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The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion

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The late Otto Kaus, who served on the California Supreme Court from 1980 through 1985, used a marvelous metaphor to describe the dilemma of deciding controversial cases while facing re-election. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving. (Uelmen, Otto Kaus and the Crocodile, 30 Loy. L.A. L. Rev. 971 (1997).) The crocodile, of course, is a manifestation of the “public accountability” many states impose upon sitting judges. The justices of supreme courts in 23 states face contested elections at some stage in their career. Supreme court justices in another 15 states face retention elections to keep their jobs. (N.Y. Times, Jan.22, 1988, § I, at 8). In recent years, many of these justices have encountered more than one crocodile in their bathtub. Abortion remains a hot-button issue in many states, and final resolution of federal issues now clears the deck for state constitutional issues to be presented for the first time to many state supreme courts. And in the 21 states that allow legislation by popular initiative, justices frequently encounter an accusation that they are thwarting the voters’ will by striking down popular initiative measures. But the fattest crocodile of all is the growing backlog of death penalty cases clogging the dockets of 39 state supreme courts. This is a crocodile with a voracious appetite.

Justice Penny White of the Tennessee Supreme Court discovered that in 1996. She was appointed to the Tennessee Supreme Court in January of 1995. She participated in one death penalty decision, joining all the other justices on her five-judge court in reversing a death penalty judgment in June of 1996. (State v. Odom, 928 S.W.2d 18 (Tenn. 1996).) By unhappy coincidence, Justice White was the only supreme court justice on the ballot two months later. Governor Don Sundquist saw an opportunity to gain another Republican seat on the court. He denounced Justice White as a judge who was soft on the death penalty and weak on victim’s rights. His campaign succeeded and she was removed from office after winning only 44.8 percent of the votes. As he contemplated appointing her successor, Governor Sundquist chortled, “Should a judge look over his shoulder about whether they’re going to be thrown out of office? I hope so.” (Com. Appeal (Memphis, Tenn.), Aug. 3, 1996, at A1.)

In keeping with our crocodile metaphor, we need to contemplate the lesson taught by one of the greatest philosophers ever to emerge from an American swamp. I refer, of course, to Pogo, the wise possum created by cartoonist Walt Kelly. Pogo was heard to say, on a number of occasions, “We have met the enemy and he is us.” When he said that, Pogo was frequently speaking to his friend, Albert—an alligator, not a crocodile, but close enough. The question for judges to contemplate is, how can one serve the crocodile without becoming its meal? Lawyers cannot simply shrug their shoulders and say to the judges, “It’s your problem.” Obviously, it is a problem for every citizen devoted to the preservation of the rule of law. Most especially, it is a problem that demands a major commitment from the organized bar. Too often, when a sitting justice is challenged, the prosecutors line up on one side, and the criminal defense bar on the other. Rather than a fight over judicial independence, the contest is perceived as a struggle to fill the bench with judges who will favor the legal arguments “our side” advances. Let me take you through the swamp. We may find there are valuable lessons to be learned from some of our encounters with crocodiles during the past 10 years.

A tour of the swamp

The American appetite for the death penalty is best reflected in one, stark statistic. There are now more than 3,000 men and women on death rows in America. At the close of 1996, California led the parade with 420, Texas had 404, Florida was at 362, and Pennsylvania was in fourth place with 196.

The supreme courts of these and other states find the processing of death penalty appeals and petitions for post conviction relief consumes a bigger slice of the docket each succeeding year. To get a quick estimate, I counted up the total number of published opinions produced by the supreme courts of six death penalty states for 1985, and again for 1995. I then ascertained what proportion

By Gerald F. Uelmen

Illustrator: Richard Laurenz
deciding fewer cases. But there is one portion of their docket that these courts have little control over: the automatic appeals of death penalty judgments. The number of death penalty cases decided by these six courts increased 31 percent between 1985 and 1995. In 1985, 5.5 percent of the published opinions produced by these six courts were in death cases. In 1995, that proportion increased to 8.3 percent. The number of published opinions, of course, is a rather crude measure of the proportion of a state supreme court justice’s workload that is devoted to death penalty review.

Many justices in these states would agree with the estimate of recently retired California Chief Justice Malcolm Lucas, who told me death cases are now 20–25 percent of the workload of the California Supreme Court.

