insufficiently committed to the death penalty.").

[32] A classic example was provided in the case of the "Scottsboro Boys," the African-American youths sentenced to death for rape in Scottsboro, Alabama, whose convictions and sentences were twice reversed by the U.S. Supreme Court. Norris v. Alabama, 294 U.S. 287 (1935) (reversing because of racial discrimination in jury selection); Powell v. Alabama, 287 U.S. 32 (1932) (reversing because of denial of counsel to the accused). Alabama Circuit Judge James Edwin Horton granted the defendants a new trial in 1933 and was voted out of office the next year, ending his judicial and political career. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 265-73 (rev. ed. 1992). Horton had encountered no opposition when he ran for the judgeship four years earlier. *Id.* at 273. In the same election that saw Judge Horton voted out of office, the state's attorney general, who had personally prosecuted the Scottsboro defendants, was elected lieutenant governor. *Id.*

majority sentiment.[33] As Justice Stevens observed, "Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty."[34] In the three states that permit elected judges to override jury sentences in capital cases,[35] judges override jury sentences of life imprisonment and impose death far more often than they override death sentences and impose life imprisonment.[36] Judges have also failed to enforce constitutional guarantees of fairness. It has been observed that "[t]he more susceptible judges are to political challenge, the less likely they are to reverse a death penalty judgment."[37] Affirmance rates over a ten-year period suggest that "[n]ationally there is a close correlation between the method of selection of a state supreme court and that court's affirmance rate in death penalty appeals."[38] Even greater pressure exists at the local level. Elected trial judges are under considerable pressure not to suppress evidence, grant a change of venue, or protect other constitutional rights of the accused. An indigent defendant may face the death penalty at trial without one of the most fundamental protections of the Constitution, a competent lawyer, because judges frequently appoint inexperienced, uncaring, incompetent, or inadequately compensated attorneys.[39] State trial court judges in many states routinely dispose of complex legal and factual issues in capital postconviction proceedings by adopting "orders" ghostwritten by state attorneys general—

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[33] *See, e.g.*, JACK BASS, TAMING THE STORM; THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 159-60 (1993) (describing the necessity for federal court intervention in civil rights cases because of the failure of elected state court judges to enforce constitutional guarantees).

[34] *Harris*, 115 S. Ct. at 1040 (Stevens, J., dissenting).

[35] The judge has the power to override the jury's decision on whether to impose the death penalty in Alabama, Delaware, Florida, and Indiana. *Id.* at 1038. Judges do not stand for election in Delaware. DEL. CONST. art. IV., § 3. In *Harris*, the Supreme Court, over the sole dissent of Justice Stevens, upheld Alabama's practice of allowing judges to override jury decisions on sentence. The Court had previously upheld judge overrides of jury recommendations of sentence in Spaziano v. Florida, 468 U.S. 447 (1984). The jury's sentence is final in 29 states. *Harris*, 115 S. Ct. at 1038. In four other death-penalty states, the jury plays no role in the sentencing decision. *Id.*

[36] *Harris*, 115 S. Ct. at 1040.

[37] Lisa Stansky, *Elected Judges Favor Death Penalty*, FULTON COUNTY DAILY REP. (Ga.), Nov. 24, 1989, at 11 (quoting Dean Gerald Uelman of Santa Clara University Law School, who has studied the relation between methods of selection and judicial behavior).

[38] Gerald Uelmen, *Elected Judiciary*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 170-71 (Leonard W. Levy et al. eds., Supp. I 1992).

[39] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994). For a description of the failure of judges to discharge their constitutional responsibility to protect the Sixth Amendment right to counsel, see *id.* at 1855-57.

orders that make no pretense of fairly resolving the issues before the court.

This Article examines the influence of the politics of crime on judicial behavior in capital cases. A fair and impartial judge is essential in any proceeding, but perhaps nowhere more so than in capital cases, where race,[40] poverty,[41] inadequate court-appointed counsel,[42] and popular passions[43] can influence the extermination of a human life. The legal system

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[40] *See* U.S. GAO, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (analyzing 28 studies of capital sentencing and finding a "remarkably consistent" pattern of racial disparities); *see also* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 3 (1990) (describing a study of capital sentencing in Georgia that found that the "worst offenders" are not always those executed, that many of the executed died for crimes that were *not* "among the most aggravated and therefore the most blameworthy cases," and that race is at least part of the explanation for this discrepancy); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 212 (1989) (concluding that "de facto racial discrimination in capital sentencing is legal in the United States").

