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CROCODILES IN THE BATHTUB:
MAINTAINING THE INDEPENDENCE OF STATE
SUPREME COURTS IN AN ERA OF
JUDICIAL POLITICIZATION

*Gerald F. Uelmen**

I. INTRODUCTION

The late Honorable Otto Kaus, who served on the California Supreme Court from 1980 through 1985, used a marvelous metaphor to describe the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.¹

In 1996, we saw two more respected and conscientious state supreme court justices fall victim to the crocodile's bite. Justice Penny White was appointed to the Tennessee Supreme Court in January of 1995. She participated in one death penalty decision, joining two other justices on her five-judge court in reversing a death penalty judgment in June of 1996.² By unhappy coincidence, Justice White was the only supreme court justice on the ballot two months later. The Governor saw an opportunity to gain another Republican seat on the court. He denounced Justice White as a judge who was soft on the death penalty and weak on victims' rights. His campaign succeeded, and she was removed from office after winning only 44.8% of the votes.³

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1 See Paul Reidinger, *The Politics of Judging*, 52 A.B.A. J., Apr. 1987, at 52, 58; Gerald F. Uelmen, *Otto Kaus and the Crocodile*, 30 LOY. L.A. L. REV. 971 (1997) (forthcoming).

2 Tennessee v. Odom, No. 02-S-01-9502-CR00014 (Tenn. June 3, 1996).

3 John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50, 53-54.

Justice David Lanphier was appointed to the Nebraska Supreme Court in 1993, shortly after a term limits initiative measure was adopted by Nebraska voters by a 70% margin. In May 1994, Justice Lanphier authored a unanimous opinion of the Nebraska Supreme Court holding the term limits initiative invalid, because it had not complied with a constitutional amendment increasing the number of signatures required to qualify the measure for the ballot.⁴ The sponsors of the initiative then trained their sights on Justice Lanphier, and mounted a well-financed campaign to unseat him. Last November, he was removed by the voters, winning only 32% of the vote in a retention election.⁵

The justices of supreme courts in twenty-three states face contested elections at some stage in their career.⁶ Supreme court justices in another fifteen states face retention elections to keep their jobs.⁷ The death penalty is not the only crocodile in their bathtubs. Abortion remains a hot-button issue in many states, and final resolution of federal issues now clears the deck for state constitutional issues to be presented for the first time to many state supreme courts. And in the twenty-one states that allow legislation by popular initiative, justices frequently encounter an accusation that they are thwarting the voters' will by striking down popular initiative measures.

The vulnerability of state supreme court justices has also been enhanced by a number of "megatrends" in the life of modern America. The nature and extent of media coverage of judicial proceedings has changed dramatically in recent years. The tabloidization of the media, ratings-driven competition in more diverse media markets, and the reduction of news coverage to ten second sound bites have rendered efforts to educate the public about the judicial process largely ineffectual. The climate of political discourse has also sharply deteriorated, with partisan maneuvering and lack of civility becoming defining elements. Political lobbies and special interest groups no longer confine their persuasive efforts to the legislative process, but

4 Duggan v. Beerman, 515 N.W.2d 788 (Neb. 1994).

5 Leslie Boellstorff, *Lanphier Loses Seat on Supreme Court*, OMAHA WORLD-HERALD, Nov. 6, 1996, at 1.

6 Justices are elected in partisan elections in Alabama, Arkansas, Illinois, Mississippi, New Mexico, North Carolina, Pennsylvania, Texas and West Virginia. Non-partisan contested elections are held in Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Utah, Washington and Wisconsin. N.Y. TIMES, Jan. 22, 1988, § I, at 8.

7 "Yes-no" retention elections are currently utilized in Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee and Wyoming. *Id.*

closely follow court decisions. Supreme court justices who not so long ago quietly contemplated the polite parsing of their opinions by academic scholars, now encounter furious denunciation by special interests who, while frequently appearing as friends of the court, are often the court's worst enemies.

The greatest challenge facing state supreme courts in the coming century will be the maintenance of judicial independence in an era of increasing politicization of the judicial office. I believe the biggest mistake we can make in facing this challenge is to throw it into the laps of the justices, and tell them "it's your problem." Obviously, it is a problem for every citizen devoted to the rule of law and its preservation. Most especially, it is a problem that demands a major commitment from the organized bar.

And speaking of crocodiles, we need to contemplate the lesson taught by one of the greatest philosophers ever to emerge from an American swamp. I refer, of course, to Pogo, the wise possum created by cartoonist Walt Kelly. Pogo was heard to say, on a number of occasions, "We have met the enemy and he is us." When he said that, Pogo was frequently speaking to his friend, Albert. Albert was a crocodile of the alligator species who smoked cigars. As in the cartoon, we can't kill the crocodile. The crocodile is not an alien invader, but a manifestation of the public which our courts serve. The question for us to contemplate is, how can one serve the crocodile without becoming its meal? Let me take you through the swamp. We may find there are valuable lessons to be learned from some of our encounters with crocodiles during the past ten years.

