

POLITICAL ATTACKS ON THE JUDICIARY: CAN JUSTICE BE DONE AMID EFFORTS TO INTIMIDATE AND REMOVE JUDGES FROM OFFICE FOR UNPOPULAR DECISIONS?

STEPHEN B. BRIGHT*

The increasing political attacks on the judiciary by both major political parties and by candidates for judicial office are diminishing the independence of the judiciary and, equally important, the public's confidence in it. Thus, the distinction between fair criticism of judges and intimidation of them is an important one.

There is no question that fair criticism plays a critical role in improving the quality of the courts. Every appeal, every petition for rehearing, every dissent is a criticism of a judicial decision. Decisions like *Dred Scott v. Sandford*,¹ *Plessy v. Ferguson*,² and *McCleskey v. Kemp*³ should be criticized. Citizens should ask if these decisions were correct. What does the Constitution require? Should it be amended? If the case involved a matter of statutory interpretation, should Congress respond with legislation?

It is equally clear that everyone in the United States has a First Amendment right to be a demagogue and to make irresponsible criticism. But irresponsible criticism which brings about the removal of judges from office or influences their decisions is incompatible with judicial independence and the rule of law. Courts have a duty to protect the rights of minorities—political, racial, ethnic—no matter how

* Director of the Southern Center for Human Rights, Atlanta. B.A., 1971, J.D., 1975, University of Kentucky. Since 1982 Mr. Bright has been director of the Center, a public interest legal project which provides representation to persons facing the death penalty and to prisoners challenging unconstitutional conditions in prisons and jails. He has taught courses on capital punishment, criminal procedure, international human rights law, and prisoners' rights at the law schools at Yale, Harvard, Georgetown, Northeastern, Florida State, and St. Mary's. He has been involved in representation of those facing the death penalty at trials, on appeals, and in postconviction proceedings since 1979. This speech draws upon those experiences as well as the authorities cited.

¹ 60 U.S. (19 How.) 393, 407 (1857) (stating that African-Americans were "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that African-Americans had no rights which the white man was bound to respect").

² 163 U.S. 537, 552 (1896) ("If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

³ 481 U.S. 279, 312 (1987) (allowing Georgia to carry out executions despite recognition of "inevitable" racial disparities in infliction of death penalty).

unpopular their rulings may be. Legislators or executives may base their decisions on focus groups or public opinion polls, but judges may not. Judges are expected to enforce the law, whether it be the First Amendment freedom of the radical right or the radical left to publish political views which may seem distasteful to some, the right of *The New York Times* to publish the Pentagon Papers,⁴ or the right of a suspected child molester to a fair and impartial trial. As Edmund Burke put it, the judiciary is to serve as "safe asylum" during times of crisis.⁵ In the United States, courts are to uphold the Bill of Rights regardless of whether the decision is popular at the time. No one has said it better than Justice Jackson:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁶

This important concept seems to have been forgotten. Indeed, former judge Robert Bork, a self-described strict constructionist, proposed in his book, *Slouching Towards Gomorrah*, that Congress should be given the power to override Supreme Court decisions.⁷ Governor Fob James of Alabama has also expressed the view that the state legislature and governor should be able to override decisions of his state's highest court⁸ and, on the federal level, that the President and Congress should simply ignore Supreme Court decisions they "know" to be wrong.⁹

⁴ See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that United States may not impose prior restraint upon publication of Pentagon Papers).

⁵ Edmund Burke, *Reflections on the Revolution in France* 242 (Thomas H.D. Mahoney ed., 1955) (1790).

⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

⁷ See Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 117 (1996) (proposing constitutional amendment that would allow Congress to overturn Supreme Court decisions by majority vote in House and Senate).

⁸ See Adam Cohen, *A Governor with a Mission*, *Time*, Sept. 4, 1995, at 32, 32 (reporting that James had proposed adoption of bill that would allow legislature and governor to overturn rulings of Alabama Supreme Court from which three or more judges dissent); James Pushes Restructuring of State's Judicial Branch, *Columbus Ledger-Enquirer* (Ga.), May 3, 1995, at B2 (describing James's proposal and reporting that James "sees Alabama judges acting like schoolyard bullies").

⁹ See James: President, Congress Should Ignore Supreme Court, *Columbus Ledger-Enquirer* (Ga.), June 17, 1996, at B2; see also James Apologizes for Kowtowing to Judiciary, *Columbus Ledger-Enquirer* (Ga.), Aug. 12, 1995, at B2 (reporting on speech in which James claimed that "the doctrine of separation of powers, the cornerstone of liberty, re-

Governor James's views are in accordance with a long history of defiance of judicial orders by Alabama governors,¹⁰ but most of us expect courts to uphold the fundamental principles enshrined in the Bill of Rights against the passions and prejudices of the moment. Judges are expected not to gauge public opinion in making their decisions, but rather, as Judge William Cranch wrote, to decide the legal issues before them "undisturbed by the clamor of the multitude."¹¹

There has been at least a grudging acceptance of this principle in the past. Politicians have long blamed judges for forcing them to take unpopular actions—for example, desegregating the schools or bringing prisons or mental health facilities up to minimal standards—but many of those politicians had enough respect for the courts that they were careful not to take their criticism too far. Today, however, politicians criticize judges for the purpose of intimidating them and getting specific results.

Immediately after Justice Penny White was voted off the Tennessee Supreme Court last August in a retention election which became a referendum on the death penalty, the Governor of Tennessee, Don Sundquist, said: "Should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so."¹² Sundquist's statement contrasts sharply with one made by Supreme Court Justice John Paul Stevens at the American Bar Association meeting in Orlando the same month: "[I]t was 'never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.'"¹³

Judges are increasingly coming under fire in the political system. When Judge Harold Baer suppressed cocaine and heroin seized by New York City police officers,¹⁴ Republican presidential candidate

mains in jeopardy" due to actions of federal judges who "regularly violate the constitution by assuming powers that belong to the legislative and executive branches of government").

¹⁰ See, e.g., Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr., and the South's Fight over Civil Rights* 185, 187-92, 207 (1993) (describing defiance of federal courts by George Wallace, first as circuit judge and later as Alabama's governor).

¹¹ 1 Charles Warren, *The Supreme Court in United States History* 303 (1923).

¹² Paula Wade, *White's Defeat Poses Legal Dilemma: How is a Replacement Justice Picked?*, *Com. Appeal* (Memphis, Tenn.), Aug. 3, 1996, at A1, available in 1996 WL 11059250.

¹³ Justice John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting* 12 (Aug. 3, 1996) (citation omitted) (quoting Florida Supreme Court Justice Ben Overton) (on file with the *New York University Law Review*).

¹⁴ See *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996) (finding that cocaine and heroin were seized in violation of Fourth Amendment).

Robert Dole called for his impeachment¹⁵ and the Clinton White House suggested it would ask for his resignation if Judge Baer did not reverse his ruling.¹⁶ Judge Baer reversed himself.¹⁷

As Senator Dole floundered about, looking for a theme for his presidential campaign, one tack he tried was to attack judges appointed by President Clinton.¹⁸ Even though Dole voted to confirm ninety-eight percent of Clinton's judicial nominees,¹⁹ and most observers found Clinton's nominees to be moderate to conservative,²⁰

¹⁵ See David S. Broder, Editorial, Space for a Judge, *Wash. Post*, Apr. 14, 1996, at C7 (reporting statement of Chief Judge Jon O. Newman of Second Circuit and other circuit judges which noted Dole's statement and pointed out that Constitution "limits impeachment to those who have committed 'high crimes and misdemeanors'" and that "[a] ruling in a contested case cannot remotely be considered a ground for impeachment"); Don Van Natta Jr., Judges Defend a Colleague from Attacks, *N.Y. Times*, Mar. 29, 1996, at B1 (reporting that "[o]n the Presidential campaign trail in California . . . Senator Dole called for Judge Baer's impeachment").