[41] Poor defendants are frequently assigned lawyers who are not provided funds for expert or investigative assistance. *See, e.g.*, *Firsthand Accounts of Capital Justice*, NAT'L L.J., June 11, 1990, at 40 (relating that 54.2% of capital trial lawyers surveyed felt that courts provided inadequate funds for investigation and experts, and quoting one Louisiana appointed counsel's complaint that "[i]t was a waste of time to ask the court for funds. I knew the bastards."); Fredric N. Tulsky, *Poor Defendants Pay the Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992, at A1, A18 (reporting that in 20 capital cases in Philadelphia in 1991 and 1992 the court paid for investigators in only eight, spending an average of $605 in each, and provided funds for experts, both psychologists, in only two cases, costing $400 in one case, $500 in the other); *see also* Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Process*, 14 PACE L. REV. 1, 13-16 (1994) (discussing the limits on fees for attorneys, investigation, and experts in capital cases); Jeff Rosenzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 ARK. L. REV. 409, 410 (1991) (describing the denial of resources for expert and investigative assistance in capital cases in Arkansas). Class considerations may also come into play in the admission of victim-impact evidence. As one judge has noted:

> Not only does the admission of Victim Impact Statements create two classes of defendants, those who kill worthy members of society and those who kill less worthy citizens, it necessarily creates classes of victims: those whose lives were so worthwhile that their killer should be put to death, and those whose lives are so worthless that their killer should only receive a sentence that will put them back into society in less than ten years.

Livingston v. State, 444 S.E.2d 748, 760 (Ga. 1994) (Benham, P.J., dissenting).

[42] Bright, *supra* note 39, at 1841-66; *see also* American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990) (finding that "the inadequacy and inadequate compensation of counsel at trial" are among the "principal failings of the capital punishment review process today").

[43] The Mississippi Supreme Court, while expressing the hope that "the days of

indulges the presumption that judges are impartial. The Supreme Court has steadily reduced the availability of habeas corpus review of capital convictions,[44] placing its confidence in the notion that state judges, who

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lynch mobs are past," has observed "that the emotions which compelled our forbears to such violence endure." Johnson v. State, 476 So. 2d 1195, 1214 (Miss. 1985). For other examples of the emotions that often accompany a capital trial, see Coleman v. Kemp, 778 F.2d 1487, 1489-1537 (11th Cir. 1985) (describing the pretrial publicity of six murders and the reaction of the community, including the testimony of one juror that community sentiment was "fry 'em, electrocute 'em"); *cert. denied*, 476 U.S. 1164 (1986); Messer v. Kemp, 760 F.2d 1080, 1086-88 (11th Cir. 1985) (relating that the father of a murder victim lunged toward the defendant during a trial in the presence of the jury screaming and shouting "He'll pay! You're liable!"), *cert. denied*, 474 U.S. 1088 (1986); *Angry Fathers Confront Gang Who Killed Their Daughters*, LEGAL INTELLIGENCER, Oct. 13, 1994, at 4 (relating how victims' fathers berated gang members, convicted of murder and rape, during the capital sentencing phase of a trial, saying among other things: "You are worse than spit. You belong in hell."); *Ex-Rosewell Woman's Killer Gets Life*, ATLANTA CONST., May 9, 1995, at C6 (describing the in-court attack by a victim's father after a defendant received a life sentence for murder and rape; the father attempted to strangle the defendant before four deputies pulled him off); Steve McVicker, *The Last Word: Judge Bill "Roy Bean" Harmon Grandstands at a Murder Trial—Again*, HOUSTON PRESS, Feb. 17-23, 1994, at 4 (reporting that a victim's father was allowed to yell obscenities at the defendant in the presence of jurors and the press); Don Plummer, *Slain Cop's Father: 'All I Can Do Is Cry'*, ATLANTA CONST., Nov. 8, 1994, at B1 (describing the testimony and tears of co-workers and relatives of a murder victim during the presentation of victim-impact testimony at the sentencing stage of a capital trial).

[44] The Court has limited the availability of the writ to vindicate constitutional rights by: adopting strict rules of procedural default, *see, e.g.*, Smith v. Murray, 477 U.S. 527, 533-36 (1986), Engle v. Isaacs, 456 U.S. 107, 130-34 (1982), Wainwright v. Sykes, 433 U.S. 72, 88-91 (1977), and Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193 (1989); excluding most Fourth Amendment claims from habeas corpus review, Stone v. Powell, 428 U.S. 465 (1976); requiring deference to factfinding by state court judges, *see, e.g.*, Sumner v. Mata, 499 U.S. 539 (1981), and Patton v. Yount, 467 U.S. 1025 (1984); making it more difficult for petitioners to obtain an evidentiary hearing to prove a constitutional violation, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); adopting an extremely restrictive doctrine regarding the retroactivity of constitutional law, Teague v. Lane, 489 U.S. 288 (1989), and James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1991); reducing the harmless error standard for constitutional violations recognized in federal habeas review, Brecht v. Abrahamson, 113 S. Ct. 1710 (1993); and restricting when a constitutional violation may be raised in a second habeas petition, McCleskey v. Zant, 499 U.S. 467 (1991). *See generally* Louis D. Bilionis, *Legitimating Death*, 91 MICH. L. REV. 1643, 1650 (1993) ("A strong theme[ ], embraced by a consistent and substantial majority of the Justices . . . [is] sharply reducing the involvement of the federal judiciary in the day-to-day business of reviewing capital cases"); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 303-04 (1993). Pending antiterrorism legislation includes even