II. THE FATTEST CROCODILE: THE DEATH PENALTY

The American appetite for the death penalty is best reflected in one stark statistic. There are now more than three thousand men and women on death rows in America. At the close of 1996, California led the parade with 420, Texas had 404, Florida was at 362, and Pennsylvania was in fourth place with 196.⁸ The supreme courts of these and other states find that the processing of death penalty appeals and petitions for postconviction relief consumes a bigger slice of the docket each succeeding year. To get a quick estimate, I counted up the total number of published opinions produced by the supreme courts of six death penalty states for 1985, and again for 1995, the most recent year for which data is available. I then ascertained what proportion of these opinions were death penalty cases. The six states

⁸ *Rate of Executions Soaring as Death-Penalty Foes Falter*, SAN JOSE MERCURY NEWS, Dec. 5, 1996, at A10.

selected were California, Illinois, Indiana, Ohio, Texas and Virginia. It's interesting that the total number of published opinions produced by these courts actually declined 13.5% during the ten year interval ending in 1995. Like the United States Supreme Court, state supreme courts are becoming more selective in filling their dockets, and they are deciding fewer cases. But there is one portion of their docket that these courts have little control over: the automatic appeals of death penalty judgments. The number of death penalty cases decided by these six courts increased 31% between 1985 and 1995. In 1985, 5.5% of the published opinions produced by these six courts were in death cases. In 1995, that proportion increased to 8.3%. The number of published opinions, of course, is a rather crude measure of the proportion of a state supreme court justice's workload that is devoted to death penalty review. Many justices in these states would agree with the estimate of recently retired California Chief Justice Malcolm Lucas, who told me death cases are now 20 to 25% of the workload of the California Supreme Court.⁹

What may be most disconcerting about the death penalty cases during the past ten years, however, is the increase in the rate of affirmance by some state supreme courts. Ten years ago, these six supreme courts affirmed 63% of the death penalty judgments they reviewed. In 1995, 90% of the death penalty judgments reviewed were affirmed. While California accounts for a disproportionate share of this sample, going from an affirmance rate of zero in 1985 to a rate of 94% in 1995, the affirmance rate in Texas went from 86% to 96% during the same ten year period. While some of this increase may be attributable to the law becoming more settled, I don't believe it can be denied that some of the increase is attributable to the presence of the crocodile in the bathtub. There are disturbing indications that judicial reluctance to reverse death penalty judgments may sometimes be reluctance to expose one's posterior to the wrath of the electorate. Crocodiles do occasionally bite.

In California, as we well know, three justices were removed from the state supreme court in the purge of 1986. The campaign that unseated them featured campaign ads promising that "no" votes against the retention of these three justices was the equivalent of three "yes" votes for the death penalty.¹⁰ Apparently, we set a standard for judicial politicking that has been emulated beyond our borders. Supreme court elections in at least ten states have been dominated by death

9 Gerald F. Uelmen, *The Lucas Legacy*, CAL. LAW., May 1996, at 29, 31.

10 Gerald F. Uelmen, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069, 2070 (1988).

penalty politicking in the past decade, and California and Tennessee are not the only states to see incumbent justices removed. Two justices were removed from the Mississippi Supreme Court after two separate campaigns focusing on death penalty issues. Justice James Robertson was defeated in 1992, after he was attacked for two dissenting opinions in death penalty affirmances. Ironically, when both cases were reviewed by the United States Supreme Court, the majority agreed with Justice Robertson's dissents and reversed the convictions.¹¹ In 1990, Mississippi Supreme Court Justice Joel Blass was defeated by an opponent promising to be a "tough judge for tough times," who attacked the incumbent justice for being "soft on crime." In both contested elections, the challenger was endorsed by the Mississippi Prosecutors Association.¹²

In 1992 I published the results of a study correlating death penalty affirmance rates for all state supreme courts for the ten year period ending in 1987, with the manner of judicial selection used for the justices on those courts. The thirty-eight states that then had a death penalty included states that appoint their justices for life, as in the federal system; states that utilize uncontested retention elections like California and Arizona; states that permit contested but nonpartisan elections like Georgia and Illinois; states that require judges to run under party labels, like Texas and Mississippi; and even a handful of states where justices are elected by the legislature, such as Virginia and South Carolina. The results suggest that judges whose tenure is more secure are more willing to overturn a death penalty judgment:¹³

Executive Appointment.....	26.3%
Uncontested Retention Elections	55.3%
Nonpartisan Contested Elections.....	62.9%
Partisan Contested Elections.....	62.5%
Legislative Elections.....	63.7%

In California, the crush of the death penalty caseload engendered a proposal to eliminate automatic direct review of all death penalty cases by the supreme court.¹⁴ That could also dissipate the

11 Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 763-64 (1995).

12 *Id.*

13 Gerald F. Uelman, *Elected Judiciary*, in LEONARD W. LEVY, ET AL., ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, supp. I, at 171 (1992).

14 Robert Weisberg, *Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California*, 28 SANTA CLARA L. REV. 243 (1988); Gerald F. Uelman, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 292-96 (1989).

political pressure so intensely focused upon the seven justices of the supreme court by the volatile death penalty issue. The automatic appeal of as many as forty-six new death judgments in one year directly from the trial court to the supreme court imposes burdens on the court that could just as expeditiously be handled by the intermediate courts of appeal. The intermediate courts of appeal have grown along with their caseload, but the size of the supreme court has remained constant for over a century. In some states, the direct appeal of death judgments to the state supreme court is an anomaly, established long before intermediate appellate courts even existed. Why should death penalty cases be singled out for direct access to the supreme court docket, when all other cases must compete for the court's limited resource of final review?

The traditional answer, of course, is that consistency in administering the ultimate punishment demands final review by the same body of judges in every case. Actually, final review by the supreme court could be preserved, after initial review by an intermediate court. The supreme court would still be spared sifting through all the preliminary procedural obstacles like appointment of counsel and certifying the record. It is much easier to review a case that has already been reviewed by a lower court. Cases reversed by the lower court would not even have to be heard. And even if final supreme court review were discretionary, the uniformity of ultimate judgment would be preserved in the process of considering applications for discretionary review.

