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1999

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Recommended Citation

Bright, Stephen B. and Bright, Stephen B. and Baird, Charles and White, Penny J. and Kendall, George H. and Hanlon, Stephen and Ogletree, Charles, Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases? (1999). Columbia Human Rights Law Review, Vol. 31, No. 1, 1999, Available at SSRN: <https://ssrn.com/abstract=2769686>

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BREAKING THE MOST VULNERABLE BRANCH: DO RISING THREATS TO JUDICIAL INDEPENDENCE PRECLUDE DUE PROCESS IN CAPITAL CASES?

Edited Transcription of Program held at the American Bar
Association Annual Meeting in Atlanta, Georgia on August 9, 1999*

Stephen B. Bright

We have been asked this morning to address whether the attacks on the judiciary and the efforts of politicians to change the judiciary so it will do things the politicians want it to do are affecting due process in capital cases. The answer to that question is yes.

In the many states where judges are elected, judges are vulnerable to being voted off the bench for unpopular decisions.¹ Two members of this panel, Charles Baird and Penny White, were voted off courts because of their votes in capital cases. State judges who are subject to elections know that casting any vote in a case to grant relief to a death row inmate may literally be signing their own political death warrants. It is difficult for many judges to avoid being influenced by this.

Due process is increasingly being affected at the federal level as well, even though federal judges have tenure for life, because of the politicization of the appointment process. For example, Senator John Ashcroft of Missouri announced that he would vote against the confirmation of Ronnie White for a United States District Judgeship in

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1. See 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 (1995) (describing numerous instances in which judges have been voted off state courts because of their votes in capital cases).

Missouri.² Justice White is a distinguished Justice of the Missouri Supreme Court. He has brought a new perspective to that court as its first African-American member.

The judges who come under attack in election campaigns or confirmation battles are often people of color and women. They seem to be more vulnerable. Beyond that, they are attacked through the exploitation of one or more cases they decided. Those who attack a judge who stands for reelection or is nominated for a higher court describe in excruciating detail all the facts of a crime committed by a defendant in a case that was reversed—without any examination of the legal issue that required the reversal.

Justice Ronnie White's attackers have focused on some of his dissents as a member of the Missouri Supreme Court in some capital cases and, in particular, in one case that involved a terrible crime, as all capital cases do.³ In that case, Justice White had pointed out that the defendant had been condemned to die after receiving abysmal representation from his court-appointed lawyer.⁴ Justice White has tried during his tenure on the court to breathe some life into *Gideon v. Wainwright*,⁵ a decision that has been largely unimplemented since it was decided thirty-seven years ago. He has also written opinions in some cases involving issues of racial bias,⁶ which is pervasive in the

2. See Deirdre Shesgreen, *Ashcroft Blasts Judge's Record on Death Penalty: Senator Says Ronnie White Isn't Fit for Federal Bench*, St. Louis Post-Dispatch, Aug. 5, 1999, at A1. In a party-line vote, Judge White's nomination was defeated 54-45. See David Stout, *Senate Rejects Judge Chosen by President for U.S. Court*, N.Y. Times, Oct. 6, 1999, at A18. Missouri's other Republican Senator, Christopher Bond, who had initially supported White, argued and voted against his confirmation. See Deirdre Shesgreen, *Bond's Reversal Leads Senate to Reject White*, St. Louis Post-Dispatch, Oct. 6, 1999, at A1. The St. Louis Post-Dispatch in an editorial observed that Senator Ashcroft had "won his shameless battle of character assassination," and "[b]y defining a vote to reverse a death penalty as 'activist,' Senator Ashcroft is sending a chilling message to state judges with higher aspirations: Vote for execution no matter what." Editorial, *Ashcroft's Ugly Victory*, St. Louis Post-Dispatch, Oct. 6, 1999, at B6.

3. See *State v. Johnson*, 968 S.W.2d 123 (Mo. 1998); Deirdre Shesgreen, *Ashcroft Blasts Judge's Record on Death Penalty: Senator Says Ronnie White Isn't Fit for Federal Bench*, *supra* note 2.

4. See *State v. Johnson*, 968 S.W.2d 123, 135-38 (Mo. 1998) (White, J., dissenting).

5. 372 U.S. 335 (1963).

6. See *State v. Kinder*, 942 S.W.2d 313, 340-42 (Mo. 1996) (White, J., dissenting) (Justice White arguing in dissent that the trial judge showed bias in announcing he was changing political parties on the eve of capital trial because Democrats represented racial minorities and those who did not work); *State v. Smulls*, 935 S.W.2d 9

criminal justice system but few judges have been willing to deal with it.

The Judiciary Committee of the United States Senate, through its chairman, Utah Senator Orrin Hatch, and some of its members such as Alabama Senator Jeff Sessions, has established support for the death penalty as a litmus test for confirmation to the federal courts. Even those like Justice White, who have voted to uphold death penalty cases in many cases, can be attacked as not sufficiently tough on crime based on any vote to reverse in a capital case.

This has an impact on everyday practice in both the state and federal courts. I was recently before a judge in Alabama for a capital sentencing hearing. The judge, Herman Thomas, had been elevated from a lower level state trial court to a higher level trial court by Alabama Governor Don Siegelman during my client's trial.⁷ Judge Thomas stands for election in two years. More significantly for purposes of this discussion, he is the leading candidate for an open seat on the United States District Court for the Southern District of Alabama.⁸

The case was Judge Thomas's first and only capital case. He was assigned the case by Judge Ferrill McRae, Thomas's leading supporter for the federal judgeship.⁹ McRae is an old-time Southern "hanging judge" who enjoys the opportunity that Alabama law gives a judge to override a jury's sentence of life imprisonment without possibility of parole and impose instead a death sentence.¹⁰ Those of us

(Mo. 1996) (finding racial bias on the part of the trial judge in a majority opinion written by Justice White).

7. See Buster Kantrow, *Thomas in Office, but for How Long?*, *Mobile Register*, June 22, 1999, at 1B.

8. See *id.* (reporting that Thomas appears to be the lead candidate for appointment to the federal bench).

9. See *id.* at 5B (describing McRae as an "outspoken Thomas supporter").

10. See Ala. Code § 13A-5-47(e) (1994). Statistics compiled by the Alabama Prison Project (Nov. 29, 1994) and lodged with the clerk of the United States Supreme Court in *Harris v. Alabama*, 513 U.S. 504 (1995), show that Judge McRae overrode sentences of life imprisonment and imposed death six times, more than any other Alabama judge. Judge McRae has a particular fondness for presiding over capital cases. Although there were nine circuit court judges in Mobile in the 1970s and 1980s, Judge McRae had presided over 30% of the capital cases, because he assigned a large number of such cases to himself. See Amended Motion for Recusal 7-8, *Whisenant v. State*, No. CC 77-697 (Ala. Cir. Ct. Mobile County Feb. 7, 1991) (on file with author).

who have long hoped that Alabama might move into a new era without some of the gross injustices of the past, have hoped that the days of judges like Ferrill McRae would pass with time. But that is clearly not the case.

From the moment the jury returned its verdict of guilty of capital murder, everyone knew that the client would be sentenced to death even though the jury unanimously recommended life imprisonment without any possibility of parole. We knew that the recommendation would be overridden. Under either the jury's recommendation of life without parole or the death penalty, there was no chance that the defendant would ever go back into the community. He was going to die in prison, either when the Lord called for him or when Alabama strapped him down into its electric chair and, if the staff hooked the electrodes up correctly—which does not always happen—put him to death by electrocution.

Before the hearing started, we knew what the judge was going to do, despite the fact that people from the prison testified that for the last twenty years the defendant had been a model prisoner; despite the fact that one of the people whom the defendant killed had killed the defendant's brother, and that the defendant's actions arose out of his brother's having been killed; despite the fact that expert witnesses said that the defendant was a model prisoner; and despite the fact that there was only one aggravating circumstance in the case and a wealth of mitigating circumstances.

We knew that the legally correct decision was to affirm the jury's sentence. We knew that the morally correct decision was to uphold the jury's sentence. But we also knew that the political requirement of the moment was for Judge Thomas to override that jury verdict so that when he went before the Senate Judiciary Committee, he would be able to say not only did he favor capital punishment, but that he had imposed the death penalty and had even overridden a jury to do it.

Two Catholic priests were at the hearing, one to testify and the other to observe. During the lunch break, one of the priests said to me, "You know, the judge is not paying any attention. It's clear what he's going to do." I responded, "Well, yes. The judge is being considered for a federal judgeship, and it may be more important than the life of the man who is before him."

In my closing argument regarding sentencing, I said that I was not going to ignore the politics of the situation; that we knew the judge was being considered for the federal judgeship, and we knew what Orrin Hatch and Jeff Sessions demanded with regard to the death penalty. I recalled what then-Governor Clinton did while running in the Democratic Presidential primaries in 1992. Governor Clinton scheduled the execution of a brain-damaged man, Ricky Ray Rector, who was so mentally deficient that he had saved his dessert, his pie, to eat after the execution.¹¹ Governor Clinton scheduled the execution right before the New Hampshire primary, came back to Arkansas, and made a big show of executing Ricky Rector.¹² I observed that we will never know for sure what was in the mind of Governor Clinton. But he will ultimately be judged, as the late federal appeals court judge Leon Higginbotham would say, "by the high court of history" and he will ultimately be judged by God, and Judge Thomas will be as well.

During the hearing, the judge was like someone in line at a fast food restaurant who could not wait to get to the front of the line. He kept fidgeting while the evidence was being presented. It was troubling that he paid so little attention. The prosecutors, knowing the outcome as well as we did, did not engage in a serious cross examination of any of our witnesses. We argued for over an hour the reasons why our client should get life imprisonment without parole; the prosecutors argued for only three minutes in support of a death sentence. Finally, when we stopped, the judge said he did not need briefs, that he was sorry people think that judges make these rulings for political reasons, that he took his oath seriously, and that he was overriding the jury and imposing the death penalty. He then asked if I had anything to say. I stood and responded, "Your honor, may God have mercy on your soul." I said that because it was clear to me that what happened in that courtroom was the sacrifice of the legal requirements of the law for what was politically expedient at the moment.

The requirement that judges constantly demonstrate their fealty to the death penalty is undermining due process in both the state and federal courts. When the only people allowed on the federal bench

11. See Marshall Frady, *Death in Arkansas*, *The New Yorker*, Feb. 22, 1993, at 105.

12. See *id.*

are those who have no hesitation about the imposition of the death penalty, the result is a partisan bench. For example, the United States Court of Appeals for the Eleventh Circuit scheduled a conference with state judges from the three states in the circuit, Alabama, Georgia, and Florida, at the Chateau Elan Luxury Resort and Winery, which boasts four golf courses, to discuss how the state and federal courts can expedite capital cases.

The topics of the Eleventh Circuit's symposium were remarkable. They were all about how courts avoid deciding issues on the merits: invocation of procedural bars; the "non-retroactivity"—they did not even say the "retroactivity"—of new decisions; and deference to state court fact findings. And the symposium covered many administrative matters, such as tracking systems and communications between courts so capital cases can be swiftly moved along to execution.

What is particularly troubling, even shocking, is that of the thirty-eight states that have capital punishment, the court held up Texas—the state and federal courts in Texas—as a model. Texas is the last place to look for fairness in the administration of capital punishment or any type of criminal justice. It has no public defender system. Its courts, both state and federal, have been indifferent to shocking injustices—such as defense lawyers sleeping during capital trials.