¹⁶ See Alison Mitchell, Clinton Pressing Judge to Relent, *N.Y. Times*, Mar. 22, 1996, at A1 ("The White House put a Federal judge on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation."). After criticism by bar leaders, the White House backed off its threat of asking for Judge Baer's resignation, issuing a statement that "the proper way for the executive branch to contest judicial decisions with which it disagrees is to challenge them in the courts." Linda Greenhouse, Judges as Political Issues: Clinton Move in New York Case Imperils Judicial Independence, Bar Leaders Say, *N.Y. Times*, Mar. 23, 1996, at A1 (quoting letter from Jack Quinn, counsel to President, to Representative Bill McCollum of Florida).

¹⁷ See *United States v. Bayless*, 921 F. Supp. 211, 212 (S.D.N.Y. 1996) (vacating prior decision and finding that police officers had reasonable suspicion of criminal activity sufficient to support stop of defendant).

¹⁸ See, e.g., Dan Balz, Dole Warns of Liberal Judiciary: Clinton Appointees Soft on Criminals, Majority Leader Says, *Wash. Post*, Apr. 20, 1996, at A1 (reporting Dole's assertion that Clinton's judicial appointees "have demonstrated outright hostility to law enforcement" and his promise to make issue central theme in his presidential campaign); Paul M. Barrett, Dole Vows to End ABA's Role in Picking Judges as He Attacks Clinton's Selections, *Wall St. J.*, Apr. 22, 1996, at B5C (reporting that Dole attacked Clinton's judges as "an all-star team of liberal leniency," described American Bar Association as "nothing more than another blatantly partisan liberal advocacy group," and promised that, if elected, he would exclude ABA from evaluation of judicial nominees); Joan Biskupic, Dole's Time-Warped Judgment on Judges, *Wash. Post*, Apr. 28, 1996, at C1 (reporting that "Dole lately has loaded his speeches with complaints about 'liberal judicial activism' and 'judicial tyranny' and singled out rulings by individual judges as part of the 'root causes of the crime explosion'"); Tony Mauro, Experts Warn that Ranking Jurists is Risky, *USA Today*, May 7, 1996, at 1A (reporting that Dole advisors claim that his criticism of judges taps "into a deep lode of voter discontent about judges who set criminals free, and show more solicitude for criminal defendants than their victims").

¹⁹ See Richard Cohen, Editorial, Dole: Yesterday's Cynical Politics . . . , *Wash. Post*, Apr. 25, 1996, at A31 (reporting that Dole voted to confirm 182 of Clinton's 185 judicial appointments); see also Albert R. Hunt, Editorial, Judge Not, that Ye Be Not Judged, *Wall St. J.*, May 9, 1996, at A19 (reporting that 97% of Clinton's judicial nominations have been approved without dissent).

²⁰ See, e.g., Neil A. Lewis, In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans, *N.Y. Times*, Aug. 1, 1996, at A20 (reporting on study that found "ideo-

Dole claimed that those judges were dismantling "guard rails that protect society from the predatory, the violent, and the anti-social elements in our midst."²¹

In response to these attacks by Senator Dole and others, Judge H. Lee Sarokin of the United States Court of Appeals for the Third Circuit resigned from the bench, saying that the efforts to "Willie Hortonize" him and other members of the federal judiciary made it impossible for him to carry out his responsibilities as a federal judge.²² "So long as I was the focus of criticism for my own opinions," Judge Sarokin wrote, "I was resigned to take the abuse no matter how unfair or untrue, but the first moment I considered whether or how an opinion I was preparing would be used [politically] was the moment I decided that I could no longer serve as a federal judge."²³

Courts are not independent when state judges are voted off the bench because of unpopular decisions by their courts and federal judges reverse decisions or resign from the bench after a barrage of criticism. We must find ways to protect the rule of law from the potential harms of irresponsible criticism of judges and judicial decisions.

The first issue I will address is what constitutes fair criticism and what constitutes irresponsible demagoguery that threatens the independence of the judiciary. Second, I will examine the damage to the integrity, effectiveness, and credibility of the courts caused by irresponsible attacks. Third, I will propose ways in which political leaders, the Bar, and others who care about the integrity of the judiciary should respond to irresponsible behavior, such as President Clinton's and former Senator Dole's attacks on Judge Baer,²⁴ and measures that could be adopted to ensure that decisions are based on the law and not political pressures.

I

IRRESPONSIBLE CRITICISM: DISTORTION AND PROMISED RESULTS

The most obvious example of irresponsible criticism and demagoguery is a distortion of a judge's record or decision in a case. Most common is the suggestion that a judge's decision indicates approval of the criminal behavior alleged in the case or that the judge "coddles

logical fingerprints" of Clinton judges to "most resemble those of judges selected by President Gerald R. Ford").

²¹ Biskupic, *supra* note 18, at C1.

²² Letter from Third Circuit Judge H. Lee Sarokin to President William Jefferson Clinton 1 (June 4, 1996) (on file with the *New York University Law Review*).

²³ *Id.* at 2.

²⁴ See *supra* notes 14-17 and accompanying text.

criminals" or is "soft" on crime.²⁵ Similarly, critics often suggest that the failure to impose the most severe sentence possible means a judge is not sympathetic to the victims of crime.

It is irresponsible for critics of the courts to argue that only results matter, without regard to the legal principles that govern judicial decisionmaking. It is irresponsible to attack a judge for the purpose of removing the judge from office so that a different political party may appoint the replacement, as was the case in the effort against Justice White in Tennessee. And it is equally irresponsible to attack a judge for the purpose of bullying those who remain on the bench into submitting to a particular course of action.

Those who criticize irresponsibly often focus only on the result of a single decision without considering the underlying facts and the legal principles which governed the judge's ruling in the case. They do not take into account the overall performance of the judge while in office. Increasingly, attacks include even outright misrepresentations of a judge's decision.

For example, in the campaign to remove Justice Penny White from the Tennessee Supreme Court,²⁶ the Tennessee Conservative Union sent out a letter that opened with the following description of crimes committed by Richard Odom:

78 year-old Ethel Johnson lay dying in a pool of blood.
Stabbed in the heart, lungs, and liver, she fought back as best
she could.
Her hands were sliced to ribbons as she tried to push the knife
away.
And then she was raped.
Savagely. . . .
. . . .
But her murderer won't be getting the punishment that he
deserves.
Thanks to Penny White.²⁷

²⁵ See, e.g., Paul M. Barrett, Editorial, *Dole Campaign May Be on Shaky Ground in Bid to Brand Another Clinton Judge as Soft on Crime*, *Wall St. J.*, Apr. 3, 1996, at A16 (reporting Republican attacks on Clinton-appointed judges and quoting Senator Orrin Hatch as claiming decisions by Clinton appointees were soft on crime); Anthony Lewis, Editorial, *Where Would You Hide?*, *N.Y. Times*, Apr. 8, 1996, at A15 (commenting on competition between Republicans and Democrats to attack judges and quoting Hatch as describing judges appointed by Democrats as "soft," "activist," and "much more prone to make excuses for criminal defendants than Republican judges").

²⁶ The Tennessee retention election procedure is codified in *Tenn. Code Ann.* § 17-4-115 (1994). The unusual circumstances surrounding the retention election of Penny White are discussed in detail in *Lillard v. Burson*, 933 F. Supp. 698 (W.D. Tenn. 1996).

²⁷ Letter from John M. Davies, President of the Tennessee Conservative Union, to Tennessee voter Robert C. Mathews, Sr. 1 (June 1996) (see *infra* App. A).

The Republican Party also mailed a brochure to voters entitled, *Just Say NO!* with the slogan, "Vote for Capital Punishment by Voting *NO* on August 1 for Supreme Court Justice Penny White."²⁸ Inside, the brochure described three cases to demonstrate that Justice White "puts the rights of criminals before the rights of victims."²⁹ It described the case of Richard Odom as follows: "Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Penny White felt the crime wasn't heinous enough for the death penalty—so she struck it down."³⁰

Neither mailing disclosed that Richard Odom's case was reversed because all five members of the Tennessee Supreme Court agreed that there had been at least one legal error which required a new sentencing hearing.³¹ The court affirmed Odom's conviction and remanded his case for a new sentencing hearing.³² No member of the court expressed the view that the crime was not heinous enough to warrant the death penalty. Indeed, the remand for a new sentencing hearing at which a jury would decide between the death penalty and life imprisonment made it quite clear that the court did not find the death penalty inappropriate for Odom. Justice White did not write the majority opinion, a concurring opinion, or a dissenting opinion. Yet Tennessee voters were led to believe that she had personally struck down Odom's death penalty because she did not think the crime was "heinous enough."³³

²⁸ Tennessee Republican Party, Campaign Brochure, *Just Say NO!* 1 (1996) (see *infra* App. B).