take the same oath as federal judges to uphold the Constitution, can be trusted to enforce it.[45] This confidence, however, is frequently misplaced, given the overwhelming pressure on elected state judges to heed, and perhaps even to lead, the popular cries for the death of criminal defendants.

Part I of this Article briefly summarizes the increasing use of the crime issue in local and national politics and the extraordinary prominence of the death penalty as a litmus test for politicians, including politicians who serve as judges, purporting to be "tough" on crime. Part II examines the politics of becoming and remaining a judge in such a climate. Part III assesses the effect of this political climate on a judge's ability to preside impartially over highly publicized capital cases. Part IV proposes some modest steps that might limit the influence of politics and the passions of the moment on judicial behavior.

I. CRIME IN POLITICS AND THE DEATH PENALTY IN THE POLITICS OF CRIME

During the Cold War, many politicians, seeking to avoid more contro-

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further restrictions of habeas corpus. The Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong., 1st Sess., 141 CONG. REC. S7857 (daily ed. June 7, 1995), requires deference by federal courts to decisions of state courts unless the decision is "contrary to, or involved an unreasonable application of, clearly established Federal law," *id.* § 604(3), establishes a statute of limitation for the filing of habeas corpus petitions, *id.* § 601, further restricts when a federal court may conduct an evidentiary hearing, *id.* § 604(4), and adds new barriers to hearing a successive habeas corpus petition, *id.* § 605. *See* David Cole, *Destruction of the Habeas Safety Net*, LEGAL TIMES, June 19, 1995, at 30.

[45] *See, e.g.*, *Brecht*, 113 S. Ct. at 1721 (rejecting the argument that a less demanding harmless-error standard in federal habeas review will result in the state courts refusing to find error harmless, unless litigants showed "affirmative evidence that state-court judges are ignoring their oath"); *Sumner*, 449 U.S. at 549 (expressing the view that deference to state court factfinding is appropriate because "[s]tate judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office"); *see also* Rose v. Lundy, 455 U.S. 509, 515 (1982) (requiring dismissal of a habeas corpus petition containing both exhausted and unexhausted claims and quoting *Ex parte* Royall, 117 U.S. 241 (1886): "State courts are 'equally bound to guard and protect rights secured by the Constitution.' "); Duckworth v. Serrano, 454 U.S. 1, 4 (1981) (relying upon and quoting *Ex parte* Royall to recall the duty of both state and federal courts to enforce the Constitution). *But see Stone*, 428 U.S. at 525 (Brennan, J., dissenting) (asserting that "[s]tate judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure," and calling for an assumption that there is "a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States").

versial and difficult issues, professed their opposition to Communism. Because almost everyone aspiring to public office was against Communism, politicians sought in various ways—such as support for loyalty oaths and investigation of unamerican activities—to demonstrate just how strongly they were opposed to Communism. Those who questioned the wisdom of such measures were accused of not being sufficiently strident—"soft" on Communism.

Since the collapse of the Soviet Union and other Soviet-bloc governments, crime has emerged as an issue that appears equally one-sided. No one is in favor of violent crime. Politicians demonstrate their toughness by supporting the death penalty, longer prison sentences,[46] and measures to make prison life even harsher than it is already.[47] Those who question the wisdom, cost, and effectiveness of such measures are branded "soft on crime." Whether sound public policy emerges from such a discussion of crime is a question to be addressed elsewhere.[48] The emergence of crime

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[46] *See, e.g.*, Fox Butterfield, *New Prisons Cast Shadow over Higher Education*, N.Y. TIMES, Apr. 12, 1995, at A21 (reporting on California's plans to spend, for the first time, more on prisons than for its two university systems—because its prison population grew from 23,511 to 126,140 in 15 years and the state anticipated an even greater population due to the passage of a "three strikes and you're out" law); William Claiborne, *'Three Strikes' Tough on Courts Too*, WASH. POST, Mar. 8, 1995, at A1 (describing the impact on judiciaries and prisons of new California laws requiring twice the normal sentence for a person convicted of a second felony, and 25 years to life for a third felony); *25 Years for a Slice of Pizza*, N.Y. TIMES, Mar. 5, 1995, at 21 (relating that a 27-year-old man received a 25-year sentence under California's "three strikes and you're out" law for stealing a slice of pizza).