The Texas "model" has been to first provide the defendant with a very bad lawyer at trial. After someone is convicted and sentenced to death, the Texas courts appoint a lawyer just as bad, or even worse, to represent the defendant in post-conviction proceedings. Some of the lawyers appointed for post-conviction proceedings do not even file the petition on time, so that people are executed without any review of their cases. This happened most recently to Albert Cantu. In other cases, appointed lawyers filed petitions that did not raise any issues or just one or two. Of course, this expedites the process tremendously. The cases go through the system to execution very quickly when the court-appointed lawyer is sleeping through trial and no issues are raised on appeal or in post-conviction proceedings. That is why Texas has executed more people than any other state and is about to carry out its 200th execution.

The Eleventh Circuit brought Judge Edith Jones of the Fifth Circuit, Presiding Judge Michael McCormick of the Texas Court of Criminal Appeals, and an attorney from the Texas Attorney General's

office to extol the virtues of the Texas system to the state and federal judges of Alabama, Florida, and Georgia. The program did not include anyone who had represented a death-sentenced inmate in Texas or had criticized the system.

Edith Jones is one of the most outspoken and adamant advocates of capital punishment in the country. She once urged prosecutors in Texas to set execution dates far enough in advance so that each case could be run through the state and federal courts and the defendant executed without a stay being granted. Once, while she and other members of the Fifth Circuit were conducting a rushed oral argument by telephone on whether to grant a stay in a case, Judge Jones complained that it was taking too long, and she had to go to a birthday party. In another case, Judge Jones wrote that a lawyer who provided pro bono legal representation to a death row inmate had "torn the veil of civility" in the same way as the client, who had raped, robbed, and murdered the victim. She thus compared the lawyer in the case to the person whom he represented.

Judge Michael McCormick has written that *Gideon v. Wainwright* was wrongly decided,¹³ has presided as the Court of Criminal Appeals ignored injustices in some cases, and was responsible for injustices in other cases by appointing inept lawyers to handle post-conviction matters and then punishing the defendants because of the errors of the lawyers the court assigned.

One cannot help but wonder why the Eleventh Circuit would not look at a state like New York, which has a well-funded capital defender office that is involved in the defense of capital cases from the moment of arrest; or Colorado, which has a public defender office statewide; or at federal circuit courts of appeal like the Third, Ninth, and Tenth Circuits, that do not decide whether a human being lives or dies during a telephone call, but instead have full briefing and oral argument before they decide a capital habeas corpus case.

One cannot help but wonder how the planners of the Eleventh Circuit's program could have omitted issues that are far more fundamental to justice than application of the procedural default doctrine and deference to state courts. For example, the agenda could have included the quality of court-appointed counsel for the poor. There are

13. See *Ex parte Jordan*, 879 S.W.2d 61, 64 (Tex. Crim. App. 1994) (en banc) (McCormick, P.J., dissenting) (expressing the view that Texas "lost its sovereignty in 'right to counsel' matters for indigent defendants" the day *Gideon* was decided).

so many procedural defaults because the court-appointed lawyers, always undercompensated and often incompetent, are often ignorant of the law and fail to preserve issues. The judges' meeting at the luxury resort might have considered the plight of those who are unable to preserve issues because they have no representation at all, such as Exzavious Gibson, a man whose IQ has been measured at between seventy-six and eighty-two in various tests, who was forced to represent himself in a Georgia post-conviction proceeding because he had no lawyer.

The agenda could have included the pervasive influence of racial discrimination in carrying out the death penalty; the underrepresentation of African-Americans as judges, jurors, lawyers, and prosecutors; and the over-representation of African-Americans on death row.

Instead of emphasizing deference to state court fact finding, the agenda of the Eleventh Circuit's conference might have included a session on the political pressures on state judges. It could have explained the pervasive practice of state court judges who delegate writing their orders to prosecutors and then—after prosecutors have taken advantage of this blank check to squeeze in as many zeros as possible by making ridiculously one-sided findings—signing off without so much as changing a comma.

In one case in Georgia, a judge signed an order in which he said he did not credit the testimony of a particular witness. That witness had not even testified in the case. The Assistant Attorney General, when she prepared the order, had gotten her cases mixed up and had put in a sentence stating that the judge discredited the testimony of a witness who had testified in another case. The judge was so cavalier in handling the matter that he did not notice the error. He signed the order.

However, none of these subjects were on the agenda. Undoubtedly one reason is that the Court's most outspoken judge on capital punishment and habeas corpus issues is Ed Carnes, who helped plan the conference. As an assistant Alabama attorney general in charge of capital cases, Carnes regularly took advantage of the low quality of court-appointed defense lawyers in Alabama to assert procedural bars and defend some egregious instances of racial discrimination by Alabama prosecutors. He also took advantage of the willingness of state court judges to sign off on orders that he prepared that "found" not only a procedural default but double or triple

defaults and credited all the government witnesses and found no credibility on the part of any defense witness. The Alabama judges would gladly sign the orders, abdicating all responsibility for deciding the cases to one of the advocates. Since Judge Carnes was to lead a discussion of issues from the federal perspective, it would be very difficult to take up some of those issues.

But if courts are going to hold programs on capital punishment and have any concern about fairness, those issues must be addressed. The topics of the conference, the speakers, and the suggestion of Texas as a "model" revealed the court of appeals as partisan, not impartial, with regard to capital cases. Just as the Supreme Court was once concerned with a jury "uncommonly willing to condemn a man to die,"¹⁴ today we should be concerned about a federal judiciary uncommonly supportive of capital punishment.

Concern for fairness would have required the judges to address at their conference the challenge to remain vigilant to the Constitution and mindful of the awesome magnitude of capital cases and to avoid becoming the kind of death mills that the Texas Court of Criminal Appeals and the Fifth Circuit have become. Many courts have become tired of so many capital cases and are treating them as "routine." They just want to avoid them and the controversy they produce. They have become indifferent to injustice, often for political reasons. The cavalier treatment of capital cases is diminishing the courts and diminishing our society's reverence for life.

The restricted role of the federal courts in reviewing state capital cases—due in part to the restrictions on habeas review imposed by Congress in the Antiterrorism and Effective Death Penalty Act, in part to the many restrictions placed on habeas corpus by the Supreme Court, and in part to the present composition of the federal courts and the hostility of many judges to the rights of those convicted of crimes—is part of a return to the era of states' rights.

Ironically, the federal judges leading the charge for a return to states' rights under the banner of "federalism," those who insist that the federal courts must stay out of the states' business and that federal courts should not review the judgments of state courts—even in cases where the state court judge did not even read the judgment before he signed it—are bringing all the state court judges together to tell them how to expedite capital cases.

14. See *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

The era of states' rights is not remembered fondly by many in this part of the country. States were free to have segregated schools, to run their prisons in violation of the Constitution and the most basic notions of decency, and to carry out death sentences regardless of whether the convictions and sentences were obtained in violation of the Constitution.

Many of us do not look forward to a return to states' rights because the state courts are not sufficiently independent to enforce the Constitution in many areas, including in capital cases. Achieving judicial independence in the South will require overcoming a long history of defiance of the United States Constitution by the state courts.¹⁵ The fact that we have not yet overcome this history is evident in virtually every courtroom in Georgia, where the Confederate battle flag, adopted as part of the Georgia state flag in defiance of *Brown v. Board of Education*, is displayed behind the judge along with the American flag.¹⁶ Achieving an independent judiciary will also require replacing elections, where judges can be removed for unpopular decisions, with merit selection of judges.¹⁷ It will also require overcoming misperceptions about the role of the judiciary, the notion that judges are just like other politicians who make decisions based on what is popular.¹⁸

Those who care about judicial independence must not be hesitant to point out these realities. We must point out the efforts of senators to pack the federal courts with judges who see no role for the federal courts in enforcing the Constitution in capital cases. We must speak out when courts set partisan agendas that reveal a lack of impartiality. We must continue to demand courts that will abide by the Constitution and the rule of law and not by what is politically expedient for the moment.

15. See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 Ga. St. U. L. Rev. 817, 819–33 (1998).

16. See *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997) (upholding Confederate battle flag as part of Georgia state flag).

17. See Bright, *supra* note 15, at 844–52.

18. See *id.* at 852–55.

Charles F. Baird

I am a former judge on the Texas Court of Criminal Appeals. That is a nice way of saying that I lost the last election, which I did in 1998.

Let me give you an overview of the way things are in Texas as we speak. The first topic I'll address is whether capital cases have an impact on the way judges are selected in Texas. The answer is a clear and resounding Yes, because of the high profile nature of all of these cases.

Let me give you an example. In early January and February of 1998, we had a death row inmate named Karla Faye Tucker.¹⁹ Many of you have heard of her. She was a young lady in Texas who was convicted of a horrendous capital crime. She was very telegenic. She had gone through a very sincere religious conversion. And she was female. She put a different face to what you normally see on death row in Texas. She had the support of Pat Robertson, Jerry Falwell, and Bianca Jagger in her request that her sentence of death be commuted to a sentence of life. In Texas, we have a Board of Pardons and Paroles. An inmate has a right, not only by constitution, but by statute, to ask the Board of Pardons and Paroles to commute his or her sentence from death to life. Ms. Tucker did that. Then she learned that before she'd even made the request, some of the members of the Board of Pardons and Paroles had come out publicly and said they were going to deny her request—having not even read it. She then filed a writ before the Court of Criminal Appeals where I sat, saying that there has got to be some level of due process in the commutation proceeding provided for by the constitution and laws of Texas such that the members of the Board of Pardons and Paroles must at least read her commutation request. The Court of Criminal Appeals, which is a nine-member court, denied her writ by a vote of eight to one. I was the one judge that dissented in her case. That vote was very well reported in the newspapers.

The next day, after the newspapers were out and our decision was down, my campaign consultant in my campaign for re-election came by, knocked on the door, and was just ashen in color. He said, "This is the worst thing you could have done for your political campaign." The truth is that he was absolutely right. It was the worst

19. See *Ex parte Tucker*, 973 S.W.2d 950 (Tex. Crim. App. 1998) (en banc) (per curiam).

thing I could have done for my political future in Texas. But it was absolutely the right thing to do in the face of the law, the precedent, and the requirements of due process in the clemency process.

So, the answer to the question whether capital cases make a difference in judicial elections is a clear and resounding Yes. The truth is that this is not only true of statewide elections to appellate benches. It also impacts judges on trial benches.

We had a judge in Houston who was an eight-year incumbent, who happened to be a Republican. He granted a motion in a capital case to suppress the gun that was allegedly used in a capital offense where the victim was a police officer. This resulted in the prosecution dismissing that capital case. He was then roundly defeated in the Republican primary, which occurred immediately after he rendered that decision.

So, you get the message very quickly in Texas that if you rule adverse to the prosecution, it's going to come back and haunt you. Perhaps, therefore, it does have an effect on your judicial future and subsequent judicial decisions.

As a result of this, we have had a lot of judges in Texas who have just switched parties. They have gone from the Democratic party to the Republican party, simply because the latter is viewed as being a political safe haven. When a judge leaves the Democratic party and joins the Republican party, he typically does so by asserting, "I'm tougher on crime than anybody else."

We recently had a judge who announced his candidacy for the Court of Criminal Appeals saying, "I am short on words but long on sentences." Moreover, we presently have a member on the Court of Criminal Appeals who went around and said in her campaign stump speech, "If you elect me, I will never, ever vote to reverse a capital murder case." Right off the bat, that was the first thing she said out on the stump when she was campaigning. And she has been true to her word. The Court of Criminal Appeals gets about fifty capital cases a year. She's now been on the court for five years, so she has sat on about 250 capital cases; she has not voted yet to reverse in a single capital murder case. During her campaign, she ran an ad in the major newspapers of Texas, including the Dallas Morning News, depicting an inmate's hands in handcuffs and saying, "This is one person who will not be voting for . . . next November." That's the type of campaign that we have.