What may be most disconcerting about the death penalty cases during the past 10 years, however, is the increase in the rate of affirmation by some state supreme courts. Ten years ago, these six supreme courts affirmed 63 percent of the death penalty judgments they reviewed. In 1995, 90 percent of the death penalty judgments reviewed were affirmed. Although California accounts for a disproportionate share of this sample, going from an affirmation rate of zero in 1985 to a rate of 94 percent in 1995, the affirmation rate in Texas went from 86 percent to 96 percent during the same 10-year period. Although some of this increase may be attributable to the law becoming more settled, it can’t be denied that some of the increase is attributable to the presence of a fat crocodile in the bathtub. There are disturbing indications that judicial reluctance to reverse death penalty judgments may sometimes be reluctance to expose one’s posterior to the wrath of the electorate.

In California, three justices were removed from the state supreme court in the purge of 1986. The campaign that unseated them featured ads promising that “no” votes against the retention of these three justices was the equivalent of three “yes” votes for the death penalty. Apparently California set a standard for judicial politicking that has been emulated by its borders. Supreme court elections in at least 10 states have been dominated by death penalty politicking in the past decade, and California and Tennessee are not the only states to see incumbent justices removed. Two justices were removed from the Mississippi Supreme Court after two separate campaigns focusing on death penalty issues. Justice James Robertson was defeated in 1992 after he was attacked for two dissenting opinions in death penalty affirmances. Ironically, when both cases were reviewed by the U.S. Supreme Court, the majority agreed with Justice Robertson’s dissents and reversed the convictions. In 1990, Mississippi Supreme Court Justice Joel Blass was defeated by an opponent promising to be a “tough judge for tough times,” who attacked the incumbent justice for being “soft on crime.” In both contested elections, the challenger was endorsed by the Mississippi Prosecutors Association. (Stephen B. Bright and Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 763–64 (1995).)
same body of judges in every case. Actually, final review by the supreme court could be preserved after initial review by an intermediate court. The supreme court would still be spared sifting through all the preliminary procedural obstacles like appointment of counsel and certifying the record. It is much easier to review a case that has already been reviewed by a lower court. Cases reversed by the lower court would not even have to be heard. And even if final supreme court review were discretionary, the uniformity of ultimate judgment would be preserved in the process of considering applications for discretionary review.

Some resistance to this proposal comes, as might be expected, from the judges of the intermediate courts of appeal. They have to face retention elections, too. Why should they be saddled with the political burden that supreme court justices must currently bear, without any of the rewards? The greatest opposition to this proposal, however, comes from those who strongly support the death penalty itself. They argue that intermediate appellate review will drag out the review process in capital cases even longer than it currently takes. It is interesting to note that one of the few death penalty states that did have review of death penalty appeals by intermediate appellate courts prior to state supreme court review abandoned the practice in 1994. The state constitution of Ohio was amended by a vote of the people in 1994, to eliminate review of death cases by intermediate appellate courts. Despite opposition from the state bar and civil liberties organizations, the measure was sold to the voters as a means of speeding up the administration of the death penalty. As a result, the Ohio Supreme Court, whose justices are elected, reviewed 17 death penalty cases in 1995, compared to the three that were reviewed in 1985. The measure has had no perceptible impact upon their rate of affirmation, however. In both 1985 and 1995 it was 100 percent. Spreading the “joy” of reviewing death penalty appeals among a wider population of appellate judges may be a promising reform in terms of more efficiently managing the workload of state supreme court justices, but it would be a hard sell to the public in today’s climate of impatience with the delays between verdict and execution. Only Alabama continues to funnel death cases through the intermediate court of appeals, and legislation has been proposed to “speed up” death cases by ending the practice there, too.

**Solutions from the Sun Belt**

Some have suggested that we look to Texas for a solution. There, final review is allocated between two courts, one for civil cases and one for criminal cases. Thus, death penalty cases can be efficiently reviewed without diverting the availability of discretionary final review in civil cases. The Texas Court of Criminal Appeals does manage to review about 30 death penalty cases each year. It has even been suggested in California that a special rotating panel of appellate justices be created just to handle death penalty cases. Although that would certainly alleviate the docket pressure that death penalty cases create for the supreme court, it would not address the problem of political vulnerability for the justices assigned to sit on a special death penalty review panel. In Texas, the court of criminal appeals reversed one death penalty case in 1993. That was enough to inspire a call for Republicans to take over the Texas Court of Criminal Appeals in 1994. The voters responded to the call. Justice Charles Campbell, a former prosecutor with 12 years on the bench, was removed. Among those placed on the court was a lawyer who had been admitted to the Texas bar for two years and whose campaign platform promised the death penalty for killers, greater use of the harmless error doctrine, and more sanctions for attorneys who file frivolous appeals, “especially in death penalty cases.” (Bright & Keenan, supra at 761). The affirmation rate for death penalty appeals in Texas rose from 86 percent in 1985 to 96 percent in 1995.

