Judges and the Politics of Death

Deciding Between the Bill of Rights and the Next Election in Capital Cases

Stephen B. Bright, Patrick J. Keenan

> 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. 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. He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat. He opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty 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.[2] A law professor who watches the court observed, "One thing it shows is that when the voters speak loudly enough, even the judiciary listens.[3] 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."[4]

The voice of "higher authority" has also been heard and felt in Texas, which has the nation's second largest death row. 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. The voters responded to the call. Republicans won every position they sought on the court.

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 harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases." Even before the election it came to light that Mansfield had misrepresented his prior background, experience, and record, that he had been fined for practicing law without a license in Florida, 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. 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. "Mansfield was sworn in to serve for a six-year term in January 1995. Among his responsibilities 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. 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. A prosecutor who specialized in death cases, Caprice Cosper, defeated Judge Lanford in the Republican primary. Lanford accused District Attorney John B. Holmes of causing congestion of Lanford's docket to help bring about his defeat. 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.

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 candidate" with the support of the Mississippi Prosecutors Association. 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. 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.[5] Opponents also attacked Robertson for his dissenting opinions in two cases that the U.S. Supreme Court later reversed.

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.[6] 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."

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. 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 majority sentiment. In the three states that permit elected judges to override jury sentences in capital cases, judges override jury sentences of life imprisonment and impose death far more often than they override death sentences and impose life imprisonment. 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.[7] 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.[8] 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.[9] 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—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, poverty, inadequate court-appointed counsel, and popular passions can influence the extermination of a human life. The legal system indulges the presumption that judges are impartial. The Supreme Court has steadily reduced the availability of habeas corpus review of capital convictions, placing its confidence in the notion that state judges, who take the same oath as federal judges to uphold the Constitution, can be trusted to enforce it. 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 controversial 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, and measures to make prison life even harsher than it is already. 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. The emergence of crime 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. Clark's defense of civil liberties and procedural safeguards had led some, including Nixon, to denounce him as "soft on crime." 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."[10] 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.

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 opponent, the state attorney general. 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. 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. Another candidate ran advertisements taking credit for thirty-two executions.[11] 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.

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. Clinton had embraced the death penalty in 1982 after his defeat in a bid for reelection as governor of Arkansas in 1980. 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. 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. 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.

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."[12] 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. 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. 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. 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. Jeb Bush also argued that Florida's eight executions since Chiles's election in 1990 were not enough.

In her quest to win the 1994 California gubernatorial race, Kathleen Brown found that her personal opposition to the death penalty was widely viewed as a major liability 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. Candidate Brown responded to the charges by producing an advertisement proclaiming her willingness to enforce the death penalty. 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. 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. Cuomo defended himself by proposing a referendum on the death penalty, but still lost his office to a candidate who promised to reinstate capital punishment and to send the prisoner back to Oklahoma for execution.

As the public debate on crime and its solutions has become increasingly 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, 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. First, judges in eleven states and the District of Columbia are never subjected to election at any time in their judicial careers. Second, the judges of three states are elected by vote of the state legislature. Third, the judges of twenty-nine states are subjected to contested elections, either partisan or nonpartisan, at some point in their careers, whether during initial selection for the bench or after appointment by the governor. The fourth category of judicial selection systems includes those systems in which the judge or justice is at some time subjected to a retention election but never faces an opponent. Thirteen states employ such a system.

There are currently thirty-eight states that have capital punishment statutes. Thirty-two states both elect their judges and sentence people to death.

In nine states—including Alabama and Texas—judges run under party affiliations. The success of the party in national or state elections may have a significant impact on the judiciary. For example, Texas Republicans swept into state judicial offices as part of the party's general success in the 1994 elections. Republicans won every elected position they sought on the Texas Court of Criminal Appeals and the Texas Supreme Court. Republican straight-ticket voting contributed to the defeat of nineteen Democratic judges and a Republican sweep of all but one of the forty-two contested races for countywide judgeships in Harris County, Texas, which includes Houston. Such straight-ticket voting, which comprised one-quarter of all votes cast in Harris County, also resulted in the removal of the only three black judges and left only one Hispanic on the bench.

The lack of racial diversity now found in Houston is consistent with the exclusion of minorities from the bench throughout the country. One reason for the lack of minority judges is that in many states—particularly those in the "death belt" states such as Florida and Texas—judges have long been elected from judicial districts in which the voting strength of racial minorities is diluted.

B. Prosecuting Capital Cases as a Stepping Stone to the Bench

One of the most frequently traveled routes to the state trial bench is through prosecutors' offices. A capital case provides a prosecutor with a particularly rich opportunity for media exposure and name recognition that can later be helpful in a judicial campaign. Calling a press conference to announce that the police have captured a suspect and the prosecutor will seek the death penalty provides an opportunity for a prosecutor to obtain news coverage and ride popular sentiments that almost any politician would welcome. The prosecutor can then sustain prominent media coverage by announcing various developments in the case as they occur. A capital trial provides one of the greatest opportunities for sustained coverage on the nightly newscasts and in the newspapers. A noncapital trial or resolution with a guilty plea does not produce such coverage.

The relationship between prosecuting capital cases and moving to the bench is evident in Georgia's Chattahoochee Judicial Circuit, which sends more people to death row than any other judicial circuit in the state. Two of the four superior court judges in the circuit obtained their seats on the bench after trying high-profile capital cases. Mullins Whisnant, who now serves as chief superior court judge in the circuit, became a judge in 1978 after serving as the elected district attorney. He personally tried many of the ten capital cases the office prosecuted in 1976 and 1977, five of which involved African-Americans tried before all-white juries for homicides of white victims. His last capital trial as prosecutor involved a highly publicized rape, robbery, kidnapping, and murder of a white Methodist Church organist by an African-American. The extensive news coverage of the case included electronic and photographic coverage of the trial. Whisnant made a highly emotional plea to jurors to join a "war on crime" and "send a message" by sentencing the defendant to death.

Once Whisnant became a judge, his chief assistant, William Smith, took over as the district attorney. Smith personally tried many of the fourteen capital cases that took place during his tenure before he joined his former boss on the bench in 1988. One of those cases involved the highly publicized trial of an African-American accused of being the "Silk Stocking Strangler" responsible for the murders of several elderly white women in the community.

And benefits other than publicity came to Smith's eventual campaign for judge as a result of his use of the death penalty as a district attorney. In a case involving the murder of the daughter of a local contractor, Smith contacted the victim's father and asked him if he wanted the death penalty. When he replied in the affirmative, Smith said that was all he needed to know, and subsequently obtained the death penalty at trial. The victim's father rewarded Smith with a contribution of $5000 during Smith's successful run for judge in the next election. The contribution was the largest Smith received. Smith's chief assistant succeeded him as district attorney and, after prosecuting eight capital cases, has announced an interest in the next opening on the Superior Court bench. So close is the relationship between the judiciary and the prosecutor's office in the circuit that the prosecutor's office has made the assignments of criminal cases to judges for the last six years, assigning the more serious drug and homicide cases to former prosecutors Whisnant and Smith.