Some resistance to this proposal comes, as might be expected, from the judges of the intermediate courts of appeal. They have to face retention elections too. Why should they be saddled with the political burden that supreme court justices must currently bear, without any of the rewards? The greatest opposition to this proposal, however, comes from those who strongly support the death penalty itself. They argue that intermediate appellate review will drag out the review process in capital cases even longer than it currently is.¹⁵ It is interesting to note that one of the few death penalty states that did have review of death penalty appeals by intermediate appellate courts prior to supreme court review abandoned the practice in 1994. The State Constitution of Ohio was amended by a vote of the people in 1994 to *eliminate* review of death cases by intermediate appellate courts. Despite opposition from the state bar and civil liberties organizations, the measure was sold to the voters as a means of speeding up the

15 See *Reducing the Caseload of the Supreme Court: A Debate*, 5 CAL. LITIG., Winter 1992, at 41-46.

administration of the death penalty.¹⁶ As a result, the Ohio Supreme Court, whose justices are elected, reviewed seventeen death penalty cases in 1995, compared to the three that were reviewed in 1985. The measure has had no perceptible impact upon their rate of affirmance, however. In 1985, it was 100%. In 1995, it was 100%. Spreading the "joy" of reviewing death penalty appeals among a wider population of appellate judges may be a promising reform in terms of more efficiently managing the workload of state supreme court justices, but it would be a hard sell to the public in today's climate of impatience with the delays between verdict and execution. Only Alabama continues to funnel death cases through the intermediate court of appeals, and legislation has been proposed to "speed up" death cases by ending the practice there, too.¹⁷

Some have suggested that we look to Texas for a solution. There, final review is allocated between two courts, one for civil cases and one for criminal cases. Thus, death penalty cases can be efficiently reviewed without diverting the availability of discretionary final review in civil cases. The Texas Court of Criminal Appeals does manage to review about thirty death penalty cases each year. It has even been suggested that a special rotating panel of appellate justices be created in California, just to handle death penalty cases. While that would certainly alleviate the docket pressure which death penalty cases create for the supreme court, it would not address the problem of political vulnerability for the justices assigned to sit on a special death penalty review panel. In Texas, the Court of Criminal Appeals reversed one death penalty case in 1993. That was enough to inspire a call for Republicans to take over the Texas Court of Criminal Appeals in 1994. The voters responded to the call. Justice Charles Campbell, a former prosecutor with twelve years on the bench, was removed. Among those placed on the court was a lawyer who had been admitted to the Texas bar for two years, whose campaign platform promised "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.'"¹⁸ As already noted, the affirmance rate for death penalty appeals in Texas rose from 86% in 1985 to 96% in 1995.

The state which seems to have managed the death penalty crocodile with greatest success is the state which probably has the largest

16 Bert Lockwood, *Voter Initiatives Target Crime in Ohio*, CINCINNATI ENQUIRER, Oct. 16, 1994, at D1 (editorial).

17 Weisberg, *supra* note 14, at 261.

18 Bright & Keenan, *supra* note 11, at 761; *see also id.* at 761-63, 779-80; Stuart Taylor, Jr., *The Politics of Hanging Judges*, AM. LAW., Dec. 1995, at 35.

indigenous population of crocodiles: Florida. The Florida Supreme Court reviewed fifty death penalty judgments in 1995, and chalked up a reversal rate of 52%, one of the highest reversal rates in America. Is it because the justices of the Florida Supreme Court are not subjected to the political pressures prevalent in other death penalty states? Hardly. Although Florida utilizes a retention election system in which justices face a yes-no confirmation vote every six years, recent years have with disturbing regularity seen organized campaigns mounted to remove targeted justices. In 1990, then Chief Justice Leander Shaw, Jr. had to raise \$300,000 for a campaign to retain his seat in the face of an organized campaign by anti-abortion forces to remove him from office.¹⁹ And in 1992, Justice Rosemary Barkett faced an organized campaign not only by anti-abortion forces, but by prosecutors and police unhappy that she joined in a dissenting opinion in one controversial death penalty case, even though she had voted to affirm over two hundred death penalty appeals during her previous nine years on the court.²⁰ While she won retention with 60.9% of the vote, the death penalty issue was trotted out in an effort to defeat her 1994 appointment to the United States Court of Appeals for the Eleventh Circuit, and it persuaded presidential candidate Bob Dole to place her on the list of Clinton appointees he labeled the judicial "hall of shame."²¹

How is it that Florida has managed to maintain an independent state supreme court that rigorously reviews death penalty cases, reversing between one-half and one-third of the cases it reviews every year? One might speculate that Florida has defused public frustration by the delivery of actual executions. Florida has successfully executed thirty-eight inmates since 1978, and the Florida Supreme Court has maintained a brisk pace of appellate review, deciding as many as seventy-three death penalty appeals in a single year. Perhaps the public frustration so frequently misdirected at courts is really frustration with the total lack of executions, rather than with reversals in particular cases. California in 1986, and Tennessee in 1996, had yet to see their death penalty law ever enforced. I'm not proposing it as a solution, but one reality we may have to face is that this crocodile must be occasionally fed; if he isn't, he will eat his keepers.

That explanation, however, is hard to reconcile with the fact that Texas has delivered 107 executions since 1978, and the pace of review by the Texas Court of Criminal Appeals is close to that of Florida.