This is the same type of judge who rejects claims even in this situation: We had an individual who had been convicted and sentenced to life in prison for the rape of a young lady, but later the inmate came forth with DNA evidence that exonerated him by proving that he did not commit the rape—the offense for which he was confined. The State then was given the chance to look at this evidence and had its own independent laboratory examine the evidence. That independent laboratory's DNA conclusion was the same: that the inmate did not commit the offense for which he was confined. The Court of Criminal Appeals rejected that claim, saying that this newly discovered evidence would not have made a difference to the jury in that case.

I'll now talk briefly about effective assistance of counsel. We had a capital case out of Houston, where the defendant was George McFarland.²⁰ Mr. McFarland hired counsel named John Benn, who was an elderly individual. He was retained because the belief in Houston is that if you have a court-appointed lawyer and you're charged with a capital offense, you're absolutely sure to go to death row, but if you have a retained lawyer, perhaps your chances are a little bit better. So, Mr. McFarland, the defendant, hired John Benn, the lawyer. What then happened was absolutely proven and established by the record: John Benn would sleep—I'm not talking about closing one's eyes, rubbing one's eyes, and resting for just a second; I'm talking about going to sleep—his head would fall back and he would snore during the trial.²¹ His sleeping would last so long that he would go to sleep during the testimony of one witness and, when he would wake up, a totally separate witness would be on the witness stand. Mr. McFarland was convicted, and was given the death penalty.

The case came to us, and Mr. McFarland raised as an issue ineffective assistance of counsel at trial.²² The Court of Criminal Appeals in a vote of seven to two affirmed the conviction and death sentence.²³ Its rationale was that perhaps the sleeping of the lawyer

20. See *McFarland v. Texas*, 928 S.W.2d 482 (Tex. Crim. App. 1996) (en banc) (per curiam).

21. See *id.* at 505.

22. See *id.* at 499–507.

23. See *id.* at 524.

through the trial was conscious trial strategy to garner sympathy from the jury.

It should not surprise you, in light of the McFarland case, how the Court of Criminal Appeals exercised the power that it then had of appointing lawyers for death row inmates seeking habeas relief. We didn't do a very good job of that. I say "we" because I was on the court at the time. One thing that happened was that we appointed a young man to represent an inmate named Ricky Kerr.²⁴ When this lawyer filed Mr. Kerr's application for the writ of habeas corpus, the lawyer was so inexperienced and so incompetent that he did not realize that when filing the writ application he could challenge the conviction and death sentence. So, he did not. He filed what one judge, Judge Morris Overstreet, called, a "non-application."²⁵ It was just a pleading under which, even if we granted all the relief the lawyer had requested, his client, Mr. Kerr, would still be eventually executed by the State of Texas. The Court of Criminal Appeals said that was okay.²⁶ Then, when a lawyer came forward and volunteered to represent Mr. Kerr pro bono, the Court said that the subsequent lawyer was procedurally barred from representing Mr. Kerr. The judges on the court agreed to deny Mr. Kerr any type of habeas relief by a vote of seven to two. Again, the dissenters were me and Judge Morris Overstreet, who wrote a very strong dissent. So, this is one of those cases that Stephen Bright has talked about where the death row inmate got absolutely no state habeas review of either his conviction or his sentence.

This case eventually wound up in federal court. Federal District Judge Orlando Garcia said: "The actions of the Court of Criminal Appeals constituted a cynical and reprehensible attempt to expedite Kerr's execution at the expense of all semblance of fairness and integrity." He was exactly right.

The Court of Criminal Appeals has gone even further than appointing an incompetent lawyer and then barring all claims when a subsequent pro bono lawyer does raise serious constitutional claims. The court has now started taking punitive measures against the lawyers that represent some of these individuals on death row. A lawyer named Steven Losch was appointed by the Court of Criminal Appeals

24. See *Ex parte Kerr*, 977 S.W.2d 585 (Tex. Crim. App. 1998).

25. See *id.*

26. See *id.*

to file a writ application on behalf of an individual named Henry Skinner.²⁷ Mr. Losch filed in the Court of Criminal Appeals a motion to file his writ application a few days late. He moved to extend the deadline, which is a common filing in Texas. On the day that the writ application was due, the Court of Criminal Appeals denied Mr. Losch's motion on the ground that Mr. Losch should instead go to the trial court in Pampa, Texas—about four hundred miles away—and file his request for an extension of time. Of course, it was impossible for Mr. Losch to refile his motion on that same day in the court where the Court of Criminal Appeals said the motion was supposed to be filed. As a result, Mr. Skinner's writ application was filed two days late. Thereafter, the Court of Criminal Appeals denied all relief. It then found that Mr. Losch owed the state of Texas all the fees that he had been paid to represent Mr. Skinner, and it sent out a Texas Ranger to Longview, Texas, and had Mr. Losch thrown in jail and held in contempt until he could come up with the money to reimburse the state for all the funds he had been paid.

So, there is a very dire and sad situation in Texas, where we have more than 450 people on death row. We executed two last week. There are six more scheduled to be executed in the next two weeks in Texas. It is, as Steve says, an assembly line of death. There is just one case after another and another and another. That's the status of the way things are in Texas. I appreciate your having me here, and I look forward to participating in the question and answer part of the program. Thank you.

Penny J. White

I, too, am a former judge, and I am from Tennessee. I want to discuss the status of things there, and then talk a bit about some things happening in other states. When you become a former judge the way I did, you become a favorite speaker in states on the issue of judicial independence. For the last three years, since losing my seat, I think I have spoken on the topic of judicial independence to judges from almost every state. So, in a sense, the former judges are doing something to buoy up the judges who are still on the bench.

I do not have the distinction that Judge Baird has of being a frequent dissenter in death penalty cases. As a matter of fact, I only

27. See *Ex parte Skinner*, cause no. 20,203-03 (Tex. Crim. App. Dec. 2, 1998) (per curiam) (unpublished opinion) (on file with the *Columbia Human Rights Law Review*).

sat as a judge on one death penalty case. I'll tell you a bit about this story so that you can understand the threat to judges at the appellate and trial levels.

I had been on the Tennessee Supreme Court about one year when the court heard oral arguments on its first capital case during my tenure, *State v. Odom*.²⁸ We decided the case in May 1996, and the decision received absolutely no publicity—none, zero.

The Tennessee Supreme Court was very active in capital cases from 1990 until 1996, reversing or remanding about sixty percent of those that came before them on some very justifiable grounds, such as duplication of aggravating circumstances. The court had been very active and very fair.

In *Odom*, just to give you a notion of the pressure on elected trial judges, the veteran trial judge declined to allow the defendant to present his expert psychiatric testimony in the sentencing phase of the case, because he considered that testimony hearsay. Tennessee, however, has a medical diagnosis and treatment exception to the hearsay rule. Tennessee also obviously follows *Lockett*²⁹ and has a statute that renders the normal rules of evidence inapplicable in the sentencing phase of capital cases.³⁰ Yet this trial judge denied the defendant the right to call his mitigating psychiatrist on the basis of hearsay. I teach evidence now, from time to time, and first-year law students know better than that. Accordingly, in reviewing the trial judge's decision, a unanimous Court of Criminal Appeals, the intermediate appellate court in Tennessee, reversed the sentencing outcome and remanded the case, solely for a new sentencing hearing.

The case then came to the Tennessee Supreme Court, which at that time reviewed every capital case. It was tradition really, because jurisdiction was vested in the Court of Criminal Appeals, but we reviewed every capital case and, among other things, conducted a mandatory statutory proportionality review.

We agreed with the appellate court that the trial judge's hearsay ruling in the sentencing phase was wrong. All five members of the court agreed that, in this case, Richard Odom, was entitled to a new sentencing hearing. That was the entire disposition of the case,

28. 928 S.W.2d 18 (Tenn. 1996).

29. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

30. See Tenn. Code Ann. § 39-13-204 (Supp. 1999).

but three of us commented on Tennessee's heinous, atrocious, and cruel aggravator and found that the evidence that was presented was insufficient to establish that aggravating circumstance beyond a reasonable doubt, as state law required. Under the Tennessee death penalty scheme, the prosecution remained able to assert that aggravating circumstance in the new sentencing hearing and to attempt to prove it then.

This decision to remand a case for a new sentencing hearing, although it received no attention at the time it was rendered, was transformed six weeks before my retention election into the major issue of the election. Unfortunately, my situation shows that even in "Missouri Plan" states or "Modified Missouri Plan" states—where a judge is initially appointed based on merit selection and thereafter there is a retention vote—the politicization of the judiciary is alive and well.

Six weeks before the date of the retention vote, the headlines of a Nashville newspaper read, "Court Finds Rape, Murder of Elderly Virgin Not Cruel." The subheadline was, "Tennessee Conservative Union Says 'Just Say No to Justice White.'" Our Governor voted early, as state law allowed. When he came out of the polling place, there was a host of journalists present, for reasons I don't exactly know. They asked, "Governor Sundquist, how did you vote on the Penny White issue?" The governor responded that he had voted "no" because Justice White did not share the views of the average Tennessean. About five days after that, Senator Fred Thompson flew home from Washington to vote early as well. When he walked out of the voting place, again there was a host of media. He was asked, "Senator Thompson, how did you vote on Penny White?" Thompson advised that he voted "no" since White did not share the views of the average Tennessean. A few days later Senator Frist also exercised his right to vote early, and he apparently had not received the memo. When he came out of the polling place, he commented to the media that he had heard that White was the workhorse of the court. Later that afternoon, Senator Frist called a press conference, said he had gone to a library to read some of White's decisions, and had determined that she did not share the views of the average Tennessean. However, the library that Frist claimed to have visited had no copies of the more than two hundred decisions I had authored in my four years as an appellate judge.

Although all of our statewide political leaders in Tennessee at this time are Republicans, I am not suggesting that they have a corner on the market in this politicization of the judiciary. When Vice President Gore flew in to Tennessee a few days later, he was asked, "Mr. Vice President, how do you plan to vote on Penny White?" His response was "no comment."

Although by statute in Tennessee, judges cannot run partisan races in appellate court retention elections, the Republican party sent the voters a very simple message emblazoned with the party's name and logo. It said, "If you support capital punishment, vote NO on Penny White." The message worked, and with an 18.6% voter turnout, I was defeated soundly, 55% to 45%.

What's the aftermath? On the day of the election, our Governor commented, "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so." He then promised, and he, like Judge Keller in Texas, has kept his word—to appoint people who saw things the way he did, who would support capital punishment. One appointee to an appellate court was, at the governor's staff's instigation, in conference with victim's rights groups in advance of the appointment in order to assure that the appointment would be acceptable to the groups. And at every opportunity, our governor has turned away applicants for courts who have any public defender experience. In one circumstance, he appointed a former city attorney over a federal public defender and a state public defender for the Court of Criminal Appeals. The word is pretty much out that if you want to be a judge in Tennessee now, do not let anybody know you were ever a public defender. I, on the other hand, am a former solo practitioner, who did lots of public defender work before we had a public defender system in Tennessee.

Tennessee has a merit selection program. We also have a judicial qualifications commission, but the Governor selects one name from the three submitted by that commission. Although I am not saying that I support judicial elections over appointments followed by retention votes, I want you to be aware that the politicization of the judicial selection and retention process exists in states with retention votes as well as states with elections.

What have been the other aftermaths of the 1996 election in Tennessee? I am now very distinguished. I am the only person to ever lose a retention race in Tennessee. I am likewise the only person to ever be viciously attacked as a result of single-issue campaigning.