[47] *See, e.g.*, Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, § 1, at 16 (reporting the Alabama prison commissioner's purchase of 300 sets of leg irons, at a cost of $17,000, to make Alabama the first state in the nation to reinstitute chain gangs); Seth Mydans, *Taking No Prisoners, In Manner of Speaking*, N.Y. TIMES, Mar. 4, 1995, at 6 (describing how a sheriff in Maricopa County, Arizona substituted bologna sandwiches for hot lunches, discontinued all movies, banned cigarettes and coffee, and housed some prisoners in tents); Adam Nossiter, *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, at 1 (describing efforts to take away television and exercise for prisoners in many states, the Mississippi legislature's decision to clothe prisoners in striped uniforms with the word "convict" emblazoned on the back, and some Mississippi legislators' "talk of restoring fear to prisons, of caning, of making prisoners 'smell like a prisoner' "); David J. Rothman, *The Crime of Punishment*, N.Y. REV. BOOKS, Feb. 17, 1994, at 34, 34-35, 37-38 (describing the severe overcrowding in U.S. prisons, pseudo-military "boot camps" for young offenders, and other aspects of the culture of punishment in this country, where the rate of incarceration—455 per 100,000—is one of the highest in the world).

[48] *See* DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW (1995) (describing Florida's experience with its capital punishment statute enacted in 1973, the state's inability to impose the death penalty consistently and swiftly, and the burden the death penalty has placed on courts and other institu-

as a dominant political issue is, however, not only having an impact on the behavior of politicians seeking positions in the legislative and executive branches of government, but also on the behavior of judges who are sworn to uphold the Constitution, a document that protects the rights of those accused of even the most serious crimes.

Even before the end of the Cold War, Richard Nixon demonstrated the potency of the crime issue by promising, in campaign speeches and in his acceptance of the Republican nomination for President in 1968, to replace Democrat Ramsey Clark as Attorney General.[49] Clark's defense of civil liberties and procedural safeguards had led some, including Nixon, to denounce him as "soft on crime."[50] In 1988, Lee Atwater urged Republicans to concentrate on the crime issue because "[a]lmost every candidate running out there as a Democrat is opposed to the death penalty."[51] George Bush was elected President that year with the help of advertisements criticizing his opponent for allowing the furlough of Willie Horton, who committed a rape in Maryland while on a weekend furlough from a Massachusetts prison.[52]

As crime has become a more prominent issue in political campaigns, the death penalty has become the ultimate vehicle for politicians to demonstrate just how tough they are on crime. During California's 1990 gubernatorial primary, an aide to one Democratic candidate observed wistfully that the carrying out of an execution would be a "coup" for her

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tions); WENDY KAMINER, IT'S ALL THE RAGE: CRIME AND CULTURE (1995) (describing the gap between the crime debate in the United States and what is needed to deal with the problem of violent crime). *See generally* Rothman, *supra* note 47 (collecting authority to question the wisdom of crime policies in the United States).

For discussion of the wisdom of the "three strikes and you're out" laws that have been passed in many states, see Joe D. Whitley, *3 Strikes: More Harm than Good*, FED. SENT. REP., Sept./Oct. 1994, at 63, and Stephen R. Sady, *The Armed Career Criminal Act—What's Wrong with "Three Strikes, You're Out?"*, FED. SENT. REP., Sept./Oct. 1994, at 69.

[49] Martin F. Nolan, *In Riots' Political Fallout, Right May Gain Might*, BOSTON GLOBE, May 3, 1992, at 24 ("[Nixon] attacked Johnson's liberal attorney general, Ramsey Clark, by promising in every speech 'to appoint a new attorney general' . . . .").

[50] *See, e.g.*, David Zucchino, *Political Preoccupation with Crime Isn't New*, DALLAS MORNING NEWS, Dec. 8, 1994, at 43A ("Nixon told campaign crowds that crime was rising nine times faster than the population. When . . . Clark blurted out, accurately, that 'there is no wave of crime in this country,' he became the laughingstock of the campaign.").

[51] John Harwood, *Approving Atwater: GOP Committee Backs Its Chairman*, ST. PETERSBURG TIMES, June 17, 1989, at 1A.