The state that seems to have managed the death penalty crocodile with greatest success is the state that probably has the largest indigenous population of crocodiles: Florida. The Florida Supreme Court reviewed 50 death penalty judgments in 1995, and chalked up a reversal rate of 52 percent, one of the highest reversal rates in America. Is it because the justices of the Florida Supreme Court are not subjected to the political pressures prevalent in other death penalty states? Hardly. Although Florida utilizes a retention election system in which justices face a yes/no confirmation vote every six years, recent years have seen organized campaigns mounted to remove targeted justices with disturbing regularity. In 1990, then-Chief Justice Leander Shaw, Jr., had to raise $300,000 for a campaign to retain his seat in the face of an organized campaign by anti-abortion forces to remove him from office. And in 1992, Justice Rosemary Barkett faced an organized campaign not only by anti-abortion forces, but by prosecutors and police unhappy that she joined in a dissenting opinion in one controversial death penalty case, even though she had voted to affirm more than 200 death penalty appeals during her previous nine years on the court. While she won retention with 60.9 percent of the vote, the death penalty issue was trotted out in an effort to defeat her 1994 appointment to the U.S. Court of Appeals for the Eleventh Circuit and persuaded presidential candidate Bob Dole to place her on the list of Clinton appointees he labeled the judicial “hall of shame.” How is it that Florida has managed to maintain an independent state supreme court that rigorously reviews death penalty cases, reversing between one-half and one-third of the cases it reviews every year? One might speculate that Florida has defused public frustration by the delivery of actual executions. Florida has successfully executed 38 inmates since 1978 and the Florida Supreme Court has maintained a brisk pace of appellate review, deciding as
many as 73 death penalty appeals in a single year. Perhaps the public frustration so frequently misdirected at courts is really frustration with the total lack of executions rather than with reversals in particular cases. California in 1986 and Tennessee in 1996 had yet to see their death penalty law ever enforced. It is not a solution, but one reality that may have to be faced is that this crocodile must be occasionally fed with executions. And if he isn’t, he will eat his keepers.

The impact of judicial overrides

Attributing Florida’s success to its delivery of executions, however, is hard to reconcile with the fact that Texas has delivered 107 executions since 1978 and the pace of review by the Texas Court of Criminal Appeals is close to that of Florida. Why would such a fat, well-fed crocodile turn on its keeper? It may simply be that Texas crocodiles grow bigger and hungrier than anywhere else and we shouldn’t try to learn anything from the Texas experience.

Two years ago, a young lawyer who had experienced the Texas death penalty system first-hand as a law clerk for the U.S. Court of Appeals for the Fifth Circuit and as an attorney for the Texas Death Penalty Resource Center, left Texas to join the capital litigation unit of the Florida State Public Defender’s Office in Miami. Writing for The Texas Lawyer, Brent Newton offered some interesting reflections on why the affirmance rate was so much higher in Texas than in Florida. (Brent Newton, Capital Punishment: Texas Could Learn a Lot From Florida, Tex. Law., Feb. 26, 1996, at 26). The most significant factor he identified was “the disparate quality of appellate judges in the two states, which is largely a function of the fact that judges on the Florida Supreme Court are not elected in partisan popular elections, as are the judges of the Texas Court of Criminal Appeals.” He also noted that the Florida Supreme Court reviews the weighing of aggravating and mitigating circumstances in the death penalty determination on appeal, while the Texas court refuses to consider whether a life sentence was more appropriate in view of the mitigating circumstances. Many death penalty reversals by the Florida Supreme Court come in cases where a jury actually recommended life imprisonment, but the recommendation was overridden by the trial judge.

The availability of judicial override has yielded what Justice Sandra Day O’Connor recently called “ostensibly surprising statistics.” (Harris v. Alabama, 115 S. Ct. 1031, 1036 (1995).) Only four states allow judges to disregard a jury’s recommendation on the death penalty and the same pattern has emerged in all four states. In Alabama, trial judges override jury recommendations of life and impose a death sentence almost 10 times as frequently as they override recommendations of death. In Florida, trial judges overrode jury recommendations of life and impose a death sentence almost 10 times as frequently as they override recommendations of death. In Florida, trial judges overrode jury recommendations in 185 cases between 1972 and 1992. In 134 of these, trial judges opted for death over a life recommendation by the jury. In Indiana, the ratio was eight judicial overrides for death to four for life between 1980 and 1994.