Since my defeat, most of the Tennessee Supreme Court's death penalty decisions have been affirmances. The court's administrative office issues press releases when those cases are affirmed.

One of the things that has really become lost in the mire is that the person, Richard Odom, whose case caused all the controversy in my retention race, has not even been resentenced, in well over three years.³¹

I'll share with you now three stories about judges from other states whom I have encountered in my discussions of judicial independence. I teach at the National Judicial College and one of the courses I have taught there is called "How to Handle"—or in my case "How not to Handle"—"the High Profile Case." In teaching the course, I once used an example of a capital case and called on a judge to "rule out loud," as we do in this very interactive education. He was in the front row when I gave the hypothetical, and under the hypothetical, he had to do something in the defendant's favor (although for brevity I won't go into the facts here.) He said, "Motion is respectfully denied." I said to him, "No, judge, wait, you don't understand; the law in your state requires you to grant the motion." But for a second time, he answered, "Motion is respectfully denied." I explained it to him a third time. He looked me straight in the eye, in a room full of judges from all over the country and he said, "Motion is respectfully denied. That's for the appellate court to worry about. I'll have my job tomorrow, and you don't have yours."

I gave a presentation to 250 judges in Florida in which I was asked to relate the entire story of my defeat. I am convinced from the reaction of the majority of the crowd that my presentation was received favorably. In evaluating the program, one judge, however, made this comment: "What did you expect? You said that Tennessee has not executed anyone in more than thirty years. When is your court going to start following the law?" An oversimplification, at best.

Just a few weeks ago, I gave a presentation on judicial independence to a separate group of judges. Afterwards, a judge came up to me and, as sincerely as he could said, "You know, I got some really bad press over a bond motion not long ago. I'm here to tell you, I haven't granted bond since, and I won't. I can't take the heat." I said, "Judge, you're thinking about it. I want you to keep thinking about it. And I want you to know that you'll sleep and rest a lot easier if you do

31. Since this Program, in late 1999, Odom was resentenced to death.

that which you know you ought to be doing, despite the consequences.”

The good news, if I can end with a little bit of better news, is that, as a result of things like the single issue attacks in Tennessee and Texas and the call for the impeachment of Federal District Judge Baer in New York during the presidential election, the American Bar Association has become very involved in the issue of judicial independence. During the six years I was on the bench, we did not have a single judicial independence program of any kind; the phrase was rarely even uttered. But in the last three years since I was voted off the bench, I've participated in more than thirty judicial independence programs all over the country. So, those men and women who are on the bench who have the ability to be courageous and who have the ability to be strong have some undergirding of support.

I think we can broadly put judges into three categories. There are some that are lost. They will never do the right thing. They never would and never will. They only care about job security. Then, there's the category of those who always do the right thing, like Judge Baird. I think that the final group, with the rising attention paid to the issue of judicial independence, will hopefully have their integrity reinforced and think about, especially in capital cases, how absolutely horrific the politicization of judicial decision making is. Thank you.

George H. Kendall

I think when we look back at this era in twenty years, and when somebody tries to make sense of the way that we presently use the death penalty, there are not going to be satisfactory answers to some very harsh costs that our present use of the death penalty is extracting upon basic fundamental rights. There is going to be no satisfactory answer for why some states, some judges, some prosecutors have been so hell-bent to see people executed who had, by all accounts, grossly inadequate legal representation. There will be no satisfactory response in other instances, where there has been clear evidence of racial discrimination affecting cases but that evidence did not stop the executioner, and those folks were executed. We all know about those obvious costs of the death penalty, and this organization with its moratorium vote has asked the American public to think about those questions directly.

I want to talk about another topic that I think will be included in another chapter in this history: the hidden costs of the

death penalty. I have been representing people either charged with capital offenses or on death row for almost two decades. I've had the opportunity to go to death rows often, to meet with individuals, talk to their families, and to meet the prison administrators who are given the very difficult assignment—if the habeas corpus petition is not successful—to actually carry out the order of the court. One cost that doesn't get much attention—one of many hidden costs of the death penalty—is what it is doing to the caliber of correctional officials who have to administer these very difficult orders.

When I came into this work, it was at the high point of the impact of courageous federal judges, like Frank Johnson and others, who had looked at horrendous state prison systems and said they were going to do something about those conditions. Because of actions by those judges, some very talented people were attracted to corrections and actually turned some of these hell holes into places where prisoners could come and, when released, not be more damaged. Unfortunately, I can report to you that many of those folks who came in and made some of our prison systems better are not sticking around now to kill people. That's one hidden cost.

Another hidden cost is how the death penalty is affecting a method of selecting judges that is supposed to be, that is designed to be, immune from partisan politics and the influence of partisan issues. Eleven states and the federal government have a system under which judges do not have to go through the extraordinary processes that have been reported by our past two speakers. Instead, in these eleven states, a prospective judge can be nominated by anybody, a board reviews the candidate's merit, temperament, and strengths, not only as a lawyer but as an individual, and asks whether this is the kind of person whom we want to have sitting in judgment of fellow citizens.

The District of Columbia is another one of these jurisdictions. When I was in the District of Columbia many years ago, it appeared to me that this was a fairly sensible way to appoint judges, with one exception. The major criticism was that it seemed that when you looked at the Superior Court bench, there were some very, very fine people and then there were other people about whom you asked yourself, "What is this person doing on the bench?" Many of those individuals were people who had been unproductive partners in large firms, and those firms had the power to solve their problems with unproductive partners by getting them appointed to the Superior

Court. That is a small fault of the appointment system, which I think is ordinarily the best way for us to select judges.

But in the past decade, in those places where we have used this sensible system, there are troubling signs that the death penalty is exerting a very undesirable effect. After the Republicans took control of the Senate in the 1994 elections, Senator Hatch, as the new Chairman of the Senate Judiciary Committee, announced that from now on any nominee for a federal judgeship would have to swear allegiance to the death penalty. As you know, if you've been to federal judicial confirmation hearings of the Senate Judiciary Committee, the hearing has in the past usually been a pro forma event. The nominee would bring his or her family, would be asked some questions about which the nominee would have been told beforehand, and would be congratulated and told that he or she was going to be approved.

Since 1993, one question that is always asked without fail by Senator Thurmond, and if Senator Thurmond is not there, by Senator Sessions, is, "Do you believe in the death penalty, and how will you adjudicate these kind of cases?" This was not a question that was asked before that time. It is one that is always asked now.

The effect of Senator Hatch's announcement that this was going to be an issue that could disqualify one from being a federal judge is clear. The White House has refrained from nominating anyone who has a background in working on cases where the death penalty was an issue and even other people who have shown a sensitivity to human rights.

One case on point is former Chief Judge of the Florida Supreme Court, Rosemary Barkett. She was nominated by President Clinton to take a seat on the Eleventh Circuit Court of Appeals before the Republicans took control of the Senate, but after some had begun to raise the kinds of concerns I've mentioned. No other nominee prior to that time had voted to affirm more death sentences as a state court judge than Rosemary Barkett. In carrying out her oath of office to apply the law in a straightforward, fair way, she had also found it necessary to vote to reverse a significant number of capital cases. Despite this evenhanded record, her opponents cast her as being very much against the death penalty and asserted that this, in and of itself, disqualified her from being a federal judge.

Another reason that Chief Judge Barkett was criticized was that she had had the temerity during the debates over the future role

of habeas corpus—an ancient writ that gives the federal judiciary the power to review the lawfulness of state criminal judgments—to join another state supreme court judge, Christine Durham of Utah, in testifying before Congress that an effective federal habeas corpus writ is important and necessary to the well-being of the Bill of Rights, and that as a state court judge, she had no problem in having her decisions reviewed by life-tenured federal judges who did not have to face the threat of later being forced out of office because of votes in criminal cases.

Chief Judge Barkett's votes in capital cases and her Congressional testimony on habeas corpus were seen as disqualifying characteristics by those who opposed her confirmation. Nevertheless, after a grueling effort and in spite of little support from the White House, she was confirmed.

Other talented, distinguished nominees have not fared so well, particularly after the Republicans gained control of the Senate. Jeff Coleman, a partner at Jenner & Block in Chicago, is, by all accounts, an extraordinary lawyer. Most of his practice concerns commercial cases. To his great credit, he was one of the first members of a large firm in this country who answered the call of a death row inmate in the South who had no lawyer. Many, many years ago, I think in the late 1970's, Jeff agreed to represent an individual in Georgia, and he ultimately prevailed and got habeas corpus relief for that individual in the Eleventh Circuit Court of Appeals. But true to the adage that no good deed goes unpunished, his efforts in support of that one prisoner and some later efforts in support of some uncontroversial cases brought by the local ACLU have disqualified him in the eyes of enough members of the Senate Judiciary Committee that he will never be a federal judge. His nomination has not been supported by the President.

Jimmy Klein, the distinguished head of the Appellate Division of the D.C. Public Defenders Service, is a well-respected lawyer. If you ask one hundred attorneys in the U. S. Attorney's Office in D.C. about him, ninety-nine would say he is one of the best and most talented lawyers they know. He has been nominated for a federal judgeship, but his nomination has been pending for two years, and the Judiciary Committee has failed to act on it.

This process is now the captive of aggressive partisanship. In the past, the way things usually worked was that the White House, in coordination with the Senator (if any) who shared the President's

party, would largely decide who would fill vacancies on the Courts of Appeal. With regard to district court judgeships, Senators from both parties were often able to propose and get candidates nominated and approved. But in a most unusual development, President Clinton was unable to persuade the Senate Judiciary Committee to accept one nominee to the Ninth Circuit Court of Appeals until he acceded to the demand of Republican Senator Slade Gorton of Washington that the President agree to also nominate to that court the most conservative member of the Washington State Supreme Court. This sort of thing had rarely happened before, and the White House's accession to Senator Gorton's demand sends a very dangerous signal to other Senators, who may now decide to make similar demands.

In other instances, the White House has offered very little defense for its judicial nominees once issues have been raised against them. Two years ago, a distinguished state court judge from Philadelphia had every reason to believe that she was going to have no problem before the Judiciary Committee. In fact, Senator Hatch had signaled to her, as had Pennsylvania Senator Specter, that it was likely that her hearing would be uneventful. On the night before her hearing, the District Attorney's office in Philadelphia sent to Senator Sessions of Alabama a lot of complaints it knew Senator Sessions would view as unflattering, such as that the judge sometimes credited the testimony of citizens over police officers in drug cases. This eleventh hour tactic was not rebutted by the White House, and this judge's nomination was later withdrawn. Steve Bright has told you about the distinguished Judge White on the Missouri Supreme Court whom some members of the Senate Judiciary Committee are very reluctant to see confirmed to the federal district court, because of a couple of votes in death penalty cases and another vote in a case involving a very disturbing instance of racial discrimination.

I wish I could say that these alterations to the appointment process are staying in Washington, D.C., but they are not. In California, which also has a modified appointment system, the new Democratic Governor has let it be known that persons who have a track record of either being opposed to the death penalty or having worked on these issues on the defense side need not apply to be judges in California.

So, I think that many of the problems that have been reported to you by former Judges Baird and White are trickling into the

appointment process. That is obviously not a good development for the fairness of our bench. Thank you.

Stephen F. Hanlon

I wrote the other day to my partners at Holland & Knight, including Chesterfield Smith, Martha Barnett, and Bill McBride, and sent them a copy of an article that Steve Bright had written and some other materials. My memo basically told the story that you are hearing today. I said in that memo that fifty years from now, someone is going to write the history of our profession during this period of time, and, unfortunately, what Mr. Bright is writing is going to be a very important chapter in that history. I know that people from time to time ask my partners why we do death penalty work. In my view, the reason is that fifty years from now, our children and our great-grandchildren are going to ask us where we were when that happened. That, in my view, is why we do death penalty work.