[52] Stephen Engelberg, *Bush, His Disavowed Backers and a Very Potent Attack Ad*, N.Y. TIMES, Nov. 3, 1988, at A1. *See generally* Larry Martz et al., *The Smear Campaign*, NEWSWEEK, Oct. 31, 1988, at 16 (reporting on the general public dissatisfaction with the tenor of the 1988 presidential campaign).

opponent, the state attorney general.[53] Candidates for governor of Texas in 1990 argued about which of them was responsible for the most executions and who could do the best job in executing more people.[54] One candidate ran television advertisements in which he walked in front of photographs of the men executed during his tenure as governor and boasted that he had "made sure they received the ultimate penalty: death."[55] Another candidate ran advertisements taking credit for thirty-two executions.[56] In Florida, the incumbent gubernatorial candidate ran television advertisements in 1990 showing the face of serial killer Ted Bundy, who was executed during his tenure as governor. The governor stated that he had signed over ninety death warrants in his four years in office.[57]

The death penalty has been a dominant political issue in Florida for over fifteen years. Bob Graham demonstrated in two terms as governor and a successful race for the United States Senate that, as one observer noted, "nothing [sells] on the campaign trail like promises to speed up the death penalty."[58] Graham's signing of death warrants enabled him to reinvent himself as tough after being initially dubbed "Governor Jello."[59] He increased the number of warrants he signed when running for reelection as governor in 1982 even though he knew they would not be carried out,[60] and again stepped up the number of warrants he was signing each

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[53] Michael Kroll, *Death-Penalty Appeal in State's Governor Race*, SACRAMENTO BEE, Oct. 30, 1989, at B13. The comment came after the United States Court of Appeals for the Ninth Circuit upheld the death sentence of Robert Alton Harris. An aide to Dianne Feinstein (the latter was running against Attorney General John Van de Kamp in the Democratic primary) said, "What a coup for John [Van de Kamp] if Harris were executed in May just before the primary . . . . I think Van de Kamp will welcome the execution." Van de Kamp did not have the benefit of this hoped-for "coup"; California did not execute Harris until April 22, 1992. Katherine Bishop, *After Night of Court Battles, a California Execution*, N.Y. TIMES, Apr. 22, 1992, at A1.

[54] *See* Michael Oreskes, *Death Penalty Politics: Candidates Rush to Embrace Execution*, COURIER-JOURNAL (Louisville, Ky.), Apr. 8, 1990, at D1, D4.

[55] Richard Cohen, *Playing Politics with the Death Penalty*, WASH. POST, Mar. 20, 1990, at A19.

[56] *Id.* (describing the Democratic primary campaign strategy of state Attorney General Jim Mattox, and remarking that Mattox's opponent—then-Treasurer and later Governor Ann Richards, herself a proponent of the death penalty—may have found the "nonlethal nature of her office" a disadvantage in the competition).

[57] *Id.* Bob Martinez proclaimed that Bundy and the other 89 had each "committed a heinous crime that I don't want to choose to describe to you [sic]." *Id.*

[58] VON DREHLE, *supra* note 48, at 325.

[59] *Id.* at 268.

[60] *Id.* at 200-01. Federal courts were granting automatic stays of execution pending the decision of the U.S. Court of Appeals on an issue that affected every capital case in Florida. *Id.* at 200. One federal district court observed that the signing of the warrants "ranges between legally unsound and futile," but it had no effect on Graham. *Id.*

month when running for the Senate in 1986.[61] One assistant attorney general responsible for representing the state in capital cases had to work so hard as a result of Graham's warrant-issuing spree during his Senate campaign that the prosecutor commented, "Nine months of Bob Graham running for the Senate nearly killed me."[62]

Presidential candidate Bill Clinton demonstrated that he was tough on crime in his 1992 campaign by scheduling the execution of a brain-damaged man shortly before the New Hampshire primary.[63] Clinton had embraced the death penalty in 1982 after his defeat in a bid for reelection as governor of Arkansas in 1980.[64] In his presidential campaign ten years later, Clinton returned from New Hampshire to preside over the execution of Rickey Ray Rector, an African-American who had been sentenced to death by an all-white jury.[65] Rector had destroyed part of his brain when he turned his gun on himself after killing the police officer for whose murder he received the death sentence. Logs at the prison show that in the days leading up to his execution, Rector was howling and barking like a dog, dancing, singing, laughing inappropriately, and saying that he was going to vote for Clinton.[66] Clinton denied clemency and allowed the execution to proceed, thereby protecting himself from being labeled as "soft on crime" and helping the Democrats to take back the crime issue. Clinton's first three television advertisements in his bid for reelection—already begun a year and a half before the 1996 presidential election—all focused on crime and Clinton's support to expand the death penalty.[67]

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[61] *Id.* at 293.

[62] *Id.*

[63] Marshall Frady, *Annals of Law and Politics: Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105, 105.