These prosecutors in the Chattahoochee Judicial Circuit have demonstrated that capital cases produce good publicity even when a guilty verdict is reversed for prosecutorial misconduct. After the United States Court of Appeals set aside a death sentence because of a lynch-mob-type appeal for the death penalty by then-District Attorney Smith, which the court characterized as a "dramatic appeal to gut emotion" that "has no place in a courtroom,"[13] Smith called a

press conference, insisted he had done nothing wrong, and announced that he would seek the death penalty again in the case. When a federal court set aside a second death sentence due to similar misconduct, Smith called another press conference and expressed his "anger" at the decision, accused the reviewing court of "sensationalism" and "emotionalism," suggested that the "judges of this court have personal feelings against the death penalty," and vowed to seek the death penalty again.[14]

Attempts to exploit capital cases for political purposes may backfire, however, particularly if the prosecution is not ultimately successful in obtaining the death penalty. For example, a verdict of voluntary manslaughter instead of first degree murder transformed the case of Bruce R. Morris in St. Charles County, Missouri, from one in which a defendant's life was at stake to one in which a political career was at stake. "[C]ourthouse observers, including [the prosecutor's] former employees" criticized the prosecutor, who was a candidate for circuit court judge, and stated that the trial was the prosecutor's first jury trial in memory. They also accused him of taking the case to trial just because he was running for judge.

Prosecutors may be criticized for failure to seek the death penalty, even when the law does not permit it. For example, a California prosecutor criticized a Colorado prosecutor for not seeking the death penalty against a defendant who had committed crimes in both states even though the Colorado prosecutor explained that there were no statutory aggravating circumstances that would permit him to seek the death penalty.

Although it may be unethical and improper for prosecutors to campaign on promises to seek the death penalty or on their success in obtaining it, there is no effective remedy to prevent the practice. Moreover, capital cases produce so much publicity and name recognition that explicit promises to seek death are hardly necessary. As a result, prosecuting capital cases remains a way of obtaining a judgeship. As will be discussed later, some persons who reach the bench in this manner have difficulty relinquishing the prosecutorial role. But even when a prosecutor is not seeking a judicial post, or is unsuccessful in obtaining one, the political use of the death penalty in the discharge of prosecutorial responsibilities may spill over into elections for judicial office and influence the exercise of judicial discretion. The political consequences of decisions by both prosecutor and judge become apparent for all to see.

C. The Death Penalty's Prominence in the Election, Retention, and Promotion of Judges

With campaigning for the death penalty and against judges who overturn capital cases an effective tactic in the quest for other offices, it is not surprising that the death penalty has become increasingly prominent in contested and retention elections for judges. Not only the judge, but her political supporters as well, may suffer the consequences of an unpopular ruling in a capital case.

In the 1994 primary election for the Texas Court of Criminal Appeals, the incumbent presiding judge accused another member of the court of voting to grant relief for convicted defendants more often than other judges. Although a Republican candidate for the second seat on the court lamented what he called the "lynch mentality" of the campaign, two other candidates for the Republican nomination, both former prosecutors, indicated their willingness to treat defendants severely. One stated that the role of the court is to ensure justice, not to reverse conviction because of "technicalities" or "honest mistakes, while the other called the Court of Criminal Appeals a "citadel of technicality" that neglected the interests of crime victims and citizens at large. Two candidates for the third position on the court criticized the incumbent for granting a new trial to a man convicted of homicide. One challenger promised to bring a "common sense" approach to such cases.

A judge's votes in capital cases can threaten his or her elevation to a higher court. No matter how well qualified a judge may be, perceived "softness" on crime or on the death penalty may have consequences not only for the judge, but also for those who would nominate or vote to confirm the judge for another court. For example, in 1992 groups campaigned

against the retention of Florida Chief Justice Rosemary Barkett for the Florida Supreme Court because of her votes in capital cases. Then in 1994 Barkett's nomination to the U.S. Court of Appeals for the Eleventh Circuit came under fire because of her record on capital punishment during nine years on the Florida Supreme Court. After a long delay, the Senate finally confirmed Barkett by a vote of sixty-one to thirty-seven.

Despite Barkett's confirmation to the Eleventh Circuit, campaigns against her and other judges tagged as "soft on crime" continued. Bill Frist, in his successful campaign to unseat Tennessee Senator Jim Sasser, attacked Sasser for voting for Barkett and for having recommended the nomination of a federal district judge who, two months before the election, granted habeas corpus relief to a death-sentenced man. Frist appeared at a news conference with the sister of the victim in the case in which habeas relief had been granted. After the victim's sister criticized Sasser for recommending U.S. District Judge John Nixon for the federal bench, Frist said that Sasser's vote to confirm Judge Barkett showed that he "still hasn't learned his lesson."

Although pro-death-penalty campaigns are not always successful in defeating judges, even the threat of such a campaign may intimidate a judge. Challenges also make retaining a judgeship more expensive than it would otherwise be, thereby forcing a candidate to raise more money and contributing to the perception that those who contribute to judicial campaigns can get more justice than others. One of the saddest and most recent examples is the bitter campaign waged for chief justice of Alabama's supreme court in 1994. The challenger accused the incumbent of shaking down attorneys who had cases before the court for contributions, while the incumbent ran advertisements in which the father of a murder victim accused the challenger of being an accomplice to the murder.

Whether the "hydraulic pressure" of public opinion that Justice Holmes once described and the political incentives accompanying it are appropriate considerations for publicly elected prosecutors is doubtful, but clearly such considerations have no place in the exercise of the judicial function. Yet in jurisdictions where judges stand for election—often with the prosecution in a position tantamount to that of a running mate—judges are subject to the same pressures. As a result of the increasing prominence of the death penalty in judicial elections as well as other campaigns for public office, judges are well aware of the consequences to their careers of unpopular decisions in capital cases.

III. The Impact on the Impartiality of Judges

The political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary. Judicial candidates who promise to base their rulings on "common sense," unencumbered by technicalities, essentially promise to ignore constitutional limits on the process by which society may extinguish the life of one of its members. Justice Byron White once observed, "If [for example,] a judge's ruling for the defendant . . . may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion." Justice William Brennan noted that the risk of a biased judge is "particularly acute" in capital cases:

> Passions, as we all know, can run to extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to secure a conviction, to "do something," can overwhelm even those of good conscience. When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.[15]

Rulings in a publicized case can have major political effects, such as loss of one's position or any hope of promotion, and judges are aware of this as they make controversial decisions, particularly in capital cases.