19 Mark Hansen, *The High Cost of Judging*, A.B.A. J., Sept. 1991, at 45.

20 Donna O'Neal, *Voters Uphold Barkett*, ORLANDO SENTINEL TRIB., Nov. 4, 1992, at D1.

21 Gibeaut, *supra* note 3, at 54.

Why would such a fat, well-fed crocodile turn on its keeper? It may simply be that Texas crocodiles grow bigger and hungrier than anywhere else, and we shouldn't try to learn anything from the Texas experience.

Two years ago, a young lawyer who had experienced the Texas death penalty system first hand, as a law clerk for a judge on the United States Court of Appeals for the Fifth Circuit and as an attorney for the Texas Death Penalty Resource Center, left Texas to join the Capital Litigation Unit of the Florida State Public Defender's office in Miami. Writing for the *Texas Lawyer*, Brent Newton offered some interesting reflections on why the affirmance rate was so much higher in Texas than in Florida. The most significant factor he identified was "the disparate quality of appellate judges in the two states, which is largely a function of the fact that judges on the Florida Supreme Court are not elected in partisan popular elections, as are the judges on the Texas Court of Criminal Appeals." He also noted that the Florida Supreme Court reviews the weighing of aggravating and mitigating circumstances in the death penalty determination on appeal, while the Texas court refuses to consider whether a life sentence was more appropriate in view of the mitigating circumstances. Many death penalty reversals by the Florida Supreme Court come in cases where jury actually recommended life imprisonment but the recommendation was overridden by the trial judge.²²

The availability of judicial override has yielded what Justice Sandra Day O'Connor recently called "ostensibly surprising statistics."²³ Only four states allow judges to disregard a jury's recommendation on the death penalty, and the same pattern has emerged in all four states.

In Alabama, trial judges override jury recommendations of life and impose a death sentence almost ten times as frequently as they override recommendations of death. In Florida, trial judges overrode jury recommendations in 185 cases between 1972 and 1992. In 134 of these, trial judges opted for death over a life recommendation of the jury. In Indiana, the ratio was eight judicial overrides for death to four for life between 1980 and 1994.²⁴

Why are trial judges more likely than jurors to favor executions? Justice John Paul Stevens put his finger on the problem in a dissenting opinion to the United States Supreme Court ruling upholding the Alabama provisions for judicial override in death penalty cases:

22 Brent Newton, *Capital Punishment: Texas Could Learn a Lot from Florida*, Tex. Law., Feb. 26, 1996, at 26.

23 Harris v. Alabama, 115 S. Ct. 1031, 1036 (1995).

24 *Id.* at 1038, 1040 & n.8 (Stevens, J., dissenting).

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.²⁵

Seen in this light, the high reversal rate in Florida may to some extent be a corrective for the politicization of death penalty decisions by judicial override in the trial courts. While Florida Supreme Court justices are also subject to the same political pressures, they are at least insulated by the device of yes-no retention elections, unlike the contested elections faced by trial judges in Florida and by judges of the Texas Court of Criminal Appeals. In the 1996 elections, three justices of the Florida Supreme Court were retained with no opposition. But retention elections are not always protection from the crocodile. Ask Justice Penny White of Tennessee, or Justice David Lanphier of Nebraska, or Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso of California. All of them lost their seats in retention elections. It cannot be denied, however, that the crocodile is more voracious in states that have contested elections.

Judges who vote to affirm in every death penalty case will be the first to loudly proclaim that the public pressure of electoral politics is not a problem. No judge would ever admit that his or her vote was influenced by public pressure or popular opinion. It takes a truly sensitive judge to even engage in the soul searching inquiry into the impact of the crocodiles in the bathtub upon his or her decisionmaking process. Since most death penalty trials involve lengthy proceedings with complex evidentiary issues, there will be errors or failures of counsel to be found in many of the records reviewed. An affirmance is easily rationalized by the harmless error rule, or by a relaxed standard of competence for lawyers. Opinions that affirm are rarely scrutinized or criticized by the press, and when they are, the criticism can be deflected or ignored by attributing it to “liberals” who are opposed to the death penalty.

Probably the most insidious influence of the death penalty crocodile is on the quality of counsel in death cases. Judges who owe their election to a campaign commitment to enforcing the death penalty will be more likely to countenance lazy and sloppy lawyers. When one compares the published opinions in death penalty opinions issued by the Florida Supreme Court with those of the Texas Court of Criminal

25 *Id.* at 1039 (Stevens, J., dissenting) (footnote omitted).

Appeals, one encounters a profound difference in attitude regarding the degree of competency to be demanded of court-appointed defense counsel. As Brent Newton sums it up:

Horror stories regarding Texas capital defense lawyers—e.g., lawyers who engage in little or no preparation for trial, lawyers who were drunk or fell asleep at trial, openly racist lawyers representing minority clients—are legion.