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

The “higher authority” to whom present-day capital judges may be “too responsive” is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. ... The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

(Harris v. Alabama, supra at 1038, 1040 and n.8 (Stevens, J., dissenting)).

Seen in this light, the high reversal rate in Florida may to some extent be a corrective for the politicization of death penalty decisions by judicial override in the trial courts. Between 1980 and 1991 the Florida Supreme Court reviewed 90 death cases in which a jury recommendation of a life sentence was overridden by a trial judge. In 69 of those cases—77 percent—the state supreme court vacated the trial judge’s sentence and either imposed a life sentence or remanded for a new sentencing hearing. (Lambrix v. Singletary, 117 S. Ct. 1517, 1534 n.8 (Stevens, J., dissenting) (1997).) Although Florida Supreme Court justices are also subject to the same political pressures, they are at least insulated by the device of yes/no retention elections, unlike the contested elections faced by trial judges in Florida and by judges of the Texas Court of Criminal Appeals. In the 1996 elections, three justices of the Florida Supreme Court were returned with no opposition.

The quality of appointed counsel

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

Probably the most insidious influence of the death penalty crocodile is its pervasive impact upon the quality of counsel in death cases. Judges who owe their elections to a campaign commitment to enforcing the death penalty will be more likely to countenance lazy and sloppy lawyers. When one compares the published opinions in death penalty opinions issued by the Florida Supreme Court with those of the Texas Court of Criminal Appeals, one encounters a profound difference in attitude regarding the degree of competency to be demanded of court-appointed defense counsel. As Brent Newton sums it up in his Texas Law Review article:

Horror stories regarding Texas capital defense lawyers—e.g., lawyers who engage in little or no preparation for trial, lawyers who were drunk or fell asleep at trial, openly racist lawyers representing minority clients—are legion. Unlike the state and appellate courts in Florida, appellate judges in Texas are generally willing to turn a blind eye to such shameful lawyering.

(Newton, supra at 26).

Regretfully, his observation of Texas courts is occasionally applicable to California. Too often, the lawyers who are criticized by judges are not the lawyers who slept through trials or did too little to prepare their client's defense. Instead, judicial wrath is visited upon the lawyers who do "too much" for their clients, by vigorously asserting every conceivable ground for reversal. Part of the problem with the review of death penalty judgments by state supreme courts today is that the siege mentality afflicting the justices leads them to regard the defense bar as "the enemy." In California, the supreme court watched quietly as the governor dismantled the state public defender's office and then thashed the appellate project created to fill the void. Largely as a result, more than 140 of the occupants of California's death row are not yet represented by appellate counsel. A recent study by the Texas Bar Foundation concludes that Texas also faces a crisis in providing competent counsel for death penalty appeals and post conviction proceedings. (A Study of Representation in Capital Cases in Texas, 56 Tex. B.J. 333 (1993). The establishment of public defender offices has been fiercely resisted in Texas, while the Texas Court of Criminal Appeals still debates whether Gideon v. Wainwright was correctly decided. (See Ex Parte Jordan, 879 S.W.2d 61, 63-64 (Tex. Crim. App. 1994) (en banc) (McCormick, J., dissenting) (criticizing the U.S. Supreme Court for interfering with Texas sovereignty by mandating counsel for indigents.)

The organized bar should be the loudest defender of judicial independence. When special interest groups or "victim's rights" organizations suggest that their unhappiness with a particular decision should result in removal of the judges who rendered it, the judges are hardly in a position to respond with a spirited defense of judicial integrity and independence. Too often, the response is simply silence, which reinforces the impression that judicial elections can become referendums on the popularity of particular decisions. When that agenda is endorsed by elected political leaders at the highest level, courts are left in a highly vulnerable position that truly threatens the principle of judicial independence. Yet, when it is appropriate for a court to speak out in defense of the principle that indigent death row inmates should be competently represented, the judicial silence is often deafening. Last October, when Congress defunded the 20 death penalty resource centers that were engaged in raising the level of competence of defense lawyers in death cases, how many state supreme courts did Congress hear from?