The American Bar Association's Commission on Professionalism found that "judges are far less likely to . . . take . . . tough action if they must run for reelection or retention every few years."[16] In no other area of American law are so many tough decisions presented as in a capital case. And no other cases demonstrate so clearly the validity of the ABA Commission's finding.

A judge who faces election is more likely to sentence a defendant to death than a jury that heard the same evidence. In some instances, political considerations make it virtually impossible for judges to enforce the constitutional protections to a fair trial for the accused, such as granting a change of venue or continuance, or suppressing evidence. Judges have failed miserably to enforce the most fundamental right of all, the Sixth Amendment right to counsel, in capital cases. And many judges routinely abdicate their judicial responsibility and allow the lawyers for the state to write their orders resolving disputed factual and legal issues in capital cases.

A. Overrides of Jury Sentences

Four states—Alabama, Florida, Indiana, and Delaware—permit a judge to override a jury's sentence of life imprisonment and impose the death penalty. Alabama judges, who face partisan elections every six years, have overridden jury sentences of life without parole and imposed the death penalty forty-seven times, but have vetoed only five jury recommendations of death. Between 1972 and early 1992, Florida trial judges, who face contested elections every six years, imposed death sentences over 134 jury recommendations of life imprisonment, but overrode only fifty-one death recommendations. Between 1980 and early 1994, Indiana judges, who face retention elections every six years, imposed death sentences over eight jury recommendations of life imprisonment, but overrode only four death recommendations to impose sentences of life imprisonment. Delaware did not adopt the override until 1991, and that state's judges do not stand for election; the first seven times judges used it, they overrode jury recommendations of death and imposed life sentences.

Indeed, the sentencing decisions of some judges are a foregone conclusion. Members of the U.S. Supreme Court have noticed the tendency of Jacksonville, Florida judge Hudson Olliff to override jury sentences of life imprisonment and impose death. An override could also be anticipated from another Florida circuit judge, William Lamar Rose, who protested the U.S. Supreme Court's decision in 1972 finding the death penalty unconstitutional by slinging a noose over a tree limb on the courthouse lawn. In Alabama, three judges account for fifteen of the forty-seven instances in which jury sentences of life imprisonment were overridden and death imposed.

B. Failure to Protect the Constitutional Rights of the Accused

The Bill of Rights guarantees an accused certain procedural safeguards, regardless of whether those safeguards are supported by popular sentiment at the time of the trial, in order to protect the accused from the passions of the moment. But nothing protects an elected judge who enforces the Constitution from an angry constituency that is concerned only about the end result of a ruling and may have little understanding of what the law requires. Judges who must keep one eye on the next election often cannot resist the temptation to wink at the Constitution.

As previously discussed, some judges have scheduled capital cases for before an election or have refused to continue a case until after an election in order to gain the publicity and other political benefits that accompany presiding over such a trial. In these situations, the judge is under immense pressure to make rulings that favor the prosecution because an unpopular decision will quickly turn the anticipated benefits of association with the case into a major liability that could result in defeat in the election.

But even in less politically charged circumstances, judges face conflicts between personal political considerations and their duty to enforce the law in

making decisions on a wide range of issues. For example, among the many decisions by trial judges to which reviewing courts defer are determinations under *Batson* v. *Kentucky*[17] of whether the use of peremptory jury strikes was racially motivated. As previously discussed, many judges are former prosecutors. Before going to the bench, a judge may have hired the prosecutor appearing before him as an assistant. Even if the judge is not personally close to the prosecutor, she may be dependent upon the prosecutor's support in the next election to remain in office. Therefore, it may be personally difficult or politically impossible for a judge to reject a prosecutor's proffered reason for striking a minority juror.

Judges may find it difficult to make other decisions required by law and remain popular with the voters. The Mississippi Supreme Court has acknowledged that the discretion to grant a change of venue places a burden on the trial judge because "the judge serves at the will of the citizenry of the district . . . [and] might be perceived as implying that a fair trial cannot be had among his or her constituents and neighbors."[18]

Even when a judge grants a change of venue, the objective may not be to protect the right of the accused to a fair trial. The clerk of a circuit court in Florida revealed several years after the death sentence was entered against Raleigh Porter that the presiding judge, Richard M. Stanley, had told the clerk that he was changing the venue to another county that had "good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then, Judge Stanley said he would send Porter to the chair." The jury returned the expected verdict and Judge Stanley, wearing brass knuckles and a gun at the sentencing hearing, sentenced Porter to death.

In *Coleman v. Kemp*,[19] a Georgia trial judge denied a change of venue from a small rural community inundated with media coverage of six murders committed by Maryland prison escapees. The media coverage included strong anti-defendant sentiments, such as those of the local sheriff who publicly expressed his desire to "pre-cook [the defendants] several days, just keep them alive and let them punish," and of an editorial writer who compared the defendants to rattlesnakes and rabid dogs. A local citizen who served as a juror in one of the cases testified that news of the murders spread in the small community "like fire in a broom sage," that "everybody was so excited and upset over it," and that the sentiment of "everybody" prior to trial was "fry 'em, electrocute 'em." The elected trial judge, faced with a choice between his community's urge for a quick and violent response to the crime and the defendants' constitutional rights, refused to grant a change of venue. The local jury convicted the defendants and the elected Georgia Supreme Court upheld the convictions.

The difficult job of setting aside the convictions obtained at three trials that lacked any semblance of fairness was left to the judges serving life tenure on the United States Court of Appeals for the Eleventh Circuit. The political consequences of protecting the rights of the accused became even more apparent after the grant of habeas corpus relief. Citizens throughout Georgia presented petitions containing over 100,000 signatures to U.S. House of Representatives Judiciary Committee's Subcommittee on Courts, urging it to impeach the three members of the Court of Appeals panel who voted unanimously for the new trials.

The price paid for an elected judiciary in Alabama, California, Georgia, Texas, and other states has been the corruption of the judges and the courts of those states. Once a judge makes a decision influenced by political considerations, in violation of the oath he or she has taken to uphold the law, both the judge and the judicial system are diminished, not only in that case, but in all cases. The realization that a ruling in a case was made with more of an eye toward the next election than the requirements of the law can irreparably damage a judge's self-perception and commitment to justice. After the first such breach of one's judicial responsibility, it is more easily repeated in future cases. Once the public understands that courts are basing their rulings on political considerations—even when the courts are giving the voters the results they want, as the California Supreme Court is now

doing—it undermines the legitimacy and the moral authority of courts as enforcers of the Constitution and law.