Unlike the state and federal appellate courts in Florida, appellate judges in Texas are generally willing to turn a blind eye to such shameful lawyering.²⁶

Regretfully, his observation of Texas courts is occasionally applicable to California.²⁷ Too often, the lawyers who are criticized by judges are not the lawyers who slept through trials or did too little to prepare their client's defense. Instead, judicial wrath is visited upon the lawyers who do "too much" for their clients, by vigorously asserting every conceivable ground for reversal. Part of the problem with the review of death penalty judgments by state supreme courts today is that the siege mentality afflicting the justices leads them to regard the defense bar as the enemy. In California our supreme court watched quietly as the governor dismantled the state public defender's office, and then the court itself trashed the appellate project created to fill the void. Largely as a result, over 140 of the occupants of California's death row are not yet represented by appellate counsel. A recent study by the Texas Bar Foundation concludes that Texas also faces a crisis in providing competent counsel for death penalty appeals and postconviction proceedings.²⁸ The establishment of public defender offices has been fiercely resisted in Texas, while the Texas Court of Criminal Appeals still debates whether *Gideon v. Wainwright* was correctly decided.²⁹

The organized bar should be the loudest defender of judicial independence. When special interest groups or victim's rights organizations suggest that their unhappiness with a particular decision should result in removal of the judges who rendered it, the judges are hardly in a position to respond with a spirited defense of judicial integrity and independence. Too often, the response is simply silence, which

26 Newton, *supra* note 22, at 26.

27 E.g., *In re Avena*, 909 P.2d 1017 (Cal. 1996); *People v. Garrison*, 765 P.2d 419, 440-41 (Cal. 1989) (en banc).

28 *A Study of Representation in Capital Cases in Texas*, 56 TEX. B.J. 333 (1993).

29 See *Ex parte Jordan*, 879 S.W.2d 61, 63-64 (Tex. Crim. App. 1994) (en banc) (McCormick, P.J., dissenting) (criticizing the United States Supreme Court for interfering with Texas "sovereignty" by mandating counsel for indigents in *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

reinforces the impression that judicial elections can become referendums on the popularity of particular decisions. When that agenda is endorsed by elected political leaders at the highest level, courts are left in a highly vulnerable position that truly threatens the principle of judicial independence. Yet when it is appropriate for a court to speak out in defense of the principle that indigent death row inmates should be competently represented, the judicial silence is often deafening. Last October, when Congress cut off funding for the twenty death penalty resource centers that were engaged in raising the level of competence of defense lawyers in death cases, how many state supreme courts did Congress hear from?

III. THE MEANEST CROCODILE: ABORTION

For nearly twenty years, a political war has been going on for control of the federal judiciary. The climax to that war was the bitter fight over the confirmation of Robert Bork as a justice of the United States Supreme Court. Unquestionably, the defining issue in that fight was abortion. While the war is far from over, the refusal of the United States Supreme Court to overrule *Roe v. Wade*,³⁰ as well as its resolution of the constitutionality of parental consent laws,³¹ will move the war to a new venue: the supreme courts of the fifty states. They will now be called upon to determine the validity of abortion restrictions under state constitutions. The "pro-life" and "right to choice" legions will now be arrayed for and against the state supreme court justices perceived to be their friends or their enemies, and many judicial election contests will undoubtedly become battlegrounds for the "clash of absolutes."

In his insightful analysis of the abortion issue entitled *Abortion: The Clash of Absolutes*, Professor Laurence H. Tribe described the reasons why the abortion crocodile can be labeled the meanest: "there is a pervasive sense of mutual distrust that arises from the conspicuously different social positioning and cultural orientation of the combatants in the abortion war."³² Noting the lack of civility and mutual respect in the rhetoric that pervades both camps, he concludes:

[T]he depth of division between the pro-choice and the pro-life tendencies appears to reflect not simply different perspectives on the value of fetal life but different orientations toward matters of tradition, change, sex and power. Such differences in turn reflect class

30 410 U.S. 113 (1973).

31 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

32 LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 239 (1990).

and culture in ways that cut across the divide between Democrats and Republicans in our political life.³³

He also notes a real irony—that pro-life advocates are often pro-death when it comes to the issue of capital punishment. Thus, our crocodiles may frequently travel in pairs.

A glimpse at what lay in store first emerged in Indiana in 1984, when the confirmation of Chief Justice Richard M. Givan was opposed by a group calling itself the “Remember Baby Doe—Retire Judge Givan Committee.” Chief Justice Givan authored an opinion denying supreme court jurisdiction to intervene in a lower court ruling that parents could withhold medical treatment for a baby born with Down’s syndrome and severe internal deformities.³⁴ Although Chief Justice Givan retained his seat, the negative vote was substantially higher than previous retention elections.

The only state supreme court so far to decide the constitutionality of a parental involvement requirement for abortions by minors was Florida’s. The law was challenged under a state constitutional guaranty of privacy. In a 1989 ruling, by a four-three margin, the court struck down the Florida statute requiring parental consent.³⁵ The opinion was authored by Justice Leander Shaw, Jr., the first black chief justice ever to preside over the Florida Supreme Court. His opinion was joined by Justice Rosemary Barkett, the only woman serving on the court. Both were targeted for defeat by pro-life forces, which are politically potent political force in Florida. Former Florida Governor Bob Martinez owed his 1986 election to pro-life forces. Justice Shaw faced the gauntlet in 1990. He raised and spent \$300,000 for his retention campaign. While the focus of the campaign was the abortion issue, he also took some pot-shots from death penalty supporters for his votes to reverse in some controversial death penalty cases. He enjoyed strong support from the organized bar and newspapers. He was confirmed with a 60% vote, 15% less than his initial confirmation six years before.³⁶ Justice Barkett faced the voters two years later, in 1992. While she was opposed by the same right-to-life groups that opposed Shaw, the pro-death penalty forces were more active in the campaign against her. She was opposed by several county prosecutors, although then-Dade County prosecutor Janet Reno offered strong support. Justice Barkett raised and spent \$230,000, and won retention by a vote of 61%. Three other justices on the ballot that year were retained with

33 *Id.* at 238.

34 *Group Seeks Ouster of Judge in ‘Baby Doe’ Case*, N.Y. TIMES, Oct. 4, 1984, at A21.

