

Targeted campaigns provoke judges to cater to majority sentiment on the death penalty

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While it may seem that judges in nonpartisan elections would be less influenced by popular majority opinion, a Princeton University-led report by the Woodrow Wilson School of Public and International Affairs finds the opposite is true.

On hot-button issues like the death penalty, state supreme court justices in the United States are more likely to side with the public majority sentiment, the researchers report in the *American Political Science Review*. This occurs only after moneyed interest groups begin pushing for or against specific judicial stances – a phenomenon that began in the 1970s called "new-style campaigning."

"Historically, judicial elections attracted little to no media attention or voter interest, but that changed in the late 1970s when new-style campaigns emerged," said Brandice Canes-Wrone, the Donald E. Stokes Professor of Public and International Affairs and professor of politics at the Woodrow Wilson School. "These campaigns, which have encompassed a broad range of issues from abortion to crime, brought about a new and politicized era for judicial elections. However, little scholarly work has investigated how and to what degree."

One of the first examples depicting the influence of this strategy was seen in 1986 when, after being targeted by an interest group for their death penalty votes, three California Supreme Court justices were defeated in a statewide election. The case went down in history and Rose Bird – the first female justice and first female chief justice – became the

only chief justice to be removed by office by voters.

"For some voters, an ad attacking a judge's stance on the death penalty, like that seen in 1986, might be the only information they receive before voting," said Canes-Wrone. "So, the influence of this campaigning strategy is pretty powerful. In this study, we wanted to determine not only how it played a role in judicial behaviors but how that might have varied over time."

With Tom Clark from Emory University and Jason P. Kelly from Virginia Tech, Canes-Wrone constructed the largest dataset of its kind. Spanning 27 years, their compilation contains 12,000 votes from more than 2,000 cases. The researchers examined cases from 1980 through 2006, a choice that was deliberate and strategic, Canes-Wrone said. This time frame included several states that "switched over" to a new judicial selection system, so the researchers could examine judicial behaviors before and after a switch. The researchers studied four types of selection systems across multiple states:

- a partisan election in which party labels (such as Republican or Democrat) appear on the ballot;
- a contestable nonpartisan election without party labels on the ballot;
- a commission-retention system under which a commission of lawyers, politicians and other unelected officials consider applicants and recommend a few candidates to the governor (after initial appointment, these judges are subject to a yes or no by the public); and
- a reappointment system, under which judicial candidates are subject to reappointment by the legislature and/or governor.

Canes-Wrone and the research team identified every death sentence appealed to a state's supreme court during the 27-year span. For states

with more than 100 appeals, the researchers drew 100 cases at random to avoid skewing data. For states that switched their judicial election system during the 27-year period, the authors allowed for up to 100 cases before the switch and 100 after. (The researchers reviewed appeals only in states where the death penalty is legal.)

"Those 'switcher states' are extremely important and provide us with direct evidence of how a state – and even an individual judge – can transform as a result of a system change," said Canes-Wrone. "You can see that a change in the system really trickles down, right to the judge."

Before testing their hypothesis, the researchers had to first take into account the public opinion surrounding the death penalty. They found that no death penalty cases occur in a year when the majority of the state's residents don't support it. Also, capital punishment has decreased in popularity over the last decade.

The researchers also studied the presiding judges' party affiliations and whether race or ethnicity of the defendants may have played a role in a death penalty decision. Past research has indicated that a judge's ideologies are reflected in whether he or she chose to impose the death penalty. The researchers verified party affiliation for 95 percent of the judges. They also made efforts to account for the race and ethnicity of the defendant and victims of the cases as well as the homicide rates for the year the case was decided based on research suggesting that crime rates affect judicial behavior.

Overall, the results suggest that the incentives facing judges have changed with the rise of new-style campaigns. After the 1986 defeats in California, judicial behaviors began following patterns that social-science theories predicted. The rise of expensive, policy-oriented judicial campaigns has indeed provoked judges to cater to majority opinion in terms of the death penalty – both in judicial races and penalty

rulings – especially in the most low-information election environments.

"There is reason to believe that the larger incentives may permeate decision making on a variety of these hot-button issues from tax policy to same-sex marriage to collective bargaining," said Canes-Wrone. "The fact that such tactics are used arguably creates incentives for judges to be mindful of public opinion.

"If reformers want to remove public influence from judging, then moving to a nonpartisan election system will not achieve this goal," Canes-Wrone said. "Indeed, on a hot-button issue like the [death penalty](#), such a move will actually have the opposite impact."

More information: The paper, "Judicial Selection and Death Penalty Decisions," was published in the February 2014 issue of the *American Political Science Review*.

Provided by Princeton University

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