I want to give you a little bit of a different take on judicial independence today, based on our experience in Florida. I've lectured around the country on a variety of issues that involve Florida since I've been practicing in Florida for the past twenty-five years, usually to describe some horrendous example of social welfare in Florida. Usually, Florida is around forty-eighth or forty-ninth in per capita funding on any particular issue. We don't have an income tax in Florida. We abolished it in the 1920's when we wanted you all to come on down. Now, many of you are down, and we still don't have an income tax. That has a horrendous effect on our funding of social services and education.

But Florida's story is a little bit different here, primarily in my view because of our state supreme court, which has been waging an enormous institutional battle with the Florida Legislature. While we do have judicial override—under some circumstances, trial judges can override capital juries' sentencing recommendations—and we have election of state judges and all the problems that are attendant to that, and we have a grossly underfunded public defender system, surprisingly, in Florida our major battle on this issue is not primarily between the people and the court or between the people and the legislature. Our battle is between the legislature and the court.

In the latest poll of Florida citizens commissioned by the Orlando Sentinel, probably our state's most conservative newspaper, 44% of Florida citizens said they are in favor of doing away with the

death penalty and using mandatory life, which we already have on the books as an alternative; 6% are undecided; and 50% are in favor of the death penalty rather than mandatory life.³² So we are very close to having a majority of Florida citizens who would trade away the death penalty in favor of mandatory life.

The poll also indicated that 77% of Florida citizens would prefer lethal injection to the electric chair, but our legislature has a love affair with the electric chair and wants to hang on to that as much as it can.³³ You've probably read about the hearings that we had earlier this month on exactly how it is that we go about the process of destroying and killing another human being—what happens with the brain and the blood, etc. You ought to sit through an hour and a half of oral arguments on that to get a sense of how uneasy the justices are about this whole process.

I'll describe to you this morning just a little bit of the history of the great institutional battle that has taken place between the Florida Legislature and the Florida Supreme Court. Back in 1985, the Florida Legislature, established the Capital Collateral Representative office ("CCR") and proceeded to grossly underfund that organization, so that that organization was always running behind. CCR would do post-conviction death penalty work. A huge array of lawyers took on the job of post-conviction work in a grossly underfunded situation. As of a couple of years ago, the score was about twenty-four to twenty-three, and CCR was ahead in terms of people released from death sentences versus death sentences carried out.

This angered the Florida Legislature no end. So, a commission was established to look into the "abuses" that existed at CCR. That commission was called the McDonald Commission. Sandy D'Alemberte and I went over and tried to stem the tide, unsuccessfully, because those proceedings were conducted in a lynch mob mentality of "attack the lawyers."

As a result of that, CCR was broken up into three organizations. CCR had been located in Tallahassee. Now it was to be three Capital Collateral Regional Counsels ("CCRCs"), one each in Tallahassee, Tampa, and Miami. By and large, highly qualified lawyers

32. See Michael Griffin, *Voters Approve of Death Penalty; the Support Would Be Weaker if Florida Voters Were Certain that Killers Would Be Locked up Forever, a Poll Found*, Orlando Sentinel Tribune, Apr. 23, 1998, at D1.

33. See *id.*

who had spent their professional lives doing post-conviction work were overlooked to lead those organizations; and former prosecutors were appointed to head those organizations. So, a very clear signal was being sent by both the legislature and the executive, and the CCRC's were grossly underfunded.

At that point, our firm entered our appearance and filed an all writs petition in the Florida Supreme Court, in which we sought two things: (1) establishment of a constitutional right to post-conviction counsel under the Florida Constitution; and (2) the ABA called-for moratorium on executions, until there was a system of adequately funded counsel. We have a statutory right in Florida to post-conviction counsel. Since the Florida Legislature was aware of the United States Supreme Court's *Murray v. Giarratano*³⁴ decision, its position was that the provision of post-conviction counsel was just a matter of grace, so that it didn't have to give any money at all for post-conviction counsel if it didn't want to, and it could repeal the statutory right tomorrow. However, the truth is that the Legislature was aware that the Florida Supreme Court was not going to allow an execution to be carried out without a lawyer for post-conviction.

The Florida Legislature is located right across Duval Street from the Florida Supreme Court. My position was that I wanted the right to take the walk across Duval Street and move from the Legislature to the Florida Supreme Court. Our effort was to strengthen the hand of the Florida Supreme Court in dealing with this monster out of control over here in terms of the Florida Legislature.

We had oral argument in May 1998, and there were no executions between that time and the time of the decision, which just came down this summer. There were two legislative sessions in between. The Florida Supreme Court essentially held that our case was moot, because there had been a significant increase in the funding of the CCRC's in the meantime. The Court did not find that the funding was adequate, but it did find that there had been a significant increase in the funding.

We did get an excellent special concurrence from Justice Anstead and Justice Kogan, who had heard the case and has since retired. As you may know, Justice Kogan is a former Chief Justice of the Florida Supreme Court. He said, while still on the Court, that he believes the Court may have presided over the executions of two or

34. 492 U.S. 1 (1989).

three innocent people. Justice Kogan joined Justice Anstead in his concurrence, which stated that Florida should establish a constitutional right to post-conviction counsel.

My take on where we are in Florida at this point is that we continue in the middle of the battle between these two institutions. The funding for the CCRC's in the previous year was at \$5.6 million and it moved up by \$2.4 million to a little under \$8 million. The CCRC's had asked for \$18 million. Our expert, the Spangenberg Group, believes the CCRC's need about \$25 million to do the job correctly.

The vast majority of the lawyers now doing post-conviction work in Florida have never before done a post-conviction case. I could not have properly handled the *Spaziano*³⁵ case had I not been working with a great criminal defense lawyer, Jim Russ. I frequently tell people that unless you have stood up at the end of a one week evidentiary hearing, the judge has said to you "Call your next witness," and you have said to the judge, "Mr. Spaziano rests," you don't know what you are talking about when considering this subject. That's about as frightening a situation as a lawyer can encounter, because if you miss something and you miss the wrong thing, you are going to wake up screaming at three o'clock in the morning. Yet, these CCRC lawyers need to have no experience whatsoever in ever having tried a post-conviction case. They just need to have three years of criminal defense work and have done five felony trials. And they can be prosecutors and never had any experience from the defense perspective before.

Their case loads are ridiculous. They are carrying twelve, fifteen, eighteen, nineteen cases per lawyer. You can't do that many of these cases properly. Four to six cases is what everybody from the Cox Commission on down has said, with two lawyers needed on each case.

So, one of two things are going to happen in our state. These lawyers are going to cave in and process these cases, or they are going to resist. If they resist, the CCRC's are going to run out of money again. If they run out of money again, I'm going to walk across Duval Street again, and be back over in the Florida Supreme Court. So, we continue to be in the middle of that struggle.

35. See *State v. Spaziano*, 692 So.2d 174 (Fla. 1997) (per curiam).

The Legislature did one other thing. It decided that it would try and get the private bar into these cases. So, it enacted what's called the Registry Act, under which lawyers are asked to come on in, do these cases, and be paid \$100 per hour, up to 640 hours. They knew very well, because we'd given them the Spangenberg report, that these cases typically take about 3000 hours from state post-conviction through to United States Supreme Court review. So, the Legislature is funding about one-fifth of what it would take to do these cases well.

The study that we had the Spangenberg Group do was not just of public counsel; it also covered private counsel. The study covered firms like Wilmer, Cutler & Pickering, Hogan & Hartson, and Arnold & Porter; and it covered private lawyers, such as Jim Russ and Pat Doherty. Each was asked how much time it had taken to do these cases from state court all the way through. Surprisingly enough, the results of the survey came out with just about the same number of hours, about 3000, that it was taking the CCRC's. Although the Legislature knew that, it decided that it wanted to cap the hours for which private firms would be paid at 640 hours.

So, we went back over to the Florida Supreme Court and said that those caps can't work. We have good case law in Florida, the *Makemson/White* cases.³⁶ They hold that the Legislature can impose caps if it wants, but that the trial court can exceed the caps in unusual and extraordinary cases, and that all death cases are extraordinary and unusual.

The Legislature was nevertheless going to try and cap the number of hours for which these lawyers could be paid. And it was going to make them sign a contract in which they would agree that those caps would be the exclusive means of obtaining compensation. They were trying, essentially, to get the lawyers to waive their *Makemson/White* rights up front through that contract.

That is really a fascinating contract. It's a contract between the lawyer and his client's executioners—those who seek the execution of your client. You would think one's ethical concerns would be quite heightened, as one enters into this contract with those who seek the execution of your client.

36. See *White v. Board of City Comm'r*, 537 So.2d 1376 (Fla. 1989); *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986).

Here's what you have to agree to in that contract. You have to promise that you would never represent this man in any proceeding challenging a conviction or a sentence other than the conviction or sentence of death for which the appointment was made. So, if a prior conviction was used as an aggravator in the sentencing phase in your client's case, you have to promise, in order to get this \$64,000, that you certainly will not challenge that prior conviction. You also have to promise that you will never, under any circumstances, make good faith arguments for the extension, modification, or reversal of existing law. Only if you make that promise can you get the \$64,000. You also have to promise that you will never represent this man pro bono in a retrial, even though you might be the best qualified lawyer around to represent that man in the retrial. You have to agree that you will turn over any records that are deemed public records, and that if you think it is not a public record and it shouldn't be turned over, but the Commission—which seeks your client's execution—disagrees with you, its decision will trump yours. You have to agree that you will submit detailed invoices in order to get paid—not to the trial judge, who can review them *in camera* and make an *ex parte* determination of whether or not that's appropriate—but rather to those who seek your client's execution.

The Florida Supreme Court declined to exercise its extraordinary writ jurisdiction. We immediately then filed this back in the circuit court. So, we are back up on our way to the Florida Supreme Court, trying to make sure that any lawyer who does one of these cases doesn't walk into court with his hands tied behind his back and can actually put up a fight and be something other than the illusion of a lawyer. In my view, the illusion of a lawyer is a dangerous thing, because it just makes it look like that process was real when in fact it was not real.

So, we are not through yet in Florida. We have a big battle ahead of us. Our state supreme court has withstood the pressure so far, and we have yet to see how we are going to come out of this.

Postscript to the Comments of Stephen F. Hanlon

In a 4-3 decision, the Florida Supreme Court held that Florida's electric chair—after several botched executions—did not violate the Eighth Amendment's cruel and unusual punishments clause.³⁷

37. See *Provenzano v. Moore*, 744 So.2d 413 (Fla. 1999).

Justice Shaw, in dissent, attached pictures of the bloody execution of "Tiny" Davis and those pictures were posted on the internet.³⁸

The Legislature immediately decided it wanted to call a special session to switch from the electric chair to lethal injection. But that wasn't good enough for Governor Jeb Bush. He insisted that there would be no special session unless the session also provided for speeding up the death penalty appeals process. A special session of the Legislature was then called to deal with both.

Governor Bush proposed importing much of the Texas death penalty system—including dual tracking of appeals, with direct appeal and post-conviction going on at the same time—into Florida's death penalty law. As his top adviser told the St. Petersburg Times, "What I hope is that we become like Texas: Bring in the witnesses, put them on a gurney and let's rock and roll."³⁹ A hurried special session was held, and in three days, a massive and comprehensive overhaul of Florida's death penalty law was enacted—much of it copied word for word from the Texas statute.⁴⁰

Every newspaper in the state editorialized against the Death Penalty Reform Act of 2000 (DPRA of 2000), either because it was done too quickly or because it was foolish on the merits, or both. That reaction came as a complete surprise to both the Legislature and the Governor. Our Managing Partner, Bill McBride, wrote the Governor and Legislative leaders, calling for a two year moratorium while we studied complex issues like race and mental retardation in the death penalty. That request received editorial support. Jeb Bush may be the first politician in modern American political history to have politically overplayed his hand on the death penalty.