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ See *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). In an opinion by Justice Birch, three members of the court held that three errors required reversal. See *id.* at 32-33. The remaining two members of the court concurred with regard to one of the errors, but dissented with regard to the other two. See *id.* at 33 (Anderson, C.J., concurring in part and dissenting in part).

³² See *id.* at 33.

³³ Although the *Odom* case dominated the attacks against Justice White, her opponents misrepresented her opinions in other cases as well. The Republican brochure also criticized Justice White for two cases she participated in as a member of the Tennessee Court of Criminal Appeals. The brochure told voters that White voted to reverse the aggravated sexual battery conviction of Edward Jones "[d]espite the child's graphic heart-breaking testimony of what Jones did to her." Tennessee Republican Party, *supra* note 28, at 2. In fact, a panel of the court unanimously reversed the conviction because the state's expert made an improper comment on the credibility of the complaining witness. See *State v. Jones*, No. 3C01-9301-CR-00024, 1994 WL 529397, at *17 (Tenn. Crim. App. Sept. 15, 1994).

The brochure also told voters that White "voted that John Henry Wallen shouldn't be tried for first degree murder when he shot to death Tennessee Highway Patrolman Doug Tripp." Tennessee Republican Party, *supra* note 28, at 2. The Court of Criminal Appeals reversed the conviction. All three members of the panel concluded that statements ob-

White's opponents also blamed her for the fact that Tennessee has not carried out any executions in the last thirty-six years.³⁴ But the *Odom* case was the only capital case which came before the Court during White's nineteen-month tenure.³⁵ Tennessee's political leaders did not call attention to this distortion; instead, Tennessee's governor and both its United States Senators, all Republicans, opposed White.³⁶

In his 1994 race for the United States Senate in California, Michael Huffington attacked his opponent, Dianne Feinstein, for voting to confirm Rosemary Barkett for a seat on the United States Court of Appeals for the Eleventh Circuit. Huffington ran full-page advertisements that were titled, "Here are the facts in a *real* murder case. See if you agree with the judge's decision."³⁷ The advertisement then described the facts of three cases. The first one reads:

Jacob Dougan brutally killed a teenage boy named Steven Orlando. After the murder, Dougan sent a tape to the boy's mother describing her son's murder.

....

Jacob Dougan was convicted and sentenced to death. But on appeal in 1992, a judge named Rosemary Barkett voted to spare Dougan the death penalty. Judge Barkett believed that a lifetime of

tained from the accused should have been suppressed. See *State v. Wallen*, No. 3C01-9304-CR-00136, 1995 WL 702611, at *17 (Tenn. Crim. App. Nov. 30, 1995). Justice White, however, expressed the view that while there was sufficient evidence of premeditation, there was insufficient evidence of deliberation as defined in Tennessee law and thus the defendant could be retried for a lesser crime, but not first degree murder. See *id.* at *9 (White, J., concurring and dissenting).

³⁴ After the election, Governor Sundquist said voters defeated White because they "believe it's wrong that we haven't enforced the death penalty in 36 years, despite the overwhelming need and support for it." Tom Humphrey, *White Ouster Signals New Political Era: Judges May Feel 'Chilling Effect'*, Knoxville News-Sentinel, Aug. 4, 1996, at A1. Republican Party chair Jim Burnett said, "The public was fed up. We've had a death penalty since 1976 and we haven't had an execution yet." John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50, 51; see also Editorial, *Litmus Test vs. the Law*, Nashville Tennessean, Aug. 6, 1996, at 6A ("Without a doubt, many of the voters who voted against White were expressing their frustration with the fact that Tennessee has not executed a death row inmate in 36 years.").

³⁵ See Gibeaut, *supra* note 34, at 51.

³⁶ See Jeff Woods, *Public Outrage Nails a Judge*, Nashville Banner, Aug. 2, 1996, at A1 (reporting that Governor Sundquist and Senators Fred Thompson and Bill Frist all announced their opposition to White). Frist had first been elected to the United States Senate by attacking the incumbent senator for voting to confirm Rosemary Barkett for a federal judgeship and for supporting a federal district judge who granted habeas corpus relief in a capital case. See Political Notebook, *Com. Appeal* (Memphis, Tenn.), Oct. 8, 1994, at 3B.

³⁷ Advertisement, *Feinstein versus Huffington: Here are the facts in a real murder case. See if you agree with the judge's decision*, L.A. Times, Sept. 22, 1994, at A17 [hereinafter *Huffington advertisement*].

discrimination explained Dougan's actions—so she let him off the hook.³⁸

The advertisement described the facts of two other cases and then compared Judge Barkett with former California Chief Justice Rose Bird, who was voted off the California Supreme Court in 1986, before concluding that "Michael Huffington strongly *opposes* soft-on-crime judges like Rosemary Barkett and Rose Bird."³⁹ The Dougan case was cited later by Robert Dole when he nominated Barkett for his "judicial Hall of Shame."⁴⁰

In truth, Judge Barkett concurred in a dissent in the Dougan case written by Justice Parker Lee McDonald,⁴¹ one of the most conservative justices on the Florida Supreme Court. A majority of the Court upheld the death sentence.⁴² No one let Jacob Dougan "off the hook," as alleged in the Huffington advertisement and later by Dole.⁴³

Justice Penny White is not alone. Justice James Robertson was voted off the Mississippi Supreme Court in 1992. His opponent in the Democratic primary ran as a "law and order candidate" with the support of the Mississippi Prosecutor's Association.⁴⁴ Robertson was attacked for a concurring opinion he had written expressing the view

³⁸ Id.

³⁹ Id.

⁴⁰ Robyn Blumner, *Dole's Slap at the 'Purist Jurist'*, St. Petersburg Times, Apr. 28, 1996, at 1D, available in 1996 WL 7113184.

⁴¹ See *Dougan v. State*, 595 So. 2d 1, 6-8 (Fla. 1992) (McDonald, J., dissenting) (asserting that death sentence should be vacated and that Dougan's sentence should be reduced to life imprisonment).

⁴² See id. at 6 (finding no reversible error and affirming death sentence).

⁴³ The Huffington advertisement misrepresented Judge Barkett's position in the other two cases as well. The advertisement told readers that Barkett voted in *Adams v. State*, 543 So. 2d 1244 (Fla. 1989), to "spare the life of the killer of an eight-year-old girl because he had 'learning problems.'" Huffington advertisement, *supra* note 37. However, Barkett dissented from the decision in *Adams* because of the trial judge's failure to instruct the jury that it could consider nonstatutory mitigating circumstances in deciding punishment. See *Adams*, 543 So. 2d at 1249-50 (Barkett, J., dissenting). Huffington's advertisement also told voters that in *Hall v. State*, 614 So. 2d 473 (Fla. 1993), Barkett voted against the death penalty for a man who had "raped, beaten and killed a woman" because "[t]he killer had experienced 'emotional deprivation.'" Huffington advertisement, *supra* note 37. In a dissent expressing the view that imposition of the death penalty on a mentally-retarded person violated the Florida Constitution, Judge Barkett pointed out that Freddie Lee Hall "has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader." *Hall*, 614 So. 2d at 479 (Barkett, C.J., dissenting).

⁴⁴ See David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 Miss. C. L. Rev. 1, 15-20 (1992) (discussing recent election that Justice Robertson lost due to partisan politics and campaign of misinformation). The resolution of the Prosecutor's Association asserted that Robertson's opponent "best represents the views of the law abiding citizens" and "will give the crime victims and the good, honest and law abiding people of this state a hearing at least as fair as that of the criminal in child abuse, death penalty and other serious criminal cases." Id. at 16 n.108.