C. Appointment and Tolerance of Incompetent Counsel for Indigent Persons

Judges often fail to enforce the most fundamental protection of an accused, the Sixth Amendment right to counsel, by assigning an inexperienced or incompetent lawyer to represent the accused. As a result of appointments by state court judges, defendants in capital cases have been represented by lawyers—and in at least one instance a third-year law student—trying their cases or with little or no experience in trying serious cases, lawyers who were senile or intoxicated or under the influence of drugs while trying the cases, lawyers who were completely ignorant of the law and procedures governing a capital trial, lawyers who used racial slurs to refer to their clients, lawyers who handled cases without any investigative or expert assistance, lawyers who slept or were absent during crucial parts of the trial, lawyers who lacked even the most minimal skills, lawyers who filed one-page to ten-page briefs on direct appeal, and other equally incompetent lawyers who were deficient in a number of other respects.

When the community that elects the judge is demanding an execution, the judge has no political incentive to appoint an experienced lawyer who will devote large amounts of time to the case and file applications for expert and investigative assistance, all of which will only increase the cost of the case for the community. As a result, judges frequently assign lawyers who are not willing or able to provide a vigorous defense.

For example, judges in Houston, Texas have repeatedly appointed an attorney who occasionally falls asleep in court, and is known primarily for hurrying through capital trials like "greased lightning" without much questioning or making objections. Ten of his clients have received death sentences. Similarly, judges in Long Beach, California, assigned the representation of numerous indigent defendants to a lawyer who tried cases in very little time, not even obtaining discovery in some of them. The attorney has the distinction of having more of his clients sentenced to death, eight, than any other attorney in California.

Local elected judges in Georgia have repeatedly refused to appoint for retrials of capital cases the lawyers who had successfully represented the defendants in postconviction proceedings, even after the Georgia Supreme Court made it abundantly clear that counsel familiar with the case should be appointed.

Local elected judges may base their assignment of counsel to indigent defendants on political ties or other considerations than the ability of the lawyer to provide competent representation. A defense attorney in Cleveland contributes thousands of dollars toward the reelection campaigns of judges and is "notorious for picking up the judges' dinner and drink tabs. They, in turn, send [the attorney] as much business as he can handle in the form of case assignments.[20] A study of capital cases in Philadelphia found that "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judge's election campaign.[21] The lawyer who received the most appointments one year to homicide cases in Philadelphia was a former judge whom the state's supreme court removed from the bench for receiving union money. He handled thirty-four murder cases in that year and submitted bills for $84,650 for fees and expenses.

As might be expected, treating the assignment of criminal cases as part of a judicial patronage system does not always result in the best legal representation. The study of capital cases in Philadelphia found that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."

Regardless of the basis for selection, assignment of cases to lawyers by judges undermines the fairness and integrity of the adversary system in other ways. Lawyers who owe their livelihood to judicial appointments may be unwilling to provide zealous representation out of fear that it will cost them future appointments. So long as this system continues,

neither the judges nor the lawyers are truly independent and able to play their proper role in the adversary system.

D. Judges Acting as Prosecutors

The prosecution of high-profile capital cases is often a stepping stone to a judgeship, as has been described. Unfortunately, more than a few prosecutors who become judges continue to prosecute from the bench. Although they fail to discharge their responsibility to be neutral, disinterested judges, they may continue to reap the same political benefits from capital cases that they received as prosecutors.

In a recent Georgia capital trial, a sitting superior court judge took the witness stand to tell the jury why, while serving as district attorney, he had sought the death penalty and had refused to agree to a plea disposition in the case. After testifying that the governor appointed him to the bench after having "serve[d] the citizens of Hall and Dawson count[ies] as their district attorney" for six years, the judge summarized the factors he had considered in making the decision as prosecutor to seek the death penalty for Stephen Anthony Mobley:

> [The defendant's] lack of remorse and a personality of "pure unadulterated meanness";
>
> The financial cost of death cases to taxpayers;
>
> Discussion with the victim's family and their support for a death sentence as the appropriate penalty;
>
> Consideration of whether the "last minutes of [the victims'] lives were more horrible to them than in other cases";
>
> [The judge's] feeling that Mobley's description of the murder to [one victim] was "unmerciful";
>
> The strength of the State's evidence.[22]

The judge summarized his decision by stating that "I've handled many cases with heinous facts of a killing, but I have never, never seen a defendant like Mr. Mobley." Remarkably, the Georgia Supreme Court upheld Mobley's death sentence over the dissent of only a single member.

Edward D. Webster, a former prosecutor in Riverside, California, publicly criticized a federal court of appeals for its decision in a capital case, even though he is now the presiding superior court judge in Riverside. Judge Webster, speaking "as a former prosecutor," expressed his "outrage" at a decision by the United States Court of Appeals for the Ninth Circuit remanding a capital habeas corpus case on grounds that the federal district court had failed to provide funds for expert assistance in support of the habeas petition. Judge Webster accused the federal court of anti-death-penalty bias and called upon Congress to prevent all federal courts except the Supreme Court from reviewing death-penalty cases.

A former prosecutor who now presides as a judge over capital cases in Houston, Texas, William Harmon, stated to a defendant during a 1991 capital trial that he was doing "God's work" to see that the defendant was executed. In the same case, Judge Harmon taped a photograph of the "hanging saloon" of Texas Judge Roy Bean on the front of the bench with his own name superimposed over Judge Bean's, and referred to the judges of the Texas Court of Criminal Appeals as "liberal bastards" and "idiots." In another capital case, Judge Harmon, upon a witness's suggestion that some death row inmates should be transported to court, stated, "Could we arrange for a van to blow up the bus on the way down here?"[23] In another capital trial in 1994, Judge Harmon allowed the victim's father to yell obscenities at the defendant in the presence of jurors and the press.

These are among the more pronounced examples of judges who have continued the prosecutorial role upon assuming the bench. Other judges may be more sophisticated in understanding their role and more subtle in their approach to capital cases. A judge does far more to undermine the fairness of a trial and hasten the imposition of a death sentence by appointing deficient counsel and in making discretionary rulings, as previously described, than by engaging in conduct such as Judge Harmon's.

It is not surprising that such judges are produced by a system that rewards prosecutors for obtaining the death penalty by giving them the public recognition and support needed to be elected judges. But this system often does not produce judges

who will be fair and impartial in capital cases. It is most difficult for a prosecutor who has made his name prosecuting capital cases to refrain as a judge from further exploitation of capital cases upon assuming the bench.