The prevailing wisdom is that Governor Bush and his supporters in the Legislature know very good and well that the DPRA of 2000 is DOA in the Florida Supreme Court. Once the Court strikes down the law—the strongest arguments appear to be based on separation of powers—Governor Bush and leading Florida legislators will blame the court, accusing it of failing to carry out the will of the people. They will then propose a constitutional amendment to strip the

38. See *id.* at 422–41; Provenzano v. Moore, No. 95-973 (Sept. 24, 1999) <<http://www.flcourts.org/sct/sctdocs/ops/95973a.pdf>> at 68–70.

39. William Yardley, *Bush's Adviser Key in Push for Quicker Death Row Appeals*, St. Petersburg Times, Jan. 6, 2000, at 5B.

40. See Death Penalty Reform Act of 2000, 2000 Fla. Laws ch. 3.

court of its power to hear death penalty cases and substitute an elected "death court" akin to the Texas model.⁴¹

All of this is playing out in a presidential election year in which our Governor, as you may have heard, is connected to one of the Republican presidential candidates, and Florida is a key state. And the death penalty is one issue on which you can't go wrong. Or is it? Stay tuned.

Professor Charles J. Ogletree, Jr.

I would like to thank all of the panelists for their thoughtful and enlightening presentations today. I will briefly frame the two issues that have been discussed, then present an opportunity for you to raise some questions, and try to get some further reactions to the ideas that have been presented and some suggestions as to a future course of action.

What is extraordinary about this session and this topic is that as controversial as the topic of the death penalty has been in this country and around the world nothing could be more dangerous to our sense of liberty and justice than a threat to the independence of the judiciary. It is, in a sense, the greatest threat to democracy that judges in courts around the country, who are employed in the pursuit of justice and fairness, are called upon time and time again to agree to do things that violate their own sense of justice and fairness; and if they fail to do what is politically popular, notwithstanding their moral abhorrence to it, they risk losing their jobs. These competing interests create circumstances wherein judges issue opinions in response to the fear and the threat of reprisals, even though they know that these opinions are fundamentally flawed. To be sure, this phenomenon is not unique to the death penalty context; however, the circumstances are graver when it involves the loss of human life.

41. Editor's Note: During the first week of Feb. 2000, the Florida Supreme Court unanimously voted to suspend the newly adopted rules until the court could rule on the constitutionality of the Death Penalty Reform Act of 2000. The court's order will remain in effect until June 30 or until the court adopts new rules, whichever comes first. See Jo Becker, *New Law on Death Appeals Snubbed*, St. Petersburg Times, Feb. 8, 2000, at 1B. In response, Representative Victor Crist, Chairman of the Criminal Justice and Corrections Council, R-Tampa, has proposed a constitutional amendment that would override the court's authority. See Daniel Ruth, *No Time to Save But One Life*, Tampa Tribune, Feb. 16, 2000, available in 2000 WL 5572862.

It is both comforting and troubling for us to remember the early 1970s when a number of United States Supreme Court Justices took a courageous stand by declaring, after careful analysis, that the death penalty was unconstitutional as applied. As one reads *Furman v. Georgia*,⁴² it is apparent that the Court approached this subject in a variety of ways and identified a number of flaws inherent to the imposition of the death penalty. In *Furman*, the members of the Court presented a variety of perspectives on the issue, and those perspectives are as relevant, if not more relevant, today than when they were presented in 1972. It is amazing that people like Justice Brennan and Justice Marshall took their oaths very seriously and concluded that they could not, in good conscience, administer a law that treated people differently on the basis of their race.

Since that time, there has been dramatic evidence of the impact of race on the administration of criminal justice. A wonderful study by Professor David Baldus in *McCleskey v. Kemp*,⁴³ gave the Supreme Court the opportunity to examine Georgia's death penalty. The data Baldus presented was not seriously disputed.⁴⁴ It revealed that if you consider all the variables and who was given life and who was given the death penalty, the factor that was always critical, after taking into account the crime, the prior criminal record, etc., was the race of the victim. Professor Baldus's recently published study on the death penalty as applied in Philadelphia shows that both the race of the defendant and the race of the victim are crucially important factors in the imposition of the death penalty in that jurisdiction.⁴⁵ So, we know that we are dealing with a fundamentally flawed system. To add to these flaws threats to judicial independence is indefensible.

42. 408 U.S. 238 (1972) (per curiam).

43. 481 U.S. 279 (1987).

44. Program Chair's Note: Although the state of Georgia presented a witness, Katz, who purported to dispute Professor Baldus's conclusions, the independent United States General Accounting Office subsequently reviewed both Professor Baldus's study and Katz's study, and concluded that Baldus's study was valid while Katz's study was seriously deficient. See Conference, *The Death Penalty in the Twenty-First Century*, 45 Am. U. L. Rev. 239, 341 (1995).

45. See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

What I would like to do now is to ask our panelists to respond to the questions that I'm going to pose, and then ask you, the audience members, to participate in the discussion.

First, I'm going to ask any of the panelists to respond to the following query: One ironic aspect of judicial independence is that it is less of an issue on the federal side, because judges are appointed for life terms without possibility of removal, except for some extraordinary cause. Almost all of the examples used today involve state court judges who have been removed through the "popular weal." It seems that the only judges who are being challenged, and whose judicial independence is being threatened, are those who have raised questions about the death penalty, not those who have consistently affirmed death penalty convictions. Do you know of many cases where judges have been recalled or subject to any kind of petition because they have been too vigorous in enforcing the death penalty?

Stephen B. Bright

In the many examinations that I have done, I have not seen a single example of this anywhere in the country. I suppose that's because the death penalty continues to be perceived as a very one-sided issue, with people overwhelmingly in favor of it.

Sometimes, the source of the money for campaigns against judges has an interest other than the death penalty. For example, the business community may not want a person to go on or stay on the bench because the person is perceived as friendly to the plaintiffs' bar. But regardless of what the opponents' real motivation may be, the attack is often based on an assertion that the judge is not sufficiently supportive of the death penalty.

What happened to Justice Penny White is an example. Her opponents' found one case, distorted it, and blew it all out of proportion. The people of Tennessee were told that Penny White had released a murderer to kill again. In fact, the conviction was upheld and the case was sent back for re-sentencing by the state's five-member supreme court. Yet, the message that was sent to the voters was that a murderer had been "set free" by one judge.

There is a major misperception about the role of the judiciary. The public believes that judges are just like other politicians. The President uses a focus group to decide where to take his vacation and consults the polls before making almost any decision. We have come

to accept that, and we accept the same behavior with legislators. It can be argued that when they respond to polls, focus groups, or special interests they are just representing their constituents. But the judiciary, in theory at least, is supposed to make decisions based on the law. A court is not supposed to convene a focus group. It is not supposed to take a poll. Unfortunately, many people think that the judges are just like any other politicians. They think that if you do not like a judge's decision, then you vote the judge out of office.

Professor Charles J. Ogletree, Jr.

This issue has not only come up with respect to sitting judges, but also with respect to those who are aspiring to the bench. Mr. Hanlon, would you talk more about what happened to Florida Supreme Court Chief Justice Rosemary Barkett and provide other examples that reveal the adverse consequences suffered by judges, even those serving at the federal level, who exercise judicial independence?

Stephen F. Hanlon

Judge Barkett's case was remarkable. As a member of the Florida Supreme Court, Judge Barkett had voted to affirm any number of death penalty cases. She had also written some dissents and had joined one dissent in another case.

So early on, before she was ever nominated to the Eleventh Circuit, there was a huge campaign, based on a distorted version of her votes in capital cases, to get voters to vote against the retention of Judge Barkett as a member of the Florida Supreme Court. Fortunately, what happened—and I think it would happen again today if it were to happen to anybody on that bench—is that Florida lawyers got together, raised money, got out there, and got the true word out on Judge Barkett, and the people of Florida then retained her in office in the election. The support of the organized bar is absolutely critical in these matters.

Thereafter, she went before the Senate for confirmation to serve on the Eleventh Circuit. My understanding is she just charmed Senator Helms to no end—and I'm sure he now regrets terribly that he had that conversation with her—and made it through, but not without an enormous amount of fuss that was completely undue, because this is as bright a jurist as you're going to find. We need to attract this kind of quality person to the bench.

Thereafter, when Senator Dole was running for President in 1996, she was named to Senator Dole's "Judicial Hall of Shame," or something like that. Senator Dole ought to be ashamed of himself for saying something like that.

Although Judge Barkett made it through, she had to run a heck of a gauntlet. As I told Penny White today, Penny's name is a household word in the Florida Legislature and in the Florida Supreme Court.

Stephen B. Bright

Judge Barkett got affirmed before the Republicans took control of the United States Senate. There were about thirty votes against her. She would never be confirmed today. She would never be voted on today.

George H. Kendall

She would never be nominated today by the President.

Stephen B. Bright

Thurgood Marshall would not be nominated for a federal district judgeship today in this country. The President probably would not nominate him because he would know that Orrin Hatch and his colleagues would not let the nomination out of the Senate Judiciary Committee. If he did nominate him, the Judiciary Committee would never recommend him to the Senate. That's a sad commentary on where we are today. The Republicans controlled the appointment of federal judges through the Reagan and Bush administrations, and the Democrats almost always confirmed whoever was nominated. The conservative Republicans continue to exercise substantial control over judicial nominations during the Clinton administration. The President quickly drops any nominee if the Republicans on the Judiciary Committee rattle their swords.

Professor Charles J. Ogletree, Jr.

Here is a question for George Kendall, who is based out of New York. We've been talking about criticisms of judges' actions in capital cases. Could you talk a bit about the lifetime-appointed federal judge, Harold Baer, who made a controversial decision on a suppression motion in a non-capital case and became entangled in the

political process, when presidential candidates and the President questioned whether he should be removed based upon the suppression opinion?

George H. Kendall

It was a straightforward case. The government put up basically one witness, a police witness, to talk about the suspicion that there were drugs in a car. That was not a very strong showing justifying the stop of the car, even though, when the car was stopped and searched, a lot of drugs were found in the car. Judge Baer's original decision that under *Terry v. Ohio*⁴⁶ there simply wasn't adequate cause to stop the car was certainly defensible.

A big furor arose after that. Senator Dole criticized this as judicial activism at its worst. President Clinton jumped on that bandwagon. To the great shame of Judge Baer, he allowed the government to reopen its evidence; the government put on one other officer, who simply confirmed what the first officer had said; and Judge Baer then changed his decision. That was not a great day for Judge Baer. Nor was it a great day for the federal judiciary, because it showed that, even with life tenure, folks can be intimidated. It's a very important lesson that, even with federal judges having life tenure, we need people on the federal bench who'll stand up to this type of pressure.

In stark contrast to Judge Baer was the late Judge Frank Johnson, who had to leave his church, who had to resign from the country club, and was virtually ostracized—as were many other Southern federal judges who said, as Judge Johnson did, that segregation was going to end in their lifetimes because it was so inconsistent with the Bill of Rights. Tragically, what we're seeing is an unwillingness of the White House to nominate in some cases, and surely the unwillingness of the Senate to confirm, people who in the next twenty to thirty years are going to face similar issues. They are going to need the guts to stand up to this kind of pressure.