LOS ANGELES TIMES

TUESDAY SEPTEMBER 22, 1996

A12

FEINSTEIN VERSUS HUFFINGTON

Here are the
facts in a real
murder case.

See if you
agree with the
judge's decision.

Jacob Dougan brutally killed a teenage boy named Steven Orlando. After the murder, Dougan sent a tape to the boy's mother describing her son's murder.

On the tape, Dougan said: "He was stabbed in the back, in the chest, and the stomach, it was beautiful. You should have seen it. I enjoyed every minute of it. I loved watching the blood gush from his eyes."

Jacob Dougan was convicted and sentenced to death. But on appeal in 1992, a judge named Rosemary Barkett voted to spare Dougan the death penalty. Judge Barkett believed that a lifetime of discrimination explained Dougan's actions — so she let him off the hook.

Why is this important? Earlier this year, Judge Rosemary Barkett was promoted — to the second highest court in America. And Dianne Feinstein voted for Barkett twice — on March 17 and April 14, 1994.

The Dougan case is not an isolated example. In *Adams vs. State* (1989), Barkett voted to spare the life of the killer of an eight-year-old girl because he had "learning problems" growing up. In *Hall vs. State* (1993), Barkett voted against the death penalty for a man who had raped, beaten and killed a woman. The

reason? The killer had experienced "emotional deprivation" throughout his life.

Feinstein's votes for soft-on-crime Liberal judges should not come as any surprise. Feinstein was one of Judge Rose Elrod's fundraising chairmen, and had Judge Elrod swear her into office three times.

When she served on the Parole Board, Feinstein gave early release to 16 convicted killers. Overall, Feinstein voted to release 762

felons. More than half wound up back in prison after Feinstein paroled them. Some had violated parole as many as six times, but Feinstein let them out again.

Also while serving on the Parole Board, Feinstein called for the abolition of the death penalty,

according to *The San Francisco Chronicle*. Feinstein strongly opposed the death penalty until she decided to run for public office.

Remember these facts when you hear Feinstein talk about being tough on criminals.

And also remember that Mike Huffington strongly opposes soft-on-crime judges like Rosemary Barkett and Rose Elrod. Huffington co-chairs the tough "Three Strikes and You're Out" initiative.

And Mike Huffington has never wavered in his support for the death penalty.

"He was stabbed
in the back, in
the chest, and
the stomach, it
was beautiful."

HUFFINGTON
UNITED STATES SENATE

Printed for the Superintendent of Documents

that the Constitution did not permit the death penalty for rape where there was no loss of life.⁴⁵ However, Robertson and his fellow justices who had taken an oath to uphold the Constitution of the United States had no choice. The United States Supreme Court had held ten years earlier that the Eighth Amendment did not permit the death penalty in such cases.⁴⁶

Robertson's opponents also told Mississippi voters that Robertson believed "a defendant who 'shot an unarmed pizza delivery boy in cold-blood' had not committed a crime serious enough to warrant the death penalty."⁴⁷ In truth, Justice Robertson filed a dissent in the case expressing the view that, because the trial court had failed to define the "heinous, atrocious or cruel" aggravating factor for the jury, the case should be remanded for a new sentencing hearing.⁴⁸ He did not suggest that the crime was not serious enough to warrant a death sentence on remand.

The eventual disposition of the case vindicated the position taken in dissent by Justice Robertson. The United States Supreme Court granted certiorari and remanded the case to the Mississippi Supreme Court because it could not discern how the majority of the Mississippi court had resolved the issue.⁴⁹ On remand, the Mississippi Supreme Court reversed the case and remanded it to the trial court for a new sentencing hearing.⁵⁰ Thus, had Justice Robertson's view prevailed on the initial appeal, it would have saved four years and considerable costs before the resentencing. If anything, Justice Robertson's dissent is an indication of his abilities as a judge, not a basis for removing him from the court.

But a critic can take a single decision—even, as in Justice Penny White's case, a decision of her court that she did not write—and ig-

⁴⁵ See *Leatherwood v. State*, 548 So. 2d 389, 406 (Miss. 1989) (Robertson, J., concurring) (expressing view that there was "as much chance of the Supreme Court sanctioning death as a penalty for *any* non-fatal rape as the proverbial snowball enjoys in the nether regions"). An editorial attacking the decision was reprinted in advertisements for Robertson's opponent. See *Court's Ruling Morally Repugnant*, *Clarion-Ledger* (Jackson, Miss.), July 2, 1989, reprinted in *Campaign Supplement*, On March 10, Vote for Judge James L. Roberts, Jr. for the Mississippi Supreme Court, *N.E. Miss. Daily J.*, Mar. 7, 1992, at 6.

⁴⁶ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that death penalty for crime of rape is disproportionate and excessive punishment in violation of Eighth Amendment where victim is not killed).

⁴⁷ Case, *supra* note 44, at 18.

⁴⁸ See *Clemons v. State*, 535 So. 2d 1354, 1367-68 (Miss. 1988) (Robertson, J., dissenting), *rev'd sub nom. Clemons v. Mississippi*, 494 U.S. 738 (1990), remanded for resentencing, 593 So. 2d 1004 (Miss. 1992).

⁴⁹ See *Clemons*, 494 U.S. at 752 (remanding case because it was "unclear" whether Mississippi Supreme Court had weighed evidence appropriately).

⁵⁰ See *Clemons*, 593 So. 2d at 1007.

nore everything else a judge has done during her tenure on the bench. Rosemary Barkett participated in more than 12,000 decisions during her eight years on the Florida Supreme Court and wrote more than 3000 opinions.⁵¹ Yet she was condemned for a dissenting opinion that another member of the court wrote.

Decisions in criminal cases are most susceptible to such distortion. Much of what judges do in other types of cases is of little concern to anyone except the litigants. But one can portray a judge's decision with regard to bail, the suppression of evidence or imposition of sentence—no matter how little discretion the judge had under the law—as putting the entire community at risk. A single decision in one of these cases can be used to distort the entire career of a judge.

Judges in some courts are called upon to make thousands of bail decisions in the course of their careers. Often those decisions are made quickly and with incomplete information. Many citizens do not understand that the purpose of bail is to ensure the defendant's appearance, not to incapacitate him or her. Out of those thousands of decisions, someone released on bail will inevitably commit another crime and, sometimes, a serious one. Unfortunately, in making the bail decision, it is impossible to predict who those people will be. It is easy, however, for a politician in hindsight to criticize a judge for granting bail to someone who commits an offense while awaiting trial.

Similarly, judges presiding over criminal dockets are required to hear many motions that seek the suppression of evidence. The Fourth Amendment—what little is left of it⁵²—is still the law of the land. It serves important purposes in protecting the privacy of all citizens. But on occasion it may require the suppression of illegally obtained evidence. A trial judge—who has no authority under the law to overrule Supreme Court precedents—eventually will run across a bad search

⁵¹ See Blumner, *supra* note 40, at 1D.

⁵² See, e.g., *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (abolishing "mere evidence" rule, which had limited scope of searches and seizures to fruits and instrumentalities of crime); *Rakas v. Illinois*, 439 U.S. 128, 140-48 (1978) (abolishing "automatic standing" rule, which had allowed any defendant legitimately on premises to contest validity of search); *New York v. Belton*, 453 U.S. 454, 460 (1981) (allowing police to search, without warrant, entire passenger compartment and contents of any containers found in car upon arrest of occupant); *United States v. Leon*, 468 U.S. 897, 903-09 (1984) (establishing "good faith" exception to the exclusionary rule where police reasonably rely upon search warrant later found to be lacking in probable cause); see also Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. Cal. L. Rev. 1389, 1410-30 (1993) (describing impact of "war on drugs" on Fourth Amendment); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. Chi. Legal F. 237, 240-63 (describing erosion of Fourth Amendment protections due to "war on drugs").

and, if the judge follows his or her oath, will be required to suppress some evidence.