IV. Remedies for the Resulting Lack of Impartiality

Elected judges are expected to "remain faithful to the values and sentiments of the people who elected them, and to render decisions using common sense rather than newfangled legalisms." But remaining faithful to popular sentiment is sometimes inconsistent with a judge's duty to mete out equal justice and to enforce the Bill of Rights. As Justice Jackson wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[24]

In contrast, federal judges have life tenure and are appointed by the President with the advice and consent of the Senate in order to ensure the independence of the judiciary and to guarantee that the courts will perform their roles as protectors of "the rights of individuals." Recognizing that "a steady, upright, and impartial administration of the laws" was essential because "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today," Alexander Hamilton wrote in the *The Federalist* No. 78: "That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by temporary commission."[25]

The state bench also differs from the federal bench in that it is more likely to be a stepping stone to a higher political office. In comparing the state and federal judiciary, Chief Justice William Rehnquist has pointed out that the life tenure of federal judges makes for a "different kind of judge" than someone "looking out of one corner of his eye for the next political opportunity that comes along."[26] However, the politics of crime have increasingly had an impact on nominations to the federal judiciary and even the Supreme Court has seemed responsive to the political potency of the crime issue.

Nevertheless, although some appointees may take a political agenda with them to the federal bench, life tenure still insulates judges from the threat of being voted out of office for an unpopular decision. Every new election reminds state judges of their vulnerability to popular sentiment. Such constant reminders make it politically and practically impossible for many judges to enforce the Constitution when doing so would be unpopular.

If courts are to have integrity and credibility, judges must be selected, evaluated, and assigned cases in a way that makes it possible for them to uphold the law without imperiling their jobs. Political considerations will always be a factor in the selection and promotion of judges in both the state and federal courts, and some who become judges will allow their personal prejudices to interfere with the faithful discharge of their duties, regardless of how they are selected. But the selection and promotion process should not allow a judge's ruling in a particular case to dominate his or her prospects for remaining on the bench. If this is not the case, judges will continue to work under unreasonable pressures and the public will not view their decisions as fair, impartial, and legitimate. The judiciary and bar should exercise leadership in bringing about the replacement of judicial elections—both retention and contested—with merit selection and periodic performance review. Although such systems are desirable and may be more likely after elections that have significantly diminished the standing of the courts in Alabama, California, Mississippi, Texas, and other states, one can expect that elections will remain in many jurisdictions.

As long as judges are selected at the ballot box, several less effective measures, small and large, should be taken to reduce the influence of political considerations on judicial rulings. Judges must recognize their constitutional and ethical responsibility to disqualify themselves in cases in which one might reasonably question their impartiality due to political pressures. Capital cases should be assigned to judges who do not face the voters from the locality of the crime. The discretion of trial judges in areas where they are under political pressures should be limited and reviewing courts should give more careful scrutiny to rulings that are susceptible to influence by political considerations. Regardless of how judges are selected, they should not appoint counsel for indigent defendants. Removal of appointment responsibility from judges is necessary to ensure the independence of the judiciary and the zealous defense of the accused.

A. Using Diffuse and Indirect Citizen Input in Appointment and Evaluation Systems

The elimination of direct and retention elections is a necessary step to improve the fairness and impartiality of the judiciary. Eleven states and the District of Columbia already employ systems in which judges never face election. The systems in those states provide for removal of judges only for misbehavior or other ethical improprieties, avoiding the opportunity to turn a judicial election into a popular referendum on a judge's rulings in controversial cases.

Although judicial elections appear to be immensely popular in the United States, judges were not always selected and retained this way. The American colonial governments utilized executive selection of judges and service during good behavior in an effort to depoliticize the judiciary. Resentment toward the Crown's control of the judiciary resulted in a shift from judges serving in the pleasure of the executive to judges serving during good behavior.

Dissatisfaction with the appointed judiciary during the period of populist Jacksonian democracy led to the election of judges. The public viewed judges as too protective of the interests of property owners. States began to adopt systems of electing judges in an effort to divorce the judiciary from property owners. However, it became apparent that popular election resulted in a highly politicized judiciary, with political machines often controlling judges. States again began to tinker with judicial selection methods, with some eventually adopting a selection plan that included gubernatorial appointment from a list compiled by a judicial selection committee, with a subsequent retention election after a certain period of time. This reform sought to depoliticize the judiciary and allow judges to make decisions unswayed by political considerations while still allowing for some form of input from citizens. But, as has been the case in California, Florida, and other places, even a retention election can degenerate into a referendum on a judge's rulings in capital or other controversial cases. Indeed, a strong argument can be made that retention elections are even worse than direct elections where the incumbent is challenged. In retention elections, there is no comparison to be made among candidates. The judge standing for retention may be a target for negative votes from various groups dissatisfied with decisions on issues ranging from crime to abortion. Voters may want to express their disapproval of the judge with no consideration of whether the replacement judge will be any better.

The independence of the judiciary can be best preserved by a merit selection system in which a bipartisan judicial qualifications commission nominates a slate of qualified candidates to the executive, who then nominates a judge subject to confirmation by at least one branch of the state legislature. Meaningful citizen input can come by ensuring that a substantial number of persons on the judicial qualifications commission are not lawyers, but people who represent various segments of the public. Such a system should provide for terms for judges of substantial length, such as ten to fifteen years. Retention in office for additional terms should depend upon an evaluation of the judge's performance by the commission, not a retention election.

One state that employs such a system is Hawaii, where the governor selects judges with the consent of the senate, from a list of nominees that a judicial selection commission compiles. The judicial selection commission's list must contain not less than six nominees. If a judge indicates at least six months before the end of his term that he wishes reappointment, the commission determines whether the judge should be retained. The primary purpose of the retention process is to "exclude or, at least, reduce partisan political action."

There are many positive aspects to Hawaii's selection and retention process. First, it provides for diffuse and indirect input in the judicial selection and retention process by allowing the governor, the president of the senate, and the speaker of the house of representatives, all of whom are elected, to appoint a total of five members of the commission. Thus, there is public accountability in a selection process that provides a layer of protection for judges who may make unpopular decisions.

Second, a judge serves a term of ten years, after which time the judicial selection commission again evaluates and either retains or rejects the judge. Commission review allows an informed body to evaluate a judge's entire ten-year record. The commission sees any unpopular or controversial decisions in the context of a broader record. In addition, the commission can review the legal reasons for the judge's decision, not just the result.

Third, commission review avoids judicial electoral campaigns, some of which can be demagogic, undignified, and unsophisticated. Judges create complicated records of rulings on a variety of issues, and an informed body representing the public can examine a judge's entire record rather than merely focus on a judge's rulings in the most notorious or highly publicized cases. Because a judge knows that an informed body will review her performance, she will be less susceptible to community pressures and will be more likely to enforce constitutional and statutory law. Such a method of selection would also result in better judges. Many capable and highly qualified individuals are unwilling to seek judgeships where they must stand for election, knowing that the responsible discharge of their duties in a controversial case could cost them their positions. Such individuals may also be unwilling to solicit campaign contributions to finance a judicial campaign, knowing that it creates an appearance of impropriety, engage in campaign tactics that are inconsistent with the Model Code of Judicial Conduct but may be necessary to obtain office, or assume the bench knowing that they will be unable to defend themselves when attacked politically for a single ruling or decision.