35 *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

36 Andrew Blum, *1990 Vote: Two Issues Dominate*, NAT’L L.J., Nov. 5, 1990, at 1, 1.

margins of 64–65%.³⁷ Subsequent judicial retention elections in Florida have reverted to quietude, and Justice Shaw faced no opposition to his retention in 1996. But that does not mean that justices in other states can relax. Twenty-seven states have statutes requiring parental consent or notification for abortions for minors, similar to the statute struck down in Florida.

California also has a state constitutional guarantee of privacy, similar to the Florida constitutional provision. The California Supreme Court issued a four-three ruling upholding the statute on April 4, 1996, shortly before two new justices were sworn in.³⁸ The new justices joined in granting a motion for rehearing, so the case will now be decided by the newly constituted court. Just the grant of a rehearing evoked loud saber-rattling from pro-life forces. A San Diego newspaper editorialized that Californians should wonder why their new Chief Justice was leading the Republican-dominated court down this “outrageous activist path, especially when one considers where it led Rose Bird.”³⁹ Even former United States Attorney General Ed Meese chimed in, speaking on behalf of the Parents Rights Coalition: “The judges ought to know that the public is watching their actions. That’s why they come up for election every 12 years.”⁴⁰ A Director of the National Right to Life League announced the organization will consider making the decision a campaign issue when five of the seven justices will be on the ballot in 1998. Even prior to the grant of rehearing, right to life advocates appeared to testify against the confirmation of Chief Justice Ron George, because of his dissenting vote in the parental notification case, as well as the confirmation of Associate Justice Ming Chin, because he said he favored a woman’s right to choose.

Thus, the meanest crocodile is snapping loudly in California. While pro-choice advocates are in the political majority, no California justice would be likely to survive a joint campaign by right-to-life forces combined with death penalty advocates.

37 Val Ellicott, *Top Judge in Florida Fights for Job*, ATLANTA J. & CONST., July 4, 1992, at 3.

38 American Academy of Pediatrics v. Lungren, 912 P.2d 1148 (Cal. 1996).

39 Mark S. Pulliam, *A Judicial Threat to Parental Authority*, SAN DIEGO UNION-TRIB., July 26, 1996, at B9 (editorial).

40 Parents’ Group Hits Teen Abortion Action, UPI., July 24, 1996, available in LEXIS, Nexis Library, UPI File.

IV. THE ANGRIEST CROCODILE: THE POPULAR INITIATIVE

The howls of protest and editorial teeth-gnashing that greeted the intervention of federal courts to stay the implementation of recent California initiatives designed to restrict access of illegal immigrants to government services and to outlaw affirmative action programs were not restrained by the reality that federal judges have lifetime tenure. Many demanded the resignation or impeachment of the federal district court judges hearing the constitutional challenges to these measures. More often, the courts that must address the legality of initiative measures are state courts, whose judges must face the wrath of a frustrated electorate.

The initiative crocodile can be labeled the angriest crocodile because the promoters of initiative measures tend to take personal pride in their handiwork, and take personal offense when a court messes with it. The drafting of initiative measures usually offers little justification for their pride. These measures frequently confront the courts with serious questions of vagueness and need for interpretation with little legislative history to guide their resolution. Initiatives frequently contain sweeping or ambiguous language because of the drafting process that produces them. Unlike the legislative process, where public hearings subject proposals to adversary scrutiny and frequent amendment, initiatives are drafted in secrecy by the special interests that have most to gain from their enactment. Once signatures have been collected, the language cannot be modified or changed.⁴¹

As a legal matter, initiatives are entitled to no greater deference than any other legislative enactment. As former Chief Justice Warren Burger put it, "the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."⁴² But as a practical matter, elected judges considering a popular initiative must face the same voters who enacted it to keep their judicial seats. Former Justice Joseph Grodin of the California Supreme Court described these cases as "hot potatoes," explaining: "It is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another."⁴³ In California, voters enacted a wide-ranging criminal justice initiative in 1982. While a challenge to the measure on grounds it violated the state constitutional requirement that initiative

41 Gerald F. Uelmen, *Taming the Wild Initiative*, L.A. LAW., May 1993, at 30.

42 Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981).

43 JOSEPH GRODIN, IN PURSUIT OF JUSTICE 105 (1989).

measures address a "single subject" was pending before the California Supreme Court, several justices were publicly reminded by elected officials that their reelection to the court would be strongly affected by their decision on the validity of the measure, and the Chief Justice was publicly threatened with a special recall effort if the court did not uphold the measure.⁴⁴ The measure was upheld by a four-three vote.⁴⁵

The initiative crocodile claimed a victim in Nebraska this year, with the ouster of Justice David Lanphier from the Nebraska Supreme Court. After he authored the unanimous ruling striking down the term limits initiative, its sponsors came after Justice Lanphier with a well organized campaign that raised and spent an estimated \$200,000 for mailings, advertising, door-to-door canvassing and telephone polling. A controversy arose during the anti-Lanphier campaign when its sponsors refused to comply with a disclosure law requiring the public reporting of campaign contributions. They contended the law had no application to judicial retention elections. Justice Lanphier raised and spent less than \$80,000 for his retention campaign. Although his authorship of the term limits opinion was the genesis of the campaign against him, his opponents also took full advantage of his participation in an unpopular decision requiring a showing of malice for second degree murder convictions, which required the retrial of numerous murder convictions. On November 5, 1996, Justice Lanphier became the first justice of the Nebraska Supreme Court ever to be removed by the voters.⁴⁶

A judicial vote against a popular initiative thus carries a unique risk, that the machinery of the political campaign that led to enactment of the initiative will simply be redeployed against the offending judges. That risk was noted by Professor Julian Eule, in his seminal analysis of the problems posed by judicial review of initiative measures:

In no area would judges seem more at risk than when they overturn plebiscites. That voters are generally unaware and unmoved when legislative action is voided is not surprising. Judicial nullifications of ballot measures are different matters altogether. They tend to be highly visible decisions

. . . .