New York politicians have frequently castigated judges for their decisions on bail and suppression of evidence. The recent enactment of a death penalty statute will politicize the New York judiciary even more. Governor George E. Pataki already has demonstrated his support for capital punishment by attacking a prosecutor for refusing to seek the death penalty in a particular case and removing him from the case.⁵³ As in other states, New York judges will be savaged for any ruling adverse to the prosecution. Appellate judges will be attacked for any reversals of capital cases. Candidates for governor of New York, like their counterparts in California, Tennessee, and elsewhere, will run promising to appoint judges who will uphold the death penalty. In this way, the distortion of one judge's record can lead to the appointment or election of a replacement who guarantees not a dispassionate review of the facts and law in accordance with constitutional principles but specific results.

Since the Supreme Court's decision in *Roe v. Wade*,⁵⁴ candidates from both political parties have promised to appoint judges who would reach a certain result on the issue of abortion. State supreme court justices face the same litmus tests, as they must now determine, under state constitutions, the validity of various restrictions on the right to abortion.⁵⁵ However, the way to change constitutional law is by amending the Constitution, not by appointing judges who will produce a desired result.

Politicians promise results with regard to the outcomes of criminal cases as well. In 1986, the Governor of California, George Deukmejian, publicly warned two justices of the state's supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences.⁵⁶ Obviously, he did not know the legal issues presented by those cases; he was merely interested in results. He had already announced his opposition to Chief Justice

⁵³ See Rachel L. Swarns, Governor Removes Bronx Prosecutor from Murder Case, N.Y. Times, Mar. 22, 1996, at A1 (reporting that Pataki expressed worry that "the death penalty law would be put into legal peril" if District Attorney Robert T. Johnson refused to seek it in particular case).

⁵⁴ 410 U.S. 113, 164 (1973) (holding unconstitutional Texas statutes that prohibited abortions at any stage of pregnancy except to save life of mother).

⁵⁵ See Gerald F. Uelman, Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization, 72 Notre Dame L. Rev. (forthcoming May 1997) (describing widespread efforts by pro-life organizations to oust from office state supreme court justices who make unfavorable rulings).

⁵⁶ See Steve Wiegand, Governor's Warning to 2 Justices, S.F. Chron., Mar. 14, 1986, at 1.

Rose Bird because of her votes in capital cases.⁵⁷ Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat.⁵⁸ He opposed the retention of all three justices, all of whom lost their seats after a campaign dominated by the death penalty.⁵⁹ Deukmejian appointed their replacements in 1987.

After a decision by the Texas Court of Criminal Appeals reversing the conviction in a particularly notorious capital case, a former chairman of the state Republican Party called for Republicans to take over the court in the 1994 election.⁶⁰ The voters responded to the call, awarding Republicans every position they sought on the court that year.⁶¹

One of these candidates, Stephen W. Mansfield, promised certain results if elected. He ran for the Texas Court of Criminal Appeals on promises of greater use of the death penalty and the harmless error doctrine, as well as sanctions for attorneys who file "frivolous appeals especially in death penalty cases."⁶² Before the election, evidence surfaced that Mansfield had misrepresented his prior background, experience, and record,⁶³ that he had been fined for practicing law without a

⁵⁷ See Leo C. Wolinsky, Governor's Support for 2 Justices Tied to Death Penalty Votes, *L.A. Times*, Mar. 14, 1986, at 3 (explaining that Deukmejian's opposition to Chief Justice Bird stemmed from her decisions on capital cases).

⁵⁸ See Henry Unger, Will Vote Against Grodin, Reynoso, Deukmejian Says, *L.A. Daily J.*, Aug. 26, 1986, at 1 (reporting Deukmejian's decision to oppose confirmation of other two justices because of their apparent reluctance to affirm death sentences).

⁵⁹ See Frank Clifford, Voters Repudiate 3 of Court's Liberal Justices, *L.A. Times*, Nov. 5, 1986, § 1, at 8 (describing how Rose Bird's "box score" of 61 reversal votes in 61 capital cases became "constant refrain of the campaign against her," and how campaign commercials against other two justices in last month of race insisted "that all three justices needed to lose if the death penalty is to be enforced"); see also Philip Hager, Grodin Says He Was 'Caught' in Deukmejian's Anti-Bird Tide, *L.A. Times*, Nov. 13, 1986, at 13 (quoting defeated Justice Joseph R. Grodin as saying that he was defeated in "tide of opposition to the chief justice and frustration over the death penalty").

⁶⁰ See Janet Elliott & Richard Connelly, Mansfield: The Stealth Candidate: His Past Isn't What It Seems, *Tex. Law.*, Oct. 3, 1994, at 1. The case was *Rodriguez v. State*, 848 S.W.2d 141 (Tex. Crim. App. 1993).

⁶¹ See John Williams, Election '94: GOP Gains Majority in State Supreme Court, *Houston Chron.*, Nov. 10, 1994, at A29 (reporting "Republican sweep of contested races for [Texas's] highest civil and criminal courts").

⁶² Elliott & Connelly, *supra* note 60, at 1.

⁶³ Before the election, Mansfield admitted lying about his birthplace (he claimed to be born in Texas but was born in Massachusetts), the amount of time he had spent in Texas, and his prior political experience. See *id.*; see also Editorial, Do It Now, *Ft. Worth Star-Telegram*, Nov. 12, 1994, at 32, available in 1994 WL 4033647 (calling for reform of judicial selection system in Texas and for immediate challenge to Mansfield's election because he had "shaded the truth of virtually every aspect of his career"); Janet Elliott, Unqualified Success: Mansfield's Mandate: Vote Makes a Case for Merit Selection, *Tex. Law.*, Nov. 14, 1994, at 1 (reporting that Mansfield was unable to verify campaign claims regarding number of criminal cases he had handled and had portrayed himself as political novice despite twice having run for Congress unsuccessfully); Q & A with Stephen Mansfield:

license in Florida,⁶⁴ and that—contrary to his assertions that he had experience in criminal cases and had “written extensively on criminal and civil justice issues”—he had virtually no experience in criminal law.⁶⁵ Nevertheless, Mansfield received 54 percent of the votes in the general election, defeating the incumbent judge, a conservative former prosecutor who had served twelve years on the court and had been supported by both sides of the criminal bar.⁶⁶ After his election, the *Texas Lawyer* declared Mansfield an “[u]nqualified [s]uccess.”⁶⁷

Alabama Circuit Judge Mike McCormick sought reelection to the bench on the basis of advertisements which proclaimed: “Some complain that he’s too tough on criminals, AND HE IS . . . We need him now more than ever.”⁶⁸

Those who have a role in nominating or confirming judicial nominees also promise results. Candidates for office promise a certain kind of judge if elected and attack their opponents for decisions made by judges their opponents may have nominated or voted to confirm. For example, Bill Frist, in his successful campaign to unseat Tennessee Senator Jim Sasser, attacked Sasser for voting to confirm Rosemary Barkett for a seat on the U.S. Court of Appeals for the Eleventh Circuit and for having recommended the nomination of a federal district judge who, two months before the election, had granted habeas corpus relief to a death-sentenced man.⁶⁹ Frist appeared at a news conference with the sister of the victim in the case in which habeas relief had been granted.⁷⁰ After the victim’s sister criticized Sasser for recommending U.S. District Judge John Nixon for the federal bench,

‘The Greatest Challenge of My Life,’ *Tex. Law.*, Nov. 21, 1994, at 8 (printing postelection interview with Mansfield in which he “retracts” a number of statements made before and during interview). After the election, it was discovered that Mansfield had failed to report \$10,000 in past-due child support when he applied for his Texas law license in 1992. See *Child Support Allegations Threaten Judge Seat*, *Ft. Worth Star-Telegram*, Dec. 10, 1994, at 29, available in 1994 WL 4037619 (reporting that Mansfield had “jeopardized his seat” on Texas’s highest criminal court by failing to report past-due child support).

⁶⁴ See Williams, *supra* note 61, at A29 (reporting that Mansfield had admitted to paying \$100 fine for practicing law without license).

⁶⁵ See Elliott & Connelly, *supra* note 60, at 1. Mansfield received the support of victims’ rights groups. See *id.*

⁶⁶ See Elliott, *supra* note 63, at 1. Mansfield won 54% of the vote in the general election; his opponent, Judge Charles F. Campbell, received 46%. See *id.* Mansfield previously had won the Republican nomination for the seat, winning 67% of the primary vote in defeating John Cossum, a former state and federal prosecutor who was working as a criminal defense lawyer in Houston. See Elliott & Connelly, *supra* note 60, at 1.