Professor Charles J. Ogletree, Jr.

Judge White, you have talked about and written on this subject: one of the ironic aspects of Tennessee is that the issue of judicial independence is completely politicized, because you were not the only

46. 392 U.S. 1 (1968).

judge participating in decisions that some Tennessee citizens found disappointing; yet, when the issue of recall was presented, particularly in the case of Justice Birch, there was a different response. What are your reflections on the ironic and contradictory treatment that you received from people and politicians, as compared to other judges serving on the same court with comparable or even more substantial records on capital cases?

Penny J. White

One of the points I didn't make in my earlier comments is that I didn't author the opinion about which such an issue was later made. I was just a signatory to it. I don't say that to back away from the opinion. The opinion was right. I'd sign it again today. Two years later, the author of the opinion, Justice Birch, was on the ballot. Justice Birch had a longer history on the Tennessee Supreme Court and on courts in general than I, and perhaps could have been more subject to attack than me. But some other things happened, which relate to what Steve Hanlon said. The Bar Association bellied up and got involved in the issue, and the politicians didn't. For whatever reason, the same Senators and the same Governor did not find it necessary to go out against Justice Birch, thank heavens.

One of the things I wanted to comment on, to follow up on Steve Bright's comment in response to your first question, is that the day after my retention election in Tennessee, the headline said, "Election Becomes Death Penalty Referendum." What the people had really believed was that they were getting to vote "Yes" or "No" on the death penalty; that that was what the vote on my retention on the court was all about. The sub-headline on the post-election story, was that our then-Attorney General, who had remained silent throughout the entire thing, had now said that the loss of Justice White would not bring Tennessee any closer to an execution. I think that people had thought that as soon as I was gone, boom, we were going to start electrocuting people. One of the things Steve Bright talks about a lot is the dearth of leadership. The Attorney General could have told the people of Tennessee before my retention election that getting rid of one justice was not going to start executions, and that those closest to execution were still litigating their cases in the federal court system. But that was never spoken.

We must not shy away from the issues. Everybody in this room is going to have the opportunity in their life to defend a judge

who's wrongly criticized, to become active as a Bar member in a group, to be proactive on judicial independence issues, or maybe to be the leader who steps up as an Attorney General or as some other public official and says, "Wait a minute. You guys are wrong here." But there was an absolute dearth of leadership, at least in my situation.

Professor Charles J. Ogletree, Jr.

Finally, before we turn to the audience, I would like to pose one final question to all of the panelists, concerning the American Bar Association. The American Bar Association has addressed a number of issues, condemning the execution of juveniles and the execution of people who suffer from mental retardation. It has called for a moratorium on the death penalty. With respect to judicial independence in the capital punishment context, what action do the American Bar Association and state bar associations need to take to redress the problem? Do the panelists have any suggestions?

George H. Kendall

Surely, the example that we've seen with Judge Baer shows that since judges can't defend themselves very well, there needs to be some capacity by the Bar to respond quickly, to reframe the issue in a broader way. It's so easy for a politician to take a shot at a judge, and without any response, that attack becomes the way the issue is looked at by the American people. The organized Bar has a responsibility to be able to come to the defense, not necessarily of the decision on the issue in a case, but surely of the process, and to protect the judges—so that there is somebody talking about what the real issues are.

Penny J. White

One of the things I recommend to bar associations and to judicial conferences when I speak on this topic is the recruitment of lay spokespersons, of non-lawyer spokespersons, in favor of judicial independence. Here is a quick example why. A lawyer in Tennessee during the 1996 election read every case I'd ever written, categorized them and found that 89% of the time, I sided with the prosecution. What kind of coverage did that get? None. They put it on the editorial page. So, lawyers as spokespersons for judicial independence aren't sufficient. I agree they have to be involved. But I encourage people to

recruit non-lawyers who can sometimes be seen as more objective and not "having a dog in the race," so to speak.

Stephen B. Bright

Penny White has said that judges running in retention elections need to be given a warning that they may be attacked. What happened to Penny White was that six weeks before the election—when there was no reason to think anyone was going to oppose her, and she had no money, no campaign apparatus, no nothing—all of a sudden, some right-wing groups came out with their advertisements attacking her, and she was unable to defend herself effectively.

Sadly, one of the results of such attacks on judges has been that judges now build huge campaign war chests to discourage potential opponents from mounting a challenge to them because it will cost too much. Of course, someone must fill up those war chests, and the people who contribute to those war chests believe their money will do something good for them. It is very disturbing when the President of the Ohio Bar says that a lot of people have found it is cheaper to buy a judge than to buy a legislator.

This just adds another problem that we have not talked about, the role special interest groups are playing in electing judges with their money.

But the bar and the judiciary do need to be alerted. Justice White and I and others have gone to state bar associations and talked about some of these problems and urged that something be done to insulate judges from these pressures.

Professor Charles J. Ogletree, Jr.

We'll take questions or comments from the audience.

Question by Dorian Lovell Pank

I'm a barrister from England, so I hope you'll forgive a guest in your country making a few comments. Talking about judges and politics, some of you may remember the name of the case in this country in the early part of the century where a judge was sentencing a man for cannibalism. The remark he made was, "There used to be twenty-seven Republicans in this town and you've eaten four of them."

On a more serious note, what we've heard here today, in my opinion, is not only medieval; it's obscene. But experience of human nature shows that you could rerun the Holocaust and you'd have no end of volunteers for running the death camps.

So, my question is a simple one. Have I been listening to the people's will here? Have I been listening to democracy in action? Or is it time to change the way that the state judges are elected?

Charles F. Baird

Certainly, there needs to be a change in the way state judges are selected, not so much because a judge like Charlie Baird can get defeated, but because a judge who would go out there and say, "I will never, ever vote to reverse a capital case" can be elected. That judge made it a cornerstone of her platform that she would pre-judge every capital case that would come before her, no matter what the circumstances or facts might be. That's the problem with the elected system.

The appointment system, though, is no panacea. It involves backroom politics and who you know and who your daddy was, as far as getting appointed. That's just not a very palatable alternative either. But there's got to be some type of change in the way we select our judges on the state level.

Penny J. White

Any judge who campaigns on the "tough on crime" platform or the "I promise to enforce the death penalty" platform violates the Code of Judicial Conduct, without question. The Code says in Canon Five that a judge or a candidate for judicial office shall not make pledges or promises of their conduct in office. Justice Stevens at the ABA annual meeting in 1996 said that a judge who does that has evidenced bias and should recuse himself or herself in every criminal case. The way I try to describe this to non-lawyers is that what you have is a person who is violating their very code of conduct to get the job they want.

To respond to the question of whether this is the people's will, I think there are people in this country who, if we could make them understand that, would say, "I don't want a person who violates their very oath, to get the job of being on the bench." But we have to somehow get people, as Steve Bright said, to understand that judges aren't

just like every other politician who promises something and then gets elected based on that promise.

Stephen F. Hanlon

Let me pick up on that just briefly. We must vigorously litigate those issues, both in terms of disqualification and recusal motions and in terms of reports to the Judicial Qualification Commissions.

In Mr. Spaziano's case, once the Florida Supreme Court sent him back to the trial court, the press got hold of the original trial judge. He said he thought Joe Spaziano was guilty as hell. That was a wonderful thing from our point of view, because we immediately moved to disqualify that judge. Joe Spaziano would be a dead man today if that judge hadn't said that. We got instead a wonderful, courageous, former prosecutor, a law and order judge, who in the midst of a media circus, withstood the pressure and overturned Spaziano's conviction and death sentence.

So, we need to do our due diligence very, very strongly and not be afraid to risk the wrath of the judiciary—as Steve Bright has done here today—and produce a counter force. Whether it's successful or not, we need to do that.

Stephen B. Bright

On the recusal point, I am litigating a case right now in Alabama where a lower court judge running for the circuit court, Bob Austin, was specially designated to try a death penalty case. He held the trial the week before the election. He was on the ballot as a Democrat in a part of the state that is going heavily Republican. He was running ads in the newspaper that said, "It doesn't matter whether you're a Democrat or a Republican as long as you will hand down the death penalty."

When the case was called for trial, he had to decide whether to grant a change of venue. Of course, if he had granted a change of venue, his whole campaign would have gone up in smoke. He also had to decide when to grant a continuance because the defense lawyer had an ulcer in his foot, was in pain, and could not stand up for any length of time. He denied that motion as well. He also had to decide whether to suppress a statement. Are you kidding? The week before the election?

We have petitioned for relief because the case was used for political purposes. It will be interesting how low Alabama may set the standard in this area. The judge who was presiding over the case in which we challenged the trial judge's failure to recuse himself looked at the advertisement that said, "It doesn't matter whether you're a Democrat or a Republican as long as you impose the death penalty" and said, "Well, this is not very bad." And it was not as bad as some of the advertisements run by candidates for Supreme Court Justice of Alabama, which featured gavels coming down and judges and survivors proclaiming how strongly the candidates supported the death penalty.

That capital trial was nothing but a whistle stop on Judge Austin's campaign for circuit judge. It was not a trial. It was a campaign event.

This is just like the other case I discussed earlier. A judge who had ambitions for higher judicial office was specially designated to try a capital case. He overrode a unanimous jury recommendation of life imprisonment without parole and imposed the death penalty, thereby enhancing his chances for a federal judgeship. This is what Justice Brennan feared: that we would come to a point where we would treat "members of the human race as nonhumans, as objects to be toyed with and discarded."⁴⁷ That is what is happening. We are toying with and discarding people. It is bad enough that politicians resort to demagoguery about crime to win and keep office. But it is unconscionable for judges to be sacrificing the due process rights of poor people charged with crimes to advance their careers.

George H. Kendall

I'm glad that comment came up from our friend from England. We are the only country of the Western democracies (outside of certain Caribbean countries) that uses the death penalty. We are increasingly humiliating ourselves in the eyes of the world. Many Americans think we have the best system of justice in the world. But if you go around the world now and say that, increasingly people are just going to break down laughing, because they are hearing over and over again these stories about sleeping lawyer cases where no state or federal judge will do anything to reverse the outcomes.

47. *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., dissenting)).

We were sued by Paraguay, far from the world's leading democracy, in the World Court last year because we would not stop an execution where there was a clear, straightforward violation of the Vienna Convention. There have been cases after cases like that, and there will be more of them unless our problems with how we carry out the death penalty—one of them being the judicial independence problem—are fixed. If you're an American, you had better wear a hood over your head when you travel overseas and surely should not identify yourself as a lawyer, because we're becoming a laughingstock due to our unwillingness to fix these problems.

Question by Judge Larry Sage

I'm an elected, non-partisan judge from Nevada. I'd like to make kind of a reply. I think the strength of the system has to be in the strength of the lawyers.

And I think Ms. White is right. We had a case where I think the candidate said, "I'll be tough on drunk drivers." And she was disciplined immediately.

Stephen B. Bright

Justice Cliff Young of the Nevada Supreme Court ran advertisements proclaiming that he had imposed the death penalty seventy-three times and was running with the Attorney General to fight crime. A condemned man whose case was before the court at the time was troubled that a member of the state supreme court, who was to decide his case, was campaigning with the opposing counsel in his case, the Attorney General. But the recusal motion was denied in that case.

Question by Judge Larry Sage

The answer to the question is twofold. To answer the gentleman from England, we are the third branch of government on behalf of the people, and the only thing they trust in our system, the highest element, is the jury system, because they participate in it.

So, I think what you should acknowledge, with all due respect, is that the election states are not going to change. What you need to do is change the way it's done. You need to reinforce the campaign financing rules. You need to reinforce the reporting

requirements. You're not going to eliminate elected judges because, for the people in those states, it's the only element of accountability.