[64] George E. Jordan, *Campaign 92: Clinton & Crime; Supports Capital Punishment as Sign of Toughness*, NEWSDAY, May 4, 1992, at 3 (recounting Clinton's relatively liberal exercise of executive clemency during his first term and his later transformation into a death-penalty "hardliner"); Mark I. Pinsky, *Will Clinton Again Oppose Executions? Old Pal Says Maybe*, L.A. TIMES, Jan. 31, 1995, at A5 (describing Clinton's change from an opponent of the death penalty to a supporter).

[65] Frady, *supra* note 63, at 105, 115.

[66] *Id.* at 105.

[67] Todd S. Purdum, *Clinton Gets Early Start on Ad Campaign Trail*, N.Y. TIMES, June 27, 1995, at A12 (describing $2.4 million worth of television advertising by the Clinton campaign to be run in two dozen markets nationwide in July 1995). In one advertisement, a police officer says, "It's not about politics. It's about a ban on deadly assault weapons. It's about a tough new death penalty law. President Clinton is helping us make this a safer nation." *Id.* In another advertisement, Clinton says, "Deadly assault weapons off our streets. 100,000 more police on the streets. Expand the death penalty. That's how we'll protect America." Todd S. Purdum, *The Ad Campaign*, N.Y. TIMES, June 27, 1995, at A12; *see also* Elizabeth Kolbert, *Clinton, Playing the Early Bird, Is Lining Up Campaign-Style Ads*, N.Y. TIMES, June 24, 1995, at 1

By 1994, crime had so eclipsed other issues that an official of the National Governor's Association commented that the "top three issues in gubernatorial campaigns this year are crime, crime, and crime."[68] Stark images of violence, flashing police lights, and shackled prisoners dominated the campaign, and candidates went to considerable lengths to emphasize their enthusiasm for the death penalty and attack their opponents for any perceived hesitancy to carry out executions swiftly.[69] Even after Texas carried out forty-five executions during Democrat Ann Richards's four years as governor, George W. Bush attacked Governor Richards during his successful 1994 campaign against her, complaining that Texas should execute even more people, even more quickly.[70] Bush's younger brother Jeb ran a television advertisement in his 1994 campaign for governor of Florida in which the mother of a murder victim blamed incumbent Governor Lawton Chiles for allowing the convicted killer to remain on death row for thirteen years.[71] Jeb Bush knew, and acknowledged when asked, that there was nothing Chiles could have done to speed up the execution because the case was pending in federal court.[72] Jeb Bush also argued that Florida's eight executions since Chiles's election in 1990 were not enough.[73]

In her quest to win the 1994 California gubernatorial race, Kathleen Brown found that her personal opposition to the death penalty was

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(describing as unprecedented Clinton's broadcasting of the advertisements a year and half before the election).

[68] Leslie Phillips, *Crime Pays as a Political Issue*, USA TODAY, Oct. 10, 1994, at 11A; *see also* Mark Horvit & Ken Herman, *Politicians on Anti-Crime Bandwagon*, HOUSTON POST, Jan. 9, 1994, at A-27 (reporting that candidates in the primary elections for state and national office in Texas were "waging a sound-bite war over who is the toughest crime-fighter among them"); Howard Kurtz, *In Political Ads Across the U.S., Crime Is the Weapon of Choice*, WASH. POST, Sept. 9, 1994, at A1, A4 (reporting that "[s]ix years after George Bush's presidential campaign turned furloughed murderer Willie Horton into a national symbol of Democratic softheadedness, the spirit of Hortonism is thriving" in television commercial wars with "crime . . . the 30-second weapon of choice").

[69] *See, e.g.*, Bob Minzesheimer, *Executioner's Song Heard in Governor Races*, USA TODAY, Oct. 27, 1994, at 9A (reporting that "[f]rom California to Texas to Florida, candidates for governor sound as if they're running to be executioner"); Phillips, *supra* note 68, at 9A (describing various campaign appeals based on crime and quoting one Democratic media consultant as saying, "No matter how far to the right we get, Republicans get righter. We say 'Hang 'em.' They say, 'Gas 'em.' ").

[70] *Bush Brothers Cast Foes as "Soft" for Not Killing Enough*, ARIZ. REPUBLIC, Nov. 3, 1994, at B5 ("That's one a month and sets a standard for the 50 states. But it's not good enough for George W., who apparently thinks the governor ought to administer the coup de grace herself.").

[71] *Id.*

[72] *Id.* ("[T]he ad is dishonest and exploitative, but Bush insists it's a good way to elevate the public discussion of crime . . . .").