⁶⁷ Elliott, *supra* note 63, at 1.

⁶⁸ Committee to Re-elect Judge Mike McCormick, *Birmingham News*, Nov. 4, 1994, at 4C (advertisement).

⁶⁹ See Political Notebook, *supra* note 36, at 3B (reporting that during his campaign, Frist had criticized Sasser’s support for Barkett).

⁷⁰ See *id.*

Some complain that
he's too tough on criminals,
AND HE IS...



We need him now more than ever.

RE-ELECT

Judge Mike

MCCORMICK

CIRCUIT JUDGE PLACE NO. 7

Paid Political ad by Committee to re-elect Judge Mike McCormick, Jim McCormick, Chairman, Birmingham, Alabama

Frist said that Sasser's vote to confirm Judge Barkett showed that he "still hasn't learned his lesson."⁷¹ In order to avoid such criticism, President Clinton has attempted to avoid nominating any judges who might be controversial and provide campaign fodder for his opponents.⁷²

Those who led some of the recent attacks upon judges have not been hesitant to acknowledge that their efforts are aimed at producing results by removing those with whom they disagree and by intimidating those who remain on the bench. Tennessee Governor Sundquist, in opposing the retention of Justice Penny White, promised that he would appoint only those who support the death penalty.⁷³ After Justice White was voted off the court, Governor Sundquist reiterated his pledge.⁷⁴ Governor Sundquist and other opponents of Justice White also made it clear that their successful campaign against her was expected to influence the remaining members of the court.⁷⁵

II

THE COSTS OF IRRESPONSIBLE CRITICISM

The bashing of judges, the removal of some from office, the efforts to stack courts with judges who will produce certain results, and, as in the case of President Clinton and the current Senate Judiciary Committee, the efforts to avoid putting any judges on courts who are

⁷¹ *Id.*

⁷² See, e.g., Barrett, *supra* note 25, at A16 (reporting that nomination of Peter Edelman to an appeals court seat in Washington was "jettisoned in the face of GOP opposition"); Harvey Berkman & Claudia MacLachlan, Don't Judge a Book . . . , Clinton's Picks—Not So Liberal, More Judges Are Minorities, Women, but Ike'd Like Them, *Nat'l L.J.*, Oct. 21, 1996, at A1 (reporting that "the president's willingness—some would call it haste—to withdraw controversial nominations has drawn criticisms from the left"); Ramona Ripston, Editorial, 'Judge Not . . .': Political Cowardice Doomed the Paz-McConnell Nominations, *L.A. Daily J.*, Feb. 3, 1995, at 6 (criticizing Clinton for abandoning two judicial nominees who faced opposition from right-wing organizations); David G. Savage, Dole Faults Clinton Judges, but Charge May Not Stick, *L.A. Times*, Apr. 20, 1996, at 15 (reporting that "[a]t the first sign of controversy, Clinton has usually moved to withdraw a disputed nomination").

⁷³ See Duren Cheek & Kirk Loggins, New Judges to Face Death-Penalty Test, *Nashville Tennessean*, July 27, 1996, at 1A (quoting Governor Sundquist as saying it is "absolutely true" he would not appoint judges opposed to death penalty).

⁷⁴ See Governor Pledges to Replace White with Get-Tough Judge, *Nashville Banner*, Aug. 20, 1996, at B-3 (reporting Governor Sundquist's promise to appoint judge who will support state's death penalty).

⁷⁵ See Humphrey, *supra* note 34, at A1 (reporting that Tennessee Conservative Union, which opposed White, would be researching records of justices to decide which ones to target in planning "Clear the Bench" campaign for next election); Kirk Loggins, Vote Called Warning to Other Judges, *Nashville Tennessean*, Aug. 3, 1996, at 1A (quoting Governor Sundquist as observing that other members of court "are going to be coming up for a yes-or-no vote, and if I were them I'd be a little worried").

subject to unfair attack as being "soft on crime," undermines the independence, integrity, and impartiality of the judiciary. A grievance similar to the one made against King George III in the Declaration of Independence could be leveled against those politicians who attack judges for their rulings: "He has made judges dependent on his Will alone, for the tenure of their offices"⁷⁶

In the current political climate, judges undoubtedly realize that by upholding the Bill of Rights in controversial cases they may be signing their own political death warrants. The costs extend far beyond those who are removed from office or denied promotion. The greatest threat to the rule of law are those judges who remain on courts and make compromises in order to stay in office or advance to a higher court. Once a judge has compromised his or her oath as a judge by refusing to enforce the law in order to stay in office, both the judge and the court have been irreparably diminished.

In addition, unfair criticisms and distortions discourage those who we would most want to be judges from seeking or taking the bench. After what happened to Justice White in Tennessee or Justice Robertson in Mississippi, why would any conscientious lawyer want to accept a seat on one of those courts, knowing that one opinion may be used to misrepresent everything he or she may do as a judge? Do we want as judges those who will violate the Canons of Judicial Ethics⁷⁷ before even taking office by promising certain results to the voters or an executive?

The credibility of the courts suffers when judges are perceived as giving in to political pressures. Regardless of why Judge Baer eventually changed his ruling with regard to the suppression of cocaine and heroin, there always will be the appearance that he backed down due to the barrage of criticism he received. Indeed, politicians who criticized him and called for his impeachment bragged that they had pressured federal judge Harold Baer into reversing his controversial ruling.⁷⁸ The defense lawyer in the case expressed the belief that the outside pressure influenced the judge and one scholar compared the reversal to "a baseball umpire who reverses his call when the crowd boos," adding, "[y]ou always fear it was the booing that influenced the umpire."⁷⁹

⁷⁶ The Declaration of Independence para. 11 (U.S. 1776).

⁷⁷ See Model Code of Judicial Conduct Canon 5A(d)(i) (1990) (prohibiting judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office").

⁷⁸ See Barrett, *supra* note 25, at A16 (reporting that "Republicans this week are crowing that they bullied" Baer into reversing ruling).

⁷⁹ John M. Goshko & Nancy Reckler, *Controversial Drug Ruling Is Reversed: N.Y. Judge Now Finds Evidence Admissible*, Wash. Post, Apr. 2, 1996, at A1.

The overall quality of justice is affected when courts are composed of judges who are there to produce certain results. The California Supreme Court, which was once one of the most distinguished state supreme courts in the country, is now an undistinguished death mill known mostly for its various refinements of the harmless error doctrine. One scholar has pointed out that the court's harmless error decisions reflect less a "jurisprudential theory" than a "desire to carry out the death penalty."⁸⁰ The steady erosion of the Fourth Amendment's protection against unreasonable searches and seizures in the quest to prosecute drug offenders has diminished everyone's right to privacy and security.⁸¹

Most fundamentally, however, when judges must depend upon majority approval, courts are simply unable to perform one of their most important constitutional roles, described by Justice Black as serving as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are . . . victims of prejudice and public excitement."⁸² Today, as politicians in both major political parties compete to see who can be the toughest on those who are most defenseless—poor people accused of crime, immigrants, and those on welfare—there is a particularly urgent need for independent courts which will rely on the Constitution alone to decide whether politically popular measures pass constitutional muster.

Ensuring independent courts in the current climate requires positive action. Given the realities of our legal system and the structure of our judiciary, such positive action must come primarily from political officeholders, members of the Bar, and members of the press—persons whose voices can be heard and who are in a position to effect the changes that must be made.

III

THE NEED FOR LEADERSHIP AND SYSTEMS THAT PROTECT JUDICIAL INDEPENDENCE

There is little that judges can do when attacked. When Judge Baer was attacked, Chief Judge Jon O. Newman and three senior judges of the United States Court of Appeals for the Second Circuit issued a statement warning that the attacks "threaten to weaken the

⁸⁰ C. Elliot Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. Rev. 41, 89 (1991).

⁸¹ See *supra* note 52.