And with all due respect, if you read the ABA report, you only see the word "accountability" once, when it uses the phrase "political accountability" with regards to elected judges. No element of accountability whatsoever is mentioned for judges appointed for life.

Don't tell me appeal is accountability. I live in the Ninth Circuit. Since last year, twenty-seven of the twenty-eight cases from our Circuit that went to the United States Supreme Court were overturned. Ladies and gentlemen, in the law, that leaves argument to a reasonable inference that the majority of the cases decided by the Ninth Circuit were not correctly decided. So, don't tell me that appeal is accountability.

You're not going to change the fact that judges will continue to be elected in the jurisdictions where they are now elected. The people love that system. So, change the way it's done. Address the campaign element. But if you're going to argue about appointed judges as being somehow magically indifferent to everything, you'd better come up with an element of accountability, because that was never even mentioned by the ABA.

Stephen F. Hanlon

We're about to find out whether or not we're going to get rid of elected judges in Florida. We got a constitutional amendment passed, and it will be determined county by county now. We're going to vote it up or down, and we may surprise a lot of people on that.

I don't think that appointment of judges is a panacea. I grew up practicing in Missouri, and I'm familiar with the Missouri plan. It sure looks like it's at least a step in the right direction, and we ought to be doing a lot of experimentation with it.

I will never forget my first election day in Florida, and the shock I had seeing judicial candidates out there on the street corner, hawking. I thought, "What have I come to?" I was ready to turn around and go back. I couldn't believe what was going on. If we needed to get rid of an incompetent or a lazy judge in Missouri, we got rid of him or her. My basic experience with it—I'd probably feel differently about it if I were in Missouri right now—is that Missouri is doing about as bad in implementing its system as anyone. But the

Missouri system nevertheless can produce some change, even though it can't solve everything.

Penny J. White

The fatal flaw in the Florida legislation that is proposed, as I understand it, is that it disallows judges from campaigning at all if they're in a retention situation. That means there would be "open season" on those judges. That's something the Florida judges are really concerned about—even those who support a retention system. They are afraid that they're really going to be targets and be unable, because of the legislation, to respond to unfair attacks at all.

Question by Leonard Meyers

I'm from Norfolk, Virginia and my question is this: In Virginia, we do have an appointment system. When I first discovered that other states actually elect judges, I found that shocking. However, I want to find out how you explain the fact that even though Virginia has an appointment system, it's the second highest in capital executions. How do you explain that phenomenon, and what can be done about that?

Stephen B. Bright

They are appointed by the Legislature, which is not much of a system. If a state is going to have an appointed system, it should have a judicial nominating commission that is made up of people appointed by a wide variety of people, so that no one dominates it. In other words, there should be a group of people, including representatives of the bar, who try to decide on people based on merit and then recommend three names to the executive. Hawaii and the District of Columbia have systems like that. No system produces perfect judges. There are always going to be bad judges, no matter what system is used. That is true of the federal courts. But the Hawaii and District of Columbia systems attempt to do two crucial things. First, they try to have a system that at least produces as good a judge as you can get; and secondly, they insulate the judges once they are in office from political pressures.

In Virginia, judges are selected based on swapping around in the Legislature. Virginia and South Carolina both have that system of having the Legislature do it. I had a case in South Carolina before a trial court judge who was very ambitious and wanted very badly to

be sitting on the South Carolina Supreme Court. We discovered later that he had been told by a member of the state supreme court that if he did not sentence my client to death, he would be holding court in Walhalla for the rest of his career. Walhalla apparently is not a prime judicial assignment in South Carolina. The trial judge did sentence my client to death, and he now sits on the South Carolina Supreme Court, having been put there by the Legislature. If he had not sentenced the client to death, he probably would be in Walhalla.

Question by Leonard Meyers

I have one follow-up question. In Virginia, I'm not sure how it is in South Carolina, the local bar associations actually recommend the candidates to the court's Justice Committee for appointment to various positions. Do you think that's something that's good or bad or should be improved, or should those bar associations work with citizens in the community to come up with an appropriate appointee candidate? But if you do the latter, are you getting back to an election sort of scheme, where prospective judges have to say they are tough on crime in order to get a position?

Charles F. Baird

I would like to see more Bar involvement in all types of judicial selection. In every legislative session in Texas, there is a new blue ribbon type of idea on how to select judges. It never gets anywhere, because it's all political.

It used to be, when the Democrats were the majority party, that they didn't want to change the system because everybody being elected was a Democrat. Now that it's a Republican state, the Republicans don't want to change the system because everybody that's being elected is a Republican. So, it's just far too partisan.

But every one of these new commissions or panels or blue ribbon proposals that comes out never does involve Bar participation. I think unless and until we have that, you're not going to have the non-partisan type of independence that we all want in the judiciary.

Professor Charles J. Ogletree, Jr.

It is worth noting that there is an article in today's Atlanta Daily Reporter about the ABA's role in the appointment process for federal judges, including Supreme Court Justices, which has been in

place for many, many years. The article reports that Senator Orrin Hatch, chair to the Senate Judiciary Committee, stated in a speech given in Utah that the ABA has acted as a partisan political entity in carrying out its role with respect to federal judicial appointments and that, from his point of view, he would prefer to ignore the ABA in terms of judicial nominees. So, even the Bar's effort to participate in the nomination/confirmation process has become a political issue and is being criticized by those who ultimately confirm federal judges.

Stephen B. Bright

If Senator Hatch said that the ABA has been a partisan political entity, you could say, "It takes one to know one."

Question by James Dilday

I'm from Boston. I wanted to comment a little bit on what Mr. Hanlon said about Florida. I find it horrendous that people with three years of practice and who have worked on five felony cases can do capital cases. In Massachusetts, where we don't even have a death penalty, we need five years of practice and to have done at least ten felonies to be accepted to do a murder trial. The Florida process seems outrageous.

I also want to say that one of the real problems is that the judiciary has nobody to stand up for it. It doesn't have any funding. It has no lobbying arm. It just has to stand there and take whatever comes out. And in general, the press, instead of speaking the truth, is going to say what it thinks is going to sell its newspapers and get people to watch its television shows.

Stephen F. Hanlon

In Florida, the judiciary's in an ongoing dialogue with the Legislature about funding the whole judicial system, including the Florida Supreme Court itself, including how many law clerks the court might have available to help it do its work.

Think of the position that the court is in. The court is totally dependent upon lawyers to ferret out error in death cases. Our court in the year before last—the latest year for which I've got statistics—only affirmed 26% of all direct appeals in capital cases. Now, it's got to go over there to the Legislature and say that it should fund the judicial system. But as far as the Legislature is concerned, the judicial

system is getting in the way. We're stacked up to about 400 people on death row in Florida. And that Legislature just can't move fast enough to speed up executions. Meanwhile, the court is saying we need to fund lawyers, and by the way, we need to fund ourselves. I would hate to be the Chief Justice sitting there talking to that Legislature and trying to work through all of those various conflicting pressures.

Stephen B. Bright

As bad as things may be in Florida, when compared to the other two states in the Eleventh Circuit, Georgia, and Alabama, Florida is the promised land of representation. Florida has a state-wide public defender system. Neither Alabama nor Georgia does. Steve Hanlon said that the CCRC's got \$8 million out of the \$18 million they asked for. A lawyer appointed to represent a death-sentenced person in post-conviction proceedings in Alabama is paid \$1,000, a flat rate. In Georgia, a lawyer is paid nothing to handle a capital case in post-conviction proceedings.

The Georgia Supreme Court just recently considered the case of a condemned man, Exzavious Gibson, whose IQ ranged on various tests between seventy-six and eighty-two. Gibson was forced to represent himself in his post-conviction proceeding, because when he asked the judge for a lawyer, the judge said he was not entitled to a lawyer. Gibson told the judge he did not know what to do. The judge proceeded anyway. The denial of relief in that case was affirmed four to three by the Georgia Supreme Court, which held that there is no right to counsel in a first capital post-conviction review, even for a man with such a low IQ. So, as bad as things may be in Florida, it is even worse in Georgia and Alabama.

Question by U.S. District Court Judge Bernice B. Donald

I'm a judge from Memphis, Tennessee, and I've been an elected judge and I'm now an appointed judge. I'm currently in the federal system.

I fully concur that there are a lot of challenges to judges, and I know we have an ongoing debate about whether judges ought to be elected or appointed. But my initial sense is that with appointed judges, at least at the state level, you're simply taking the political decision out of the hands of the many and placing it in the hands of

the few. What you get and how that process works depends on what the motives are, in terms of making that decision.

Unfortunately, at the county level, which is where I was elected in a popular election—as judges there are still elected—judicial vacancies are filled by appointment by the county commission. We had an opportunity recently to have a judge appointed through that system. One of the candidates was a very reputable public defender. As you know, public defenders generally do not get appointed, and often do not get elected, to judicial positions. This woman was a sterling, highly qualified candidate. But because she had represented an individual in a highly publicized capital case and had gotten an acquittal, she was basically discounted from the start. It is unlikely that she will ever get a judicial position, not because she's not highly skilled, but because that particular case is just going to dog her. I think many people's decisions about whether they will go into particular types of work are probably being affected by situations like that one, if they have aspirations for judicial office.

As to the judge's ability to get out and comment: obviously, judges can't get out and comment on cases. But judges can help themselves some, in terms of disseminating information or about being involved in the community on non-case-related matters—simply from an educational standpoint. Unfortunately, I'm finding that, more and more, people in the community do not know what courts do; they do not know what judges do; and they simply lump a lot of things on the plate of judges that really don't belong there. We're held responsible for what the police do, and for what a lot of other people do.

My final note is that in, I believe it's the Northern District of Illinois, where Marvin Aspen is, the federal court now has a public information officer who will give the press information about the process—because in many instances, the press simply gets it wrong. The press, too, add to the problem by incorrectly attributing things to the judges or the courts. While I'm not suggesting that we ought to go out and do our own public information campaign, I think that when we have opportunities to disseminate information about the judicial process in the community, we can take advantage of those opportunities and do some of the groundwork.

Penny J. White

Both Judge Donald and I were at a meeting of women judges, where the advice by a very respected jurist was this: If you want to

get on the federal bench or if you want to be a judge, don't make a paper trail. Don't write articles. If you give seminars, don't hand out materials. Just don't have a paper trail. That is a very sad indictment of what one must do to heighten one's chances of becoming a judge.

Question by Judge Crawford

I've been a trial judge for twenty years, and I've noticed the judiciary come out from the black robes and that judges are now on the front pages of newspapers. They're in the top movies, and also they're on talk shows. I've been on the "Leeza" show and "48 Hours." The whole concept has been brought to the surface because of the interest of the public in the judiciary and what the legal profession is doing.

I think what we have to do when we talk about the independence of the judiciary, when we go around, it to understand the cause of the present situation. The cause is that the public now knows what we do. We can't hide anymore. They like what we do, and they're interested in what we do. So, we now need to discuss with the public what we do.

If the Tennessee Supreme Court had a press release before the case used against Justice White in her retention election came out, talked about what happened, got together with the local people, the Bar, etc., before the fact, probably there might have been a different result in Justice White's election. But you didn't know it was going to happen. And that's the sad part.

I think now we all have to know it's going to happen. We have to be aware that we are watched every single day. The camera is on our shoulder twenty-four hours a day, and we have to learn to respond to it, get the P.R. people, unfortunately, and be honest, but also explain why it's being done.

Professor Charles J. Ogletree, Jr.

Thank you, Judge Crawford. Our time has expired, but we appreciate your attendance here. Thanks to the panelists for all of their comments today.