Fourth, the public may have more confidence in and respect for the judiciary because it knows that judges who do not have to worry about offending a particular segment of the population in order to raise campaign funds or stay in office are more likely to be impartial. At the same time, periodic review of judicial behavior protects the public from those who are unfit for judicial service.

Finally, and most importantly, such a system ensures that when an individual takes the bench, he or she is independent in the sense that former United Slates Supreme Court Justice Owen Roberts described:

> When a man goes on the Court he ought not to have to depend upon the strength . . . of his own character to resist the temptation to shade a sentence in an opinion or shade a view. [He should not have] to put an umbrella up in case it should rain. He ought to be free to say his say, knowing as the founding fathers meant he should know, that nothing could reach him and his conscience was as free as could be.[27]

To be independent, a judge must be free to disregard public sentiment when required by the law, and to take unpopular, but constitutionally mandated, action.

Until recently judicial elections, whether direct or retention, attracted little public attention. Judges seldom encountered opposition either from opponents or from interest groups opposing their retention. However, this is no longer the case. The judiciary in states all across the nation is becoming increasingly politicized. The success in defeating incumbent judges in some states is leading to new efforts in others. No judge can risk alienating a powerful special interest group or being viewed as "soft on crime." The elimination of both direct and

retention elections is essential if courts are to be responsive to the commands of the law and Constitution instead of the will of the majority.

B. Judicial Disqualification When Rulings Could Imperil Election

In jurisdictions in which judges stand for election or retention, judges should be disqualified from presiding over cases in which there is the appearance that political considerations could tempt judges in their ruling. The law of judicial disqualification and due process currently provides for this, but courts fail to apply this law properly, relying on fictions of impartiality while ignoring political realities.

In *Tumey v. Ohio*[28], the Supreme Court held as violative of due process a judicial system in which a mayor sat in judgment of alleged violators of a Prohibition ordinance, and was not paid unless he convicted and fined at least some of those brought before him. The Court concluded such a system deprives the accused of due process in several ways. First, it "subjects [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Second, "It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the Mayor should weigh against his acquittal." Third, any system that "offer[s] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or [that] might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process." Fourth, given the mayor's position, "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"

In *Ward v. Village of Monroeville*, the Court extended the *Tumey* principle to prohibit a mayor from acting as a judge in a case in which his financial interest was not personal, but in which his general mayoral responsibilities included revenue production. The Court rejected the village's argument that this system does not deprive defendants of due process because the mayor's decisions were correctable on appeal and trial de novo in the County Court of Common Pleas. Justice Brennan wrote that "there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. . . . [The defendant] is entitled to a neutral and detached judge in the first instance."

The impartiality of judges who promise to be "tough on crime" is also called into question by the Model Code of Judicial Conduct. Canon 3 provides that a judge "should not be swayed by partisan interests, public clamor or fear of criticism."[29] Canon 5 provides that a judge "shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.[30]

The *Tumey* situation is analogous to a typical capital case tried, appealed, or brought for postconviction review before an elected judge. The justices of the Supreme Courts of California and Mississippi, the judges of the Texas Court of Criminal Appeals, and trial judges in Houston and other jurisdictions certainly know that their future on the courts and their judicial salaries and pensions are closely related to their decisions in capital cases. At the very least, these pressures create the appearance of partiality.

The legitimacy of judicial decisions depends on the appearance of fairness, and elected judges hearing capital cases too often make rulings that appear to be patently unfair. It is apparent not only to Justice Stevens but also to those who observe the courts that judges are frequently responding to a "higher authority" than the Constitution. In some instances, that voice sounds too much like the cries of a lynch mob. *Tumey* commands judges not have an improper temptation to rule in one way or the other. A judge who will lose his position by ruling against the prosecution in a single case is under far greater pressure not to "hold the balance nice, clear and true between the state and the accused" than is a judge whose salary comes from fines that may be imposed in some of the many cases that come before him. It is

possible to construct fictions of impartiality and impute them to every judge, but the reality is that capital punishment is popular and judicial elections can become referenda on the death penalty.

One step in the right direction would be to permit disqualification of at least one judge without attempting to assess the question of impartiality. For example, in Maryland, a party who believes that a fair and impartial trial cannot be had before the assigned judge may file a suggestion that the judge is incapable of affording him or her an impartial trial and the case must be removed to another court. A judge in a capital case may not refuse to grant the motion. This at least allows the defendant to decide if the judge originally assigned to his case may not be in a position to put aside political considerations, such as a judge facing a tough election. This system is attractive because it does not operate on the presumption that judges become somehow immune to influences that would weigh strongly on non-judges. This system does not attempt to discern a judge's actual biases, but recognizes that the appearance of bias may make it appropriate for another judge to hear the case. On the other hand, when there is no concern about improper influences, the judge will remain on the case. There is no assurance, however, that the new judge assigned to a case will not also be facing a tough reelection campaign and be subject to the same pressures.

It may be that practical considerations prevent courts from acknowledging the appearance of partiality of elected judges due to political pressures. If an entire state supreme court is disqualified, how is the case decided? If a judge is disqualified from all criminal cases because he promised to be "too tough on criminals," how is the criminal docket to be managed? The answer to these practical problems, however, is not to substitute legal fictions for political reality.

The popular frustration regarding crime is making it increasingly difficult for courts to discharge their constitutional obligation of fairness. Judges who realize they cannot hold the balance nice, clear, and true between the state and the accused in particular cases because of political considerations have a duty to recuse themselves. Lawyers have a duty to move for the disqualification of judges who are subject to the temptation to give in to political pressures in the cases before them. In reviewing disqualification issues, trial and appellate courts should face the reality of the political pressures that are present instead of hiding behind legal fictions. If disqualification in cases in which one might reasonably question judges' partiality due to political pressures begins to burden dockets, the legislature and the bar will be forced to devise different selection systems that will minimize the influence of political pressures on judges.

C. Altering Judicial Assignment Systems

One way to reduce the political pressures on elected judges is to prohibit those judges from presiding over capital cases in the districts that elect them. This could be accomplished through the judicial assignment system.

For example, in both North and South Carolina judges rotate among judicial districts within the state. When out of his county of residence, the judge is relieved from the political pressure of having to portray himself as the protector of his community; a judge would not necessarily stand for election in the very place in which he had made controversial rulings.

This system would help to diminish the role of political pressure on judicial decision making, but would not eliminate it. A judge could still seek to impress the voters at home with his toughness in the case before him in another district. In a highly publicized case, a controversial ruling would still be well known and, even if it were not, an opponent could still seize upon an unpopular but correct ruling and use it in opposing the judge. Additionally, in any system a judge who intends to run for higher office may want to use his or her position for visibility.