The greater visibility of judicial decisions respecting plebiscites is not the only factor that renders such cases high risk for an elected

44 Gerald F. Uelman, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333, 342 (1988).

45 *Brosnahan v. Brown*, 651 P.2d 274 (Cal. 1982) (en banc).

46 Leslie Boellstorff, *Commission Won't Block Lanphier Effort*, OMAHA WORLD-HERALD, Nov. 2, 1996, at 33SF; Boellstorff, *supra* note 5, at 1.

judiciary. Plebiscites pass as a result of well-organized—and usually well-financed—organizations behind them. These groups are in place to mount anti-retention campaigns should the judiciary thwart their efforts. Monied special interests that have sunk considerable resources into the passage of a ballot measure may be willing to spend more to bump off the judges who stand in the way of the measure's enforcement. Judges considering the constitutionality of voter efforts are not likely to be blind to the specter of an interest-group structure energized to carry out the same kind of voter campaign in displacing offending judges that was used in getting the plebiscite passed in the first place.⁴⁷

The initiative process is available in twenty-one states. It is not a coincidence that all but two of these states also require their supreme court justices to face elections, many of them in contested races. The initiative, after all, is a product of the same populist movement that promoted the election and even the recall of judges. This crocodile has a pedigree.

V. LIVING WITH CROCODILES

Our travels through the swamp with Pogo may offer some tentative lessons about how we can preserve and protect the vulnerable tadpole of judicial independence. One of my favorite Pogo adventures was the crisis he encountered when asked by a friendly Momma frog to babysit her tadpole. The tadpole was swimming in a mason jar which Albert "mistook" for a martini with an olive. Pogo was ready to climb down Albert's throat himself to retrieve the victim, but was dissuaded when Albert insisted on a farewell handshake. Pogo then came up with a brilliant solution: he made Albert drink so much water that the tadpole was able to swim back out to Pogo's arms. Pogo then declares that the solution is "not so hard once we puts our minds to it."

Once we "puts our minds to it," the problem of preserving judicial independence in an era of judicial politicization becomes a question of political will. Do those who value the independence of the judiciary have the will to fight for it in the political arena? Do they value it enough to put it ahead of their political agenda of gaining "control" of a court for a political party or a special interest? Do they value it enough to finance the campaigns that will have to be mounted on behalf of judges who are targeted for defeat because of the unpopularity of their decisions?

⁴⁷ Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1581-83 (1990).

The answers to these questions are by no means obvious. We cannot assume that all lawyers, or even all judges, are strongly committed to the principle of judicial independence. We have recently witnessed the spectacle of candidates for the Presidency of the United States and governorships of our largest states calling for the resignation or defeat of judges because they didn't like the decisions they rendered. If lawyers, who should know better, are more committed to gaining personal political advantage than to preserving the principle of judicial independence, how will we ever convince the electorate they should look beyond their disagreements with a particular decision?

There are many potential reforms which could make judges less vulnerable, even if the principle of electoral accountability is preserved. Contested elections, especially partisan ones, have little to recommend themselves. While retention elections are no guarantee of independence, they are certainly an improvement over contested elections. The timing of judicial elections should also be examined. In California, we only vote on the retention of supreme court justices in gubernatorial years, thus increasing the risk that judicial retention could be politicized as an issue in the governor's race. Giving judges longer terms is another reform that would enhance their independence and put some distance between a controversial decision and an election.

Many advocates of judicial independence stress the importance of "educating the public" about what judges do and why their independence should be valued. It has even been suggested that the normal rule that judges don't publicly discuss or debate the reasoning for their decisions should be suspended when judges face an election contest.⁴⁸ There are others who point out that public understanding of what courts do doesn't necessarily increase public support for the courts. Perhaps judicial survival is enhanced by judicial invisibility. I find it hard to imagine how even the most reticent judges can avoid controversy, however, when they must decide the kinds of issues that regularly come before the supreme court of every state. The reality is that every justice who faces an election contest to keep his or her job is a tadpole in a pond full of crocodiles. The more crocodiles, the

48 In *ACLU v. Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990), the court ruled that a Florida Canon of Judicial Conduct, which prohibited judges from announcing their views on disputed legal or political issues, was a violation of the First Amendment. The ABA's new *Model Code of Judicial Conduct* prohibits only statements that *commit* (or appear to commit) a candidate with respect to cases or controversies that are likely to come before the court. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990).

greater the risk. A rule of thumb might be "Three crocodiles and you're out."

If the past ten years is any indication, the states where judicial independence is most gravely at risk are the states which feature growing death rows without any executions, states which have laws requiring parental consent for abortions by minors, and states which allow statutory enactments or constitutional amendments by initiative. Are there any "three crocodile" states? Indeed, there are two such states, and both subject their supreme court justices to contested elections! The two states are Ohio and Kentucky.