Three-crocodile states:
Ohio and Kentucky

If the past 10 years is any indication, the states where judicial independence is most gravely at risk are the states that feature growing death rows without any executions, states in which abortion is a divisive political issue, and states that allow statutory enactments or constitutional amendments by initiative. It might be said to justices in these states, "Three crocodiles and you're out."

Indeed, there are two such states, Ohio and Kentucky, and both subject their supreme court justices to contested elections. Both states experience highly partisan and expensive races for supreme court seats on a recurring basis. Ohio experienced one of the costliest judicial elections in American history in 1986, when incumbent Chief Justice Frank Celebrezze spent $1.7 million in an effort to keep his seat, only to lose to Thomas Moyer, who spent $1 million. The newly elected chief justice voted to rehear 30 cases that had been decided in the final weeks of his predecessor's term. After news reports disclosed that he had received campaign contributions from lawyers in five of those cases,
be disqualified himself from the hearings. In response to a subsequent “reform” movement, the supreme court itself imposed spending limits on Ohio judicial election campaigns. Candidates for associate justice were limited to campaign expenditures of $350,000. A federal district court judge held the spending limits unconstitutional and an appeal is now pending before the U.S. Court of Appeals for the Sixth Circuit. (Ohio Supreme Court Appeals Ruling in Judicial Spending Limits Case, Pol. Fin. & Lobby Rep., Nov. 27, 1996 at 6.) Meanwhile, more than $1.75 million was spent on races for two seats on the Ohio Supreme Court in 1996. Although candidates stayed within the court-imposed limits, independent groups pumped massive amounts of money into media campaigns. The Ohio Republican party invested $305,000 on one campaign, while a coalition of labor unions and plaintiffs’ lawyers spent $234,000 in the opposing campaign. Ohio judicial campaigns tend to line up on traditional political party lines. Issues such as the death penalty have not played a prominent role, even though Ohio has not had an execution since 1961 and 169 inmates are waiting on Ohio’s death row. The Ohio Supreme Court for many years had the advantage of intermediate appellate courts reviewing death judgments, so most reversals occurred at the lower court level. Since 1994, the state supreme court has reversed one death judgment.

Kentucky has also been regularly setting and breaking records for campaign expenditures in recent judicial elections. In a 1996 contest, an incumbent justice raised $625,000, including $520,000 from his own pocket. He was defeated by a challenger who raised and spent $150,000. Kentucky has 29 individuals on death row and has not had an execution since 1962. After the state supreme court reversed a death judgment in 1983, 2,000 citizens of Powell County, where the defendant had been convicted, signed petitions calling for the removal of the chief justice. Shortly thereafter, Powell County was removed from the judicial district where the chief justice had to stand for reelection. Only two death judgments have been reversed by the Kentucky Supreme Court since then.

**Living with crocodiles**

One of my favorite Pogo adventures was the crisis he encountered when asked by a friendly momma frog to baby-sit her tadpole. The tadpole was swimming in a mason jar that Albert “mistook” for a martini with an olive. Pogo was ready to climb down Albert’s throat to retrieve the victim, but was dissuaded when Albert insisted on a farewell handshake. Pogo then came up with a brilliant solution: He made Albert drink so much water that the tadpole was able to swim back out to Pogo’s arms. Pogo then declares that the solution is “not so hard once we put our minds to it.”

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

The answers to these questions are by no means obvious. We cannot assume that all lawyers, or even all judges, are strongly committed to the principle of judicial independence. We have recently witnessed the spectacle of candidates for the presidency of the United States and the governorship of our largest states calling for the resignation or defeat of judges because they didn’t like the decisions they rendered. It might be appropriate to demand that these politicians drink lots of water from a mason jar!

If lawyers, who should know better, are more committed to gaining personal political advantage than to preserving the principle of judicial independence, how will we ever convince the electorate it should look beyond the disagreements with a particular decision?

Ultimately, the preservation of judicial independence in America will depend upon the commitment of American lawyers to the cause. If lawyers utilize contested judicial elections as an opportunity to choose up sides and promote the candidates whom they believe will best serve the narrow interests of their clients, while removing those who participated in decisions that did not serve those interests, we will get the judiciary we deserve. Unfortunately, the most active bar associations in judicial contests are the special interest bars that seem more committed to the principle that their side should win than they do to the principle of judicial independence. As Pogo so aptly put it, “We have met the enemy and he is us.”
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