D. Limiting the Deference Reviewing Courts Give to Judges Influenced by Political Pressures

So long as judges are subject to election or retention, the discretion of trial judges on crucial matters should be limited by objective standards that

are carefully reviewed on appeal and in postconviction proceedings. Reviewing courts should acknowledge the reality of the political pressures on trial judges, and, where the potential for such influence is present, they should carefully scrutinize rulings without the normal deference accorded to trial judges.

Appellate courts routinely defer to findings of fact of state trial judges, and review decisions of trial judges under the highly deferential abuse-of-discretion and clearly-erroneous standards on critical issues such as granting of a change of venue, allowing a continuance, the extent and scope of voir dire, whether there has been racial discrimination in the exercise of jury strikes, the impartiality of prospective jurors, and the admission of certain types of evidence. Federal courts, when reviewing state court judgments in habeas corpus proceedings, are required to give a presumption of correctness to findings of fact by the state courts. The notion that the trial judge, having observed the demeanor of the witnesses and heard all of the evidence first hand, is in a better position to make determination of credibility forms much of the basis for the deference accorded the trial judge. This deference also rests upon the prevailing legal fiction that assumes the impartiality of judges.

In reality, however, political considerations may be more important than legal principles or the demeanor of witnesses. As previously discussed, judges are under immense political pressure in making discretionary rulings in high-profile capital cases. A classic example is the case of *Sheppard v. Maxwell*. The murder trial of Dr. Samuel H. Sheppard started, after extensive pretrial publicity, just two weeks before a November election in which the chief prosecutor was a candidate for judge and the trial judge was a candidate for reelection. The Supreme Court held that Sheppard was entitled to habeas corpus relief because the trial court had failed to protect his right to a fair trial by taking measures such as continuing the case until after the election, changing venue, and controlling the trial participants' release of prejudicial information to the press.

Unfortunately, since *Sheppard*, the Supreme Court has not mandated procedures to minimize the risk of prejudice in such volatile situations or required careful scrutiny based on objective standards of similar discretionary decisions by trial judges. The Court has also retreated from its earlier pronouncements that because of the exceptional and irrevocable nature of the death penalty, capital cases require a heightened degree of procedural protection.

A few state supreme courts have recognized the political pressures on trial judges and have fashioned more objective standards and mandatory procedures to reduce the discretion of trial judges in making rulings that may be politically unpopular. For example, the Mississippi Supreme Court, after acknowledging the political pressures that may influence a judge's decision on whether to grant a change of venue, decided that "some objective standards should be available to shield the [trial] court from even the appearance of such subtle coercion."[31]

The Mississippi Supreme Court described the political reality for elected trial judges in considering a motion to change venue:

> [B]y perennially holding that a change of venue is granted solely at the discretion of the court, we perpetuate a burden on the trial judge. On the one hand, the judge is to act impartially, dispassionately and with scrupulous objectivity. On the other hand, in reality, the judge serves at the will of the citizenry of the district; the judge is, after all, a public official who must occasionally, perhaps even subconsciously, respond to public sentiment when making the decision to refuse a change of venue. It must be observed that, in granting a change, the trial judge might be perceived as implying that a fair trial cannot be had among his or her constituents and neighbors.

To keep such sentiment from influencing the judge, the court held that

> the accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained; such doubt is implicit when there is present strong public sentiment against the defendant; upon proper application, there arises a presumption that such sentiment exists; and, the state then

> bears the burden of rebutting that presumption.

The court also emphasized the importance of fairness in capital cases:

> A heightened standard of review is employed on appeal where the defendant's life is at stake. . . . It follows then that the trial court should, likewise, be particularly sensitive to the need for a change of venue in capital cases.

The Georgia Supreme Court also modified its standard of review of denials of motions for a change to venue and directed trial judges in Georgia to grant changes of venue when a capital defendant makes "a substantive showing of the likelihood of prejudice by reason of publicity.[32] The Court rejected the argument of the dissent that the determination of the trial judge was subject to "special deference" and should not be overturned unless it was "manifestly erroneous."

Venue decisions are but one example of potential for the influence of improper political considerations on judicial rulings and the need for reviewing courts to remedy politically influenced decisions by adopting and applying objective standards. Where a particularly notorious crime produces volumes of publicity, that publicity often creates pressure on the judge to score political points. The more objective standards that the Supreme Courts of Mississippi and Georgia have adopted lessen the discretion allowed the trial judge, and allow courts a greater distance from the political influences to review trial decisions. A reviewing court can examine the testimony, the newspaper articles, and the tapes of broadcasts and make its own determination of whether there is a "likelihood of prejudice" or the prosecution has rebutted a defendant's showing that public sentiment makes the likelihood of an impartial jury doubtful.

Although these decisions of the Supreme Courts of Georgia and Mississippi providing for greater protection of the rights of the accused than the decisions of the U.S. Supreme Court may appear encouraging they say more about the retreat of the U.S. Supreme Court from protecting the rights of the accused than it does about the willingness—or political practicality—of the state courts upholding the Constitution in these situations. Most courts have shown little inclination to face reality with regard to many other discretionary decisions of trial judges that political considerations may influence. Decisions recognizing the political pressures on elected judges and adopting and applying more objective standards to limit discretion are the rare exceptions to thousands of decisions routinely deferring to decisions by trial judges on a wide range of issues. The deference in federal habeas corpus actions to state court factfinding, as well as other increasingly severe restrictions on habeas review, insulate many decisions by state courts from federal review.

Nevertheless, a reexamination of the deference given to elected judges on discretionary matters is urgently needed. The outcomes of the judicial elections in California, Texas, Mississippi, and other states discussed in this Article are exposing for all to see the political pressures that influence the decisions of judges who face election or retention. It is of course impossible to know the number of judges who simply give in, either consciously or subconsciously, to their political pressures or the number of judicial rulings and opinions that political considerations influence. But the political realities are apparent to anyone who practices in the courts and observes these pressures at work. In many of the jurisdictions where the death penalty is frequently imposed, the political reality is that the elected state court judge cannot even consider granting relief to one facing the death penalty.

If judges continue to be voted off trial and appellate courts for their decisions in capital cases and are replaced with judges who are little more that conductors on railroads to the execution chambers, it will be impossible for courts to maintain the fiction that judges who face election are impartial without risking public ridicule and immense damage to the perception of the legitimacy and credibility of the courts. Until more fundamental reform of judicial selection is feasible, courts must acknowledge and deal with the

political pressures on judges. In addition, full federal habeas corpus review of state court convictions should be restored. The once Great Writ of habeas corpus barely survives the blows that have rained upon it from the efforts of the Supreme Court and the Congress to expedite executions, achieve finality, and reduce friction between the state and federal courts. Yet as numerous examples set out in this Article make clear, only federal judges have the independence and job security that enable them to enforce the protections of the Constitution when doing so would be vastly unpopular. If the Constitution is to serve its purpose as fundamental law that protects us from "our baser selves" when there is "a demand for vengeance on the part of many persons in the community against one who is convicted of a particularly offensive act,"[33] its enforcers must be judges who cannot be swept from office for making a controversial decision.