Both states experience highly partisan and expensive races for supreme court seats on a recurring basis. Ohio experienced one of the costliest judicial elections in American history in 1986, when incumbent Chief Justice Frank Celebrezze spent \$1.7 million to keep his seat, only to lose to Thomas Moyer, who spent \$1 million. The newly elected Chief Justice voted to rehear thirty cases which had been decided in the final weeks of his predecessor's term. After news reports disclosed that he had received campaign contributions from lawyers in five of those cases, he disqualified himself from the hearings. The State Bar President commented, "The people with money to spend who are affected by Court decisions have reached the conclusion that it's a lot cheaper to buy a judge than a governor or an entire legislature and he can probably do a lot more for you."⁴⁹ In response to a subsequent "reform" movement, the Supreme Court itself imposed spending limits on Ohio judicial election campaigns. Candidates for associate justice were limited to campaign expenditures of \$350,000. A federal district court judge held the spending limits unconstitutional, and an appeal is now pending before the United States Court of Appeals for the Sixth Circuit.⁵⁰ Meanwhile, over \$1.75 million was spent on races for two seats on the Ohio Supreme Court in 1996. While candidates stayed within the court-imposed limits, independent groups pumped massive amounts of money into media campaigns. The Ohio Republican party invested \$305,000 on one campaign, while a coalition of labor unions and plaintiff's lawyers spent \$234,000 in the opposing campaign.⁵¹ Ohio judicial campaigns tend to line up on traditional political party lines. Issues like the death penalty have not played a prominent role, even though Ohio has not had an execu-

49 Kaplan, *Justice For Sale*, COMMON CAUSE MAG., May-June 1987, at 29, 30.

50 *Ohio Supreme Court Appeals Ruling in Judicial Spending Limits Case*, POL. FIN. & LOBBY REP., Nov. 27, 1996, at 6.

51 T.C. Brown & Joe Hallett, *Post-Election Reports Show Last-Minute Spending*, PLAIN DEALER (Cleveland, Ohio), Dec. 14, 1996, at B5.

tion since 1961, and 169 inmates are waiting on Ohio's death row. The Ohio Supreme Court for many years had the advantage of intermediate appellate courts reviewing death judgments, so most reversals occurred at the lower court level. Since 1994, the Supreme Court has reversed one death judgment.

Kentucky has also been regularly setting and breaking records for campaign expenditures in recent judicial elections. In a 1996 contest, an incumbent justice raised \$625,000, including \$520,000 from his own pocket. He was defeated by a challenger who raised and spent \$150,000.⁵² Kentucky has twenty-nine on death row, and has not had an execution since 1962. After the Supreme Court reversed a death judgment in 1983, two thousand citizens of Powell County, where the defendant had been convicted, signed petitions calling for the removal of the Chief Justice. Shortly thereafter, Powell County was removed from the judicial district where the Chief Justice had to stand for reelection! Only two death judgments have been reversed by the Kentucky Supreme Court since then.

The answer to the challenge to judicial independence cannot be that judges must become more adroit politicians. If that's our solution, the game is not worth the candle. The adroitness of politicians is inevitably measured by their ability to raise money. Here's what incumbent justices on five other state supreme courts had to raise and spend in recent years to keep the seats they currently occupy:⁵³

Arkansas	\$500,000
Florida	\$300,000
Montana.....	\$250,000
Pennsylvania	\$1.4 million
Texas.....	\$1 million

It should be apparent to political observers throughout America that the increasing flow of money into state supreme court campaign coffers represents a cynical judgment. Such contributions are perceived as a good investment by institutional litigants, with a potential for far greater returns than other political races. In the 1986 California election, insurance, oil, agriculture and real estate interests contributed \$356,000 to defeat three justices. Plaintiff's law firms and individual lawyers representing plaintiffs coughed up \$425,000 to retain the justices, with over \$160,000 coming from one law firm and its partners. While the celebrated case of *Texaco v. Pennzoil* was pending

52 Deborah Yetter, *King Raises a Record \$625,000 in Court Race—Most from Himself*, COURIER-JOURNAL (Louisville, Ky.), Oct. 18, 1996, at B3.

53 Gerald F. Uelman, *The Politicization of the Courts: The Crocodile in Our Bathtub*, CAL. LITIG., Winter 1992, at 33.

before the Texas Supreme Court, the two oil companies contributed \$387,700 to the campaign coffers of five Texas Supreme Court justices.⁵⁴

Ultimately, the preservation of judicial independence in America will depend upon the commitment of American lawyers to the cause. If lawyers utilize contested judicial elections as an opportunity to choose up sides and promote the candidates whom they believe will best serve the narrow interests of their clients, while removing those who participated in decisions that did not serve those interests, we will get the judiciary we deserve. While the Supreme Court has effectively neutralized integrated bars from playing any role in judicial election contests, voluntary bars are free to do so. Unfortunately, the most active voluntary bars in judicial contests are the special interest bars, that seem more committed to the principle that their side should win than they do to the principle of judicial independence. Too often, judicial election contests see the criminal defense lawyers lining up against the District Attorneys Association, or the plaintiff's personal injury bar lining up against the insurance defense bar. As Pogo so aptly put it, "we have met the enemy and he is us."

The most encouraging news has to be the Florida success story. Despite two campaigns by right to life groups and death penalty advocates, judicial independence is alive and well in the state of Florida. The Florida Supreme Court maintains the highest rate of reversal in death penalty cases of any court in the country, and in 1996, three of its justices were retained without challenge. This seems to suggest that if the challenge to judicial independence is successfully resisted, the crocodiles may seek another feeding ground. Successful resistance in Florida, however, included a strong, unified defense of the court by the organized bar, and an investment of over one-half million dollars by true friends of the court.

54 Uelmen, *supra* note 44, at 349.