[73] *Id.*

widely viewed as a major liability[74] even though she promised to carry out executions as governor. She had to defend herself against Governor Pete Wilson's charges that, because of her personal moral convictions, she would appoint judges like Rose Bird. Governor Wilson, whose approval ratings had been "abysmal," recovered by following the advice of the old master, Richard Nixon, who told him to hit his opponent hard on crime.[75] Candidate Brown responded to the charges by producing an advertisement proclaiming her willingness to enforce the death penalty.[76] Nevertheless, she lost to Wilson. Both Illinois Governor Jim Edgar and Iowa Governor Terry E. Branstad similarly attacked their opponents' personal opposition to the death penalty.[77] Both were reelected. New York Governor Mario Cuomo faced heated attacks for his vetoes of death-penalty legislation during twelve years in office and his refusal to return a New York prisoner to Oklahoma for execution.[78] Cuomo defended himself by proposing a referendum on the death penalty,[79] but still lost his office to a candidate who promised to reinstate capital punishment and to send the prisoner back to Oklahoma for execution.[80]

As the public debate on crime and its solutions has become increas-

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[74] *See, e.g.* Dan Walters, *Odd Segments of "60 Minutes"*, SACRAMENTO BEE, Jan. 26, 1994, at A3.

[75] Howard Fineman, *Riding the Wave*, NEWSWEEK, May 22, 1995, at 19, 19 (describing how Wilson employed this strategy to win, linking his foe to every "them" feared by California voters, including "lenient judges" and "criminal-defense lawyers").

[76] Susan Yoachum, *Ad Wars Raise Politics of Blame*, S.F. CHRON., Sept. 29, 1994, at A6.

[77] *Vote '94: The Nation*, WASH. POST, Oct. 21, 1994, at A6. In Iowa, which does not have capital punishment, Governor Branstad, in response to polls showing his challenger, Bonnie Campbell, was in the lead, "turned to the crime issue, and specifically Campbell's opposition to capital punishment." *Id.* He followed the example of Governor Edgar, who had "built a huge lead over Democratic challenger Dawn Clark Netsch thanks in part to a barrage of television commercials stressing her opposition to the death penalty." *Id.*; *see also* Minzesheimer, *supra* note 69, at 9A (reporting that the issue of their opponents' personal opposition to the death penalty had "clearly helped" both Edgar and Wilson in their bids for reelection).

[78] *See* Ian Fisher, *Clamor over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at 45, 48 (reporting that although Cuomo built more prisons than all New York governors before him combined, "[a] central paradox of Mr. Cuomo's 12-year tenure is that no matter what he has done on crime, he is judged most often by his opposition to the death penalty, even though crime rates are down, jail time is up and police forces have grown"); *see also Cuomo Takes Anti-Crime Stance*, WASH. POST, Jan. 6, 1994, at A9.

[79] James Dao, *Cuomo Proposes a Referendum on Death Penalty*, N.Y. TIMES, July 8, 1994, at B5.

[80] *Pataki on the Record: Excerpts from a Talk on Campaign Issues*, N.Y. TIMES, Oct. 10, 1994, at B4. Upon assuming office, Governor George Pataki carried out his promise and sent Grasso back to Oklahoma, and that state executed Grasso on March

ingly one-sided and vacuous, the death penalty has become the ultimate litmus test for demonstrating that one is not "soft on crime." The impact of this development has been felt not only in the executive and legislative branches of government, where popular sentiment is expected to play a major role in the development of policy, but also in the judiciary, where judges are expected to follow the law, not the election returns.

II. The Politics of Becoming and Staying a Judge

Judges in most states that have capital punishment are subject to election or retention. Although all judges take oaths to uphold the Constitution,[81] including its provisions guaranteeing certain protections for persons accused of crimes, judges who must stand for election or retention depend on the continued approval of the voters for their jobs and concomitant salaries and retirement benefits. A common route to the bench is through a prosecutor's office, where trying high-profile capital cases can result in publicity and name recognition for a prosecutor with judicial ambitions. A judge who has used capital cases to advance to the bench finds that presiding over capital cases results in continued public attention. Regardless of how one becomes a judge, rulings in capital cases may significantly affect whether a judge remains in office or moves to a higher court.

A. *Judges Face Election in Most States That Employ the Death Penalty*

Almost all judicial selection systems fall into one of four categories.[82] First, judges in eleven states and the District of Columbia are never subjected to election at any time in their judicial careers.[83] Second, the

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20, 1995. John Kifner, *Inmate Is Executed in Oklahoma, Ending N.Y. Death Penalty Fight*, N.Y. Times, Mar. 20, 1995, at A1.

[81] U.S. Const. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

[82] Because some states employ different methods of judicial selection for different courts, the number of states in the four categories described exceeds 50.