E. Appointment of Counsel Independent of Judges

Regardless of how judges are selected, they should not be responsible for the appointment of counsel for poor persons accused of crimes. An independent judiciary should be independent not only of political influences and the prosecution, but also of the defense. Judges have a different role to play in the adversary system than the management of the defense. In addition, defense counsel should be independent of the judge in order to fulfill the obligation of providing zealous representation to the accused.

The American Bar Association recommends that there be a defender office or a special appointments committee to select counsel for indigent defendants. Removing the responsibility for the representation of defendants from judges and placing it with a program charged with protecting only the best interests of the defendants will not completely depoliticize the process or always ensure adequate counsel, but it would be an important step toward a properly working adversary system and effective representation of indigent defendants.

Conclusion

Justice Hugo Black once observed that "[u]nder our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, out-numbered, or because they are . . . victims of prejudice and public excitement."[34] This role is of particular importance in capital cases, where the winds of public excitement blow especially hard against the poor, members of racial minorities, and the despised who stand accused of heinous crimes. Judges are not legislators; they have a different role than simply carrying out the wishes of their constituents to impose the death penalty.

Capital cases put extraordinary pressures on all participants in the legal system. Even the most conscientious and independent judge faces an enormous challenge of reining in the emotions that accompany a brutal crime and the loss of innocent life. If decisions about guilt and punishment are to be made fairly, objectively, and reliably, it is critical that judges be guided by the Constitution, not personal political considerations.

Yet in high-visibility capital cases in which public opinion is overwhelmingly one-sided though often ill-informed, the political pressures may be so great that a judge who has an interest in remaining on the bench cannot ignore them. In today's political climate, a commitment to fairness is too often perceived as "softness" on crime—a political liability for a judge who must run for office. The lack of electoral clout of those facing the death penalty makes the political equation easy; however, the cost to justice and the rule of law is significant.

Nevertheless, it appears unlikely that even the most modest proposals discussed in this Article will be implemented in many jurisdictions—particularly those where they are most urgently needed—in the near future. In part, this is because there are many people who prefer judges who follow the election returns to judges who follow the law. It is also partly because the judiciary and the bar persist in hiding behind the legal fiction that judges are impartial instead of acknowledging the reality that in many instances they are not. The U.S. Supreme Court

indulges in wishful thinking about what the state courts should be, instead of facing what they are, including the political pressures on those judges.

It is, however, time for open and honest discussion of the political pressures on judges who must stand for election and retention. The integrity, credibility, and legitimacy of the courts are at stake. Judges themselves should lead the discussion by disqualifying themselves *sua sponte* from cases in which they recognize that political considerations may keep them from holding the balance "nice, clear and true." But it may be necessary for lawyers to prompt the discussion by filing motions for recusal in cases in which such pressures are present. The judiciary and the bar have a duty to explain to the public the difference between the representative function of legislative bodies and the adjudicatory function of courts. These steps are urgently needed to bring about reforms that will increase the likelihood that the only "higher authority" to which judges are responsive is the Constitution and laws of the United States.

Notes

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

2. Maura Dolan, *State High Court Is Strong Enforcer of Death Penalty,* L.A. Times, Apr. 9, 1995, at A1.

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

4. 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).

5. Coker v. Georgia, 433 U.S. 584 (1977).

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

7. 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).

8. Gerald Uelmen, Elected Judiciary, in *Encyclopedia of the American Constitution* 170-71 (Leonard W. Levy et al. eds., Supp. 1 1992).

9. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Crime but for the Worst Lawyer,* 103 YALE L.J. 1835 (1994).

10. John Harwood, Approving Atwater: GOP Committee Backs Its Chairman, *St. Petersburg Times*, June 17, 1989, at 1A.

11. Richard Cohen, Playing Politics with the Death Penalty, *Wash. Post*, Mar. 20, 1990, at A19.

12. Leslie Phillips, Crime Pays as a Political Issue, *USA Today*, Oct. 10, 1994, at 1A.

13. Hance v. Zant, 696 F.2nd 940, 952-53 (11th Cir.).

14. Phil Gast, District Attorney Criticizes Court for Rejecting Sentence, *Columbus Enquirer* (Ga.), Sept. 17, 1983, at A-1, A-2.

15. Wainwright v. Witt, 469 U.S. 412, 459 (1984) (Brennan, J., dissenting) (citations omitted).

16. American Bar Ass'n, Report of Commission on Professionalism, 112 F.R.D. 243, 293 (1986).

17. 476 U.S. 79 (1986).

18. Johnson v. state, 476 So. 2d 1195, 1209 (Miss. 1985).

19. 778 F.2d 1487 (11th Cir. 1985).

20. James F. McCarty, Law and Disorder with Rumpled Suits and Befuddled Ways, Thomas Shaughnessy Has Managed to Become the Matlock of Cuyahoga County, *Plain Dealer* (Cleveland), Oct. 23, 1994, at 8, 13.

21. See Fredric N. Tulsky, Big-time Trials, Small Time Defenses, *Phila Inquirer*, Sept. 14, 1992, at A1, A8.

22. Mobley v. State, 455 S.E.2d 61, 69-70 (Ga. 1995).

23. Nichols v. Collins, 802 F. Supp. 66, 78-79 (S.D. Tex. 1992) (granting writ of habeas corpus).

24. West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

25. *The Federalist* No. 78, (Alexander Hamilton) (Clinton Rossiter ed., 1961).

26. Chief Justice William Rehnquist, Press Conferences 5 (Mar. 15, 1989) (unofficial transcript, on file with *Boston University Law Review*).

27. Robert W. Raven, Does the Bar Have an Obligation to Help Ensure the Independence of the Judiciary? 69 *Judicature* 66, 67 (1985) (quoting Justice Roberts).

28. 273 U.S. 510 (1927)

29. *Model Code of Judicial Conduct* Canon 311(2) (1990). For further discussion of the Model Code of Judicial Conduct and elected judges, see Ross, *supra* note 120, at 128-30 (applying the 1972 Model Code to the problem of elected judiciaries).

30. *Model Code of Judicial Conduct* Canon 5A(3)(d)(i), (ii) (1990).

31. Johnson v. State, 476 So. 2d 1195, 1209 (Miss. 1985).

32. Jones v. State, 409 S.E. 2d 642, 643 (Ga. 1991).

33. Furman v. Georgia, 408 U.S. 238, 344-45 (1972) (Marshall, J., concurring).

34. Chambers v. Florida, 309 U.S. 227, 241 (1940).