⁸² *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

constitutional structure of this nation.”⁸³ Chief Justice Rehnquist, without mentioning Judge Baer, Senator Dole, or President Clinton, defended judicial independence in a speech at American University and reminded his audience that judges were not to be removed from their jobs because of unpopular rulings.⁸⁴ Justice John Paul Stevens briefly addressed the pressures on judges in his speech to the American Bar Association meeting last August.⁸⁵ But judges do not command the media attention of a presidential candidate, a sitting president, a mayor, or a senator. Fortunately, judges do not start media “feeding frenzies.” Moreover, judges are prohibited from discussing pending cases by certain codes of judicial ethics.⁸⁶

However, it is imperative that someone tell the rest of the story about the decision in a particular case, put a single ruling by a judge in the broader perspective of a career, and, most importantly, point out how the role of judges is different from that of legislators or executives. Responsible public officials and members of the Bar must step forward and respond to irresponsible attacks on judges. There has been a dearth of leadership in this area.

Some Republican officeholders should have responded to Senator Dole’s call for the impeachment of Judge Baer by pointing out that it was irresponsible. They should have reminded Senator Dole that impeachment of a federal judge is authorized only for a most serious offense after a very careful procedure. Where was Senator Orrin Hatch, a lawyer and the chairman of the Senate Judiciary Committee? Unfortunately, he was not defending the independence of the judiciary. After Judge Baer reversed his ruling, Senator Hatch said, “Unfortunately, this sort of attention cannot be brought to bear on all of the other soft-on-crime decisions issued by other activists that President Clinton has appointed.”⁸⁷ Similarly, those in the Democratic Party should have taken President Clinton—a former constitutional law professor—to task for the suggestion that he might call for Judge Baer’s resignation because he disagreed with Baer’s decision.

⁸³ Van Natta, *supra* note 15, at B1. The statement continued: “These attacks do a grave disservice to the principle of an independent judiciary and, more significantly, mislead the public as to the role of judges in a constitutional democracy.” *Id.*

⁸⁴ See Joan Biskupic, *A Declaration of Independence: Though Open to Criticism, Judges’ Rulings Must Not Jeopardize Their Jobs*, *Rehnquist Says*, *Wash. Post*, Apr. 10, 1996, at A17.

⁸⁵ See Stevens, *supra* note 13, at 12-13 (discussing various problems inherent in practice of electing judges).

⁸⁶ See, e.g., 2 *Guide to Judicial Policies & Procedure* ch. 1, Canon 3(A)(6) (Conference Comm. on Codes of Conduct, Administrative Office of U.S. Courts 1994) (providing that “[a] judge should avoid public comment on the merits of a pending or impending action”).

⁸⁷ Barrett, *supra* note 25, at A16.

When Senator Dole was nominating Rosemary Barkett for his "judicial hall of shame," where was Republican Senator Connie Mack, who supported Barkett's nomination to the United States Court of Appeals? Senator Mack could have told his former colleague of her distinguished career as a jurist, including service as the Chief Justice of Florida. When Senator Dole singled out a few decisions for criticism, Senator Mack could have reminded him that Barkett voted to uphold the death sentence in 275 cases, even on occasions when the court reversed, and that she was endorsed for retention in 1992 by the Fraternal Order of Police, the Police Officers Benevolent Association, and the Peace Officers Association.⁸⁸ But, much more important, Senator Mack could have taught Senator Dole and everyone else in his party a lesson about the importance of judicial independence and the responsibility of all of us, including public officeholders, to help preserve it.

The Bill of Rights is regularly denigrated in political discourse in the United States today as nothing more than a collection of technicalities. Someone needs to step forward and remind everyone that the procedural guarantees of the Bill of Rights are fundamental principles that distinguish the rule of law from the rule of the lynch mob.⁸⁹

Where is the Bar with all of its committees upon committees? Why is there not a strike force, a rapid response team, to deal with these attacks—not so much to defend individual judges, but to put things in proper perspective and to point out the importance of the independence of the judiciary? One would think that the highest priority of the American Bar Association would be to protect the independence and the integrity of the courts. Instead of harassing the law school at the City University of New York for its innovative programs to produce more desperately needed public interest lawyers,⁹⁰ why doesn't the ABA educate Americans about the limits of judicial decisionmaking, the fact that judges do not select their cases, that their decisions are narrowly circumscribed by the law, and that the law in

⁸⁸ See Blumner, *supra* note 40, at 1D.

⁸⁹ See, for example, the comment of former Nebraska Supreme Court Justice Norman Krivosha: "I studied those technicalities in school, . . . they were [portions of] the Constitution of the United States." Sheila MacManus, *Changes in Code of Judicial Conduct, Judicial Campaigns and Alcohol Abuse Among Topics Debated at 11th National Conference*, 72 *Judicature* 185, 185 (1988) (alteration in original) (quoting Justice Norman Krivosha, Address Opening the 11th National Conference for Judicial Conduct Organizations (Sept. 1988)).

⁹⁰ See Edward A. Adams, *ABA Sees Lingering Problems at CUNY Law School*, N.Y. L.J., Apr. 22, 1996, at 1 (describing ABA report which criticized public interest, practice-oriented curriculum at CUNY Law School as insufficient).

certain instances requires the grant of bail, or the suppression of evidence, or other decisions which may not be popular?

Several steps should be taken to insulate judges from political pressures. The first and most fundamental is to end direct elections and retention elections for judicial office. The elimination of judicial elections is needed not only to prevent the problems discussed here, but also because of the increasing tendency of special interest groups to buy judges by spending huge sums on judicial campaigns.⁹¹ The recent election in Tennessee demonstrates that retention elections are no better than direct elections. Indeed, retention elections are particularly susceptible to completely negative attacks against a judge with no consideration of an alternative.

Executives should appoint judges on the basis of merit from a list of nominees provided by a nominating committee. They should be appointed for long terms or for life. At the end of the term, the judge should be evaluated by a judicial qualifications commission based upon the entire tenure in office. This type of system is employed in the District of Columbia, where a commission submits three names to the President, who appoints a judge from the list to the Superior Court for a fifteen-year term.⁹²

This type of merit selection of judges will be true merit selection only if there is diffuse citizen input and involvement in the nominating process. The members of the nominating committee must be appointed by various officeholders so that neither the executive nor the Bar dominates the process.

Such a system will provide some insulation, but it is of course not guaranteed always to produce good judges. Any system is only as good as the honor of the people in charge of it. Regardless of what

⁹¹ See, e.g., John Cornyn, *Ruminations on the Nature of Texas Judging*, 25 St. Mary's L.J. 367, 378 (1993) (Cornyn, a justice of the Texas Supreme Court, stated that "[t]he gravest concern that inheres in the elective system . . . is that judicial candidates are compelled to raise campaign funds: money and judges simply do not mix."); Robert D'Agostino, *The Decline of the Law in the Texas Supreme Court*, 2 Benchmark 171, 171 (1986) (stating that Texas courts have "ignored precedent, invalidated on Texas constitutional grounds long-accepted legislative enactments, interpreted Texas statutes so as to render them meaningless, and glossed over and misinterpreted fact findings of trial courts, all in pursuit of desired results"); Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 Tex. Tech L. Rev. 525, 545-52 (1992) (discussing rising campaign costs in Texas judicial elections); Barry F. McNeil, *State Judges: Merit Selection, Not Partisan Politics*, Litigation, Summer 1996, at 1, 1 (describing costs of judicial campaigns and efforts of various groups to elect judge of their choice); Robert F. Utter, *Selection and Retention—A Judge's Perspective*, 48 Wash. L. Rev. 839, 843-45 (1973) (noting extraordinary campaign costs of judicial elections in Washington and observing that lawyers who supported victor's opponent in judicial campaign subsequently have reason to question legitimacy of judgments made by judges).

⁹² See D.C. Code Ann. §§ 11-1501, 11-1502 (1981).

system is employed, there will still be presidents, governors, and mayors promising to obtain certain results with their judicial appointees. Thus, whatever system is employed, it will be essential for politicians, bar leaders, and journalists to remind citizens of the value of independent courts.