[83] *See* Conn. Const. art 5, § 2 (governor nominates judges from a list that a judicial selection commission submits, for eight-year terms); Del. Const. art. IV, § 3 (governor appoints judges and justices, with advice and consent of the senate, for 12-year terms); Haw. Const. art. VI, § 3 (governor appoints judges, from a judicial selection commission's list of nominees and with consent of the senate, for 10-year terms; judicial selection commission determines retention); Me. Const. art. 5, pt. 1, § 8 (governor nominates judicial officers, with confirmation by a committee from both houses of the legislature), art. 6, § 4 (judges hold office for seven-year terms); Mass. Const. ch. 2, § 1, art. 9 (governor appoints all judicial officers, with advice and consent of the governor's council), pt. 2, ch. 3, art. I (judicial officers hold office during good behavior); Md. Const. art. 41D (governor appoints district court judges, with advice and consent of the senate, for 10-year terms); N.H. Const. pt. 2, art. 46 (governor and

judges of three states are elected by vote of the state legislature.[84] Third, the judges of twenty-nine states are subjected to contested elections, either partisan or nonpartisan, at some point in their careers,[85] whether

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council appoint judicial officers), art. 73 (judges hold office during good behavior); N.J. CONST. art. 6, § 6, paras. 1, 3 (governor appoints judges and justices, with confirmation by the senate, for initial seven-year terms; upon reappointment judges and justices serve during good behavior); N.Y. CONST. art. 6, § 2 (governor appoints court of appeals judges, with advice and consent of the senate, for 14-year terms); R.I. GEN. LAWS §§ 8-2-1, 8-8-7 (1985) (governor appoints superior court and district court justices, with confirmation by the senate; justices hold office during good behavior); VT. CONST. ch. II, §§ 32, 34 (governor appoints judges from a judicial nominating body's list of candidates, with advice and consent of the senate, for six-year terms; general assembly votes for retention; general assembly can vote by simple majority to remove); D.C. CODE ANN. § 11-1501 (1995) (President selects judges from names that a commission recommends, with advice and consent of the Senate, for 15-year terms; judicial qualification commission reviews performance).

[84] R.I. CONST. art. 10, § 4 (vote of two houses of the legislature to select or remove supreme court judges; judges hold office until death, resignation, or removal by a vote of both houses); S.C. CONST. art. V, § 3 (general assembly elects supreme court justices for 10-year terms), § 8 (general assembly elects court of appeals judges for six-year terms), § 13 (general assembly elects circuit judges for six-year terms); VA. CONST. art. VI, § 7 (vote of both houses of the general assembly elects all judges and justices; supreme court justices serve 12-year terms, all other judges serve eight-year terms).

[85] *See* ALA. CONST. amend. 328, § 6.13 (all judges elected); ALA. CODE §§ 12-2-1, 12-3-3, 12-3-4 (1986) (supreme court justices, court of criminal appeals judges, and court of civil appeals judges all elected for six-year terms); ARK. CONST. art. 7, §§ 6, 17, 29 (supreme court justices elected for eight-year terms; circuit court judges elected for four-year terms; county court judges elected for two-year terms); FLA. CONST. art. V, § 11 (circuit judges and county court judges elected in competitive elections; governor fills all vacancies from a judicial nominating commission's list); GA. CONST. art. 6, § 7, para. 1 (superior and state court judges elected in nonpartisan elections for four-year terms; supreme court justices and court of appeals judges elected in nonpartisan elections for six-year terms); IDAHO CONST. art. VI, § 7 (supreme court justices and district judges selected in nonpartisan elections); ILL. CONST. art. 6, § 12 (judges initially selected in partisan elections; thereafter judges subject to nonpartisan retention elections); KAN. CONST. art. 3, § 6 (district court judges selected in elections); KY. CONST. § 117 (all judicial officers elected in nonpartisan elections); LA. CONST. art. 5, § 22 (judges and justices elected in regular elections); MD. CONST. art. IV, § 3 (all trial judges except for district judges elected for 15-year terms), § 5 (governor appoints circuit court judges to fill unexpired terms or for one year, whichever is less; thereafter judges subject to election); MICH. CONST. art. VI, §§ 2, 8, 9, 12 (supreme court justices elected at nonpartisan elections for eight-year terms; court of appeals judges elected by district in nonpartisan elections for six-year terms; circuit judges elected at nonpartisan elections for six-year terms); MINN. CONST. art. 6, § 7 (all judges elected for six-year terms); MISS. CONST. art. 6, §§ 145, 145A, 145B, 149, 153 (supreme court justices elected by district for eight-year terms; circuit and chancery court judges elected for four-year terms); MONT. CONST. art. 3, ch. 2, §§ 202, ch.2, §§ 201, 203