There is much that can be done. Those who have the respect of those in politics, journalism, and the Bar should express disapproval of unfair attacks and efforts at intimidation of judges. Those who have the ear of a governor or a mayor should caution them that they have gone too far, that their actions are irresponsible. Whenever a politician launches an *irresponsible* attack on a judge's decision or calls for impeachment or replacement, all of us have a duty to write that official a letter expressing our disapproval. Bar associations should create strike forces to tell citizens in various ways—through press conferences, reports, op-ed pieces, letters to the editor, and in public forums—about the role of the courts and the importance of the independence of the courts. Law schools must instill in their students respect for the Bill of Rights and the rule of law.

Within individual cases, judges must disqualify themselves in cases in which they cannot be fair and impartial due to political pressures.⁹³ And litigants must move for the disqualification of judges who come under such pressures or have engaged in campaigns which raise questions about their impartiality. As Justice Stevens pointed out at the ABA meeting, "[a] campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases."⁹⁴

IV CONCLUSION

An example of the leadership that is missing in the United States was provided recently by President Nelson Mandela of South Africa. When the Constitutional Court of South Africa struck down a law delegating broad powers to his Administration, President Mandela immediately made a public announcement that the court had spoken and its decision must be implemented. Unless we heed this lesson, some may applaud the results reached by the courts in the short run, but justice will not be done.

⁹³ 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, 822-25 (1995) (noting that although law of judicial disqualification and due process provide for disqualification of judges who preside over cases in which political considerations could be factor, courts fail to apply law properly).

⁹⁴ Stevens, *supra* note 13, at 12; see also Bright & Keenan, *supra* note 93, at 822-25.

APPENDIX A



Monday afternoon

Dear

78 year-old Ethel Johnson lay dying in a pool of blood.

Stabbed in the heart, lungs, and liver, she fought back as best she could.

Her hands were sliced to ribbons as she tried to push the knife away.

And then she was raped.

Savagely. Brutally.

This poor woman suffered horrible tortures that I cannot even describe in print.

For a long time she lay on the floorboard of her car, clinging to life.

Finally, mercifully, she breathed her last.

Miss Johnson's attacker was arrested, convicted by a jury, and sentenced to death.

But her murderer won't be getting the punishment that he deserves.

Thanks to Penny White.

You may not know who Penny White is.

She's not exactly a household word.

But she is one of the most powerful officials in Tennessee.

845 Oak Street ★ Chattanooga, TN 37403 ★ 423/756-9660
Lloyd C. Daugherty, Chairman ★ John M. Davies, President

Page Two

Penny White is a justice of the Tennessee Supreme Court.

And she voted to overturn the death sentence of Miss Johnson's murderer.

Incredibly, she said 78 year-old Miss Johnson's rape was not "serious physical abuse."

Not serious! Not physical! Not abuse!

If the savage rape and bloody murder of a helpless 78 year-old woman is not "serious physical abuse" then what is???

This wasn't the first time her attacker had struck.

No indeed.

He was an escapee from a Mississippi prison where he was already serving a life sentence for another murder.

Yet Justice White voted to overturn his conviction.

Not on the evidence. Not because there was any doubt that he was the actual killer.

His conviction was overturned because Justice White said rape is not "serious physical abuse."

Now, Justice White is asking for your vote.

She wants to remain on the State Supreme Court.

She wants you to vote "Yes" for her in August.

"Yes" so she can free more and more criminals and laugh at their victims!

That's just plain WRONG!

Tennesseans must stand up and vote NO on August 1st.

NO to judges who allow the rape and murder of 78 year-old women to go unpunished.

NO to judges who re-write the law according to their personal views.

And NO to Penny White.

Unfortunately, the other two Supreme Court justices who voted to overturn the death sentence of Miss Johnson's killer are not up for election this year.

Penny White is the only judge we can send a message to.

We must do everything we can to defeat Justice White at the polls on August 1st.

Page Three

Here's what The Tennessee Conservative Union Campaign Fund will do with your help:

1. Run radio and newspaper ads exposing Justice White's shameful Pro-Criminal voting record.
2. Mail 100,000 Fact Kits to citizen leaders.
3. Print 500,000 postcards for "get out the vote" efforts.

Our budget for this project is \$45,000.

That's a lot of money to us. More than we have ever spent on a statewide race like this.

And frankly, it will not be easy to defeat Justice White.

- * Every trial lawyer in the state will be pushing for her.
- * Big Labor Unions will give her tons of cash.
- * The American Civil Liberties Union loves her.
- * Liberal Newspapers will endorse her.

But she still has to be voted on by the people.

And that's where we must make our stand.

Here's what I need for you to do right now.

1. RUSH the enclosed Emergency Reply Form back to me so I know I can count on you.
2. Send an Emergency contribution of \$25, \$50, \$100, \$500 or even \$1,000 back to me to help pay for this project.

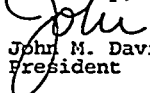
This emergency campaign was not in our budget this year.

I obviously had no way of knowing Justice White would turn out to be as Liberal as she has.

But I cannot sit back and do nothing while one of the most liberal judges in the entire country is given even more power!

Please, I hope and pray I can count on your support to defeat Justice White on August 1st.

Sincerely,


John M. Davies
President

P.S. Justice White already has her campaign in full swing. We must move quickly to organize the opposition. Please let me hear from you today.

REPLY MEMO

TO: John Davies
Tennessee Conservative Union Campaign Fund
845 Oak Street
Chattanooga, Tenn. 37403

FROM:

Dear John,

() I agree that we must get rid of liberal judges like Penny White who let murderers off to roam our streets and kill again.

() To help you pay for this Emergency campaign to defeat Penny White, I've enclosed my donation of:

___ \$30 ___ \$50 Other \$___

The Tennessee Conservative Union Campaign Fund is a political campaign committee registered by the State of Tennessee. Because TCUCF works to defeat liberals and elect conservatives to public office, donations cannot be tax deductible.

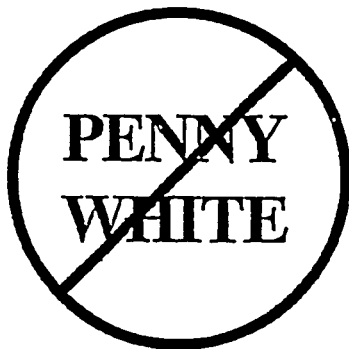
JLY-TCU-EX

APPENDIX B

Tennessee Republican Party
P.O. Box 150368
Nashville, TN 37215-0368



JUST SAY NO!



Vote for Capital Punishment by
Voting NO on August 1st for Supreme Court Justice Penny White

PENNY WHITE'S LIBERAL RECORD...

puts the rights of criminals before the rights of victims.

State v. Odom

Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Penny White felt the crime wasn't heinous enough for the death penalty - so she struck it down.

State v. Wallen

In This case, Penny White voted that John Henry Wallen shouldn't be tried for first degree murder when he shot to death Tennessee Highway Patrolman Doug Tripp. Penny White believed this despite Wallen's confession that "I meant to kill him. I shot the rifle empty."

State v. Jones

In 1994, Edward Jones sexually assaulted a four year-old girl. Despite the child's graphic heart-breaking testimony of what Jones did to her, Penny White voted to reverse Jones aggravated sexual battery conviction.

These are just a few of the tragic examples where year after year and case after case

PENNY WHITE'S LIBERAL RECORD

Puts the rights of criminals before the rights of victims.

As you can see, Penny White's record as a judge shows a pattern of judicial activism and a clear pro-defendant judicial philosophy. She is far too liberal for the average Tennessean. The above cases are examples of a number of opinions and Appellate Court decisions rendered by Judge White that most Tennesseans will find totally offensive.

A strong "NO" vote on August 1 sends a message that law-abiding Tennesseans feel it is time to get tough on crime. Our State law provides for the death penalty; and we need judges that will not stand in its way when the criminal clearly deserves it. Tennesseans are fed up with judges that consider the rights of criminals over the rights of their innocent victims.

This is an issue that clearly cuts across party lines. We ask that you join with other concerned citizens, Democrats, Independents as well as Republicans in this effort to put the rights of victims ahead of the rights of criminals. Voters should just say NO to Penny White.

Jim Burnett, Chairman