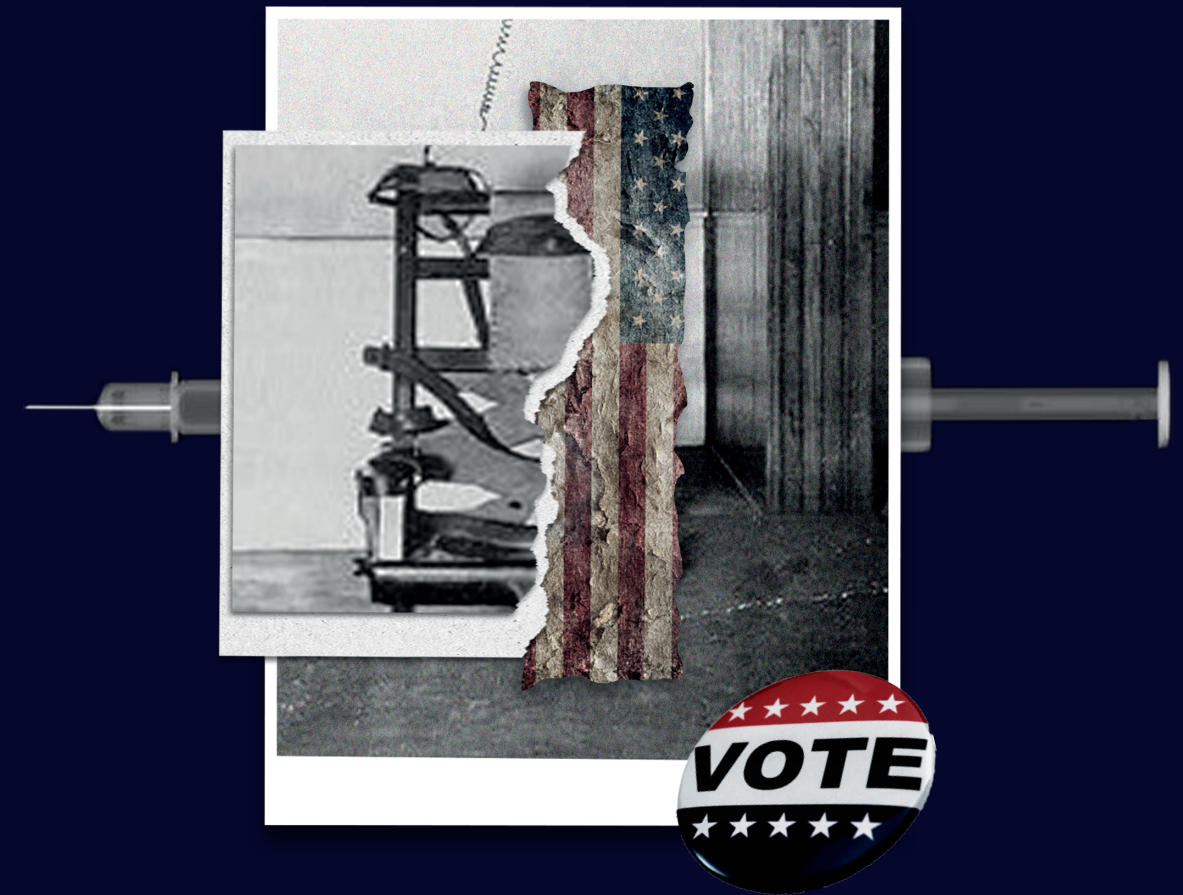


LETHAL ELECTION



How the U.S. Electoral Process
Increases the Arbitrariness of
the Death Penalty

Death Penalty Information Center

A Report by the Death Penalty Information Center

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The **Death Penalty Information Center** is a national non-profit organization whose mission is to serve the media, policymakers, and the general public with data and analysis on issues concerning capital punishment and the people it affects. We do not take a position on the death penalty itself but we are critical of problems in its application. Further sources for facts and quotations are available upon request. The Center is funded through the generosity of individual donors and foundations, including the Roderick and Solange MacArthur Justice Center; the Fund for Nonviolence; M. Quinn Delaney; and the Tides Foundation. Funding for the Center's Legal Fellow position was provided in part by the UC Berkeley School of Law. The views expressed in this report are those of the Death Penalty Information Center and do not necessarily reflect the opinions of its donors.

EXECUTIVE SUMMARY: KEY FINDINGS



Elected supreme court justices in Georgia, North Carolina, and Ohio are twice as likely to affirm death penalty cases during an election year than in any other year. This effect is statistically significant when controlling for the number of cases each year.



Changing public opinion means that zealous support for the death penalty is no longer a litmus test for elected officials in many death penalty jurisdictions. Today's elections feature viable candidates who criticize use of the death penalty and pledge reforms or even non-use, reflecting the significant decline in public support for the death penalty.




Elected governors were more likely to grant clemency in the past when they did not face voters in an upcoming election. Concerns about voter "backlash" have eased today with declining public support and low numbers of new death sentences and executions, and have led to an increased number of prisoners benefiting from clemency grants, especially mass grants, in recent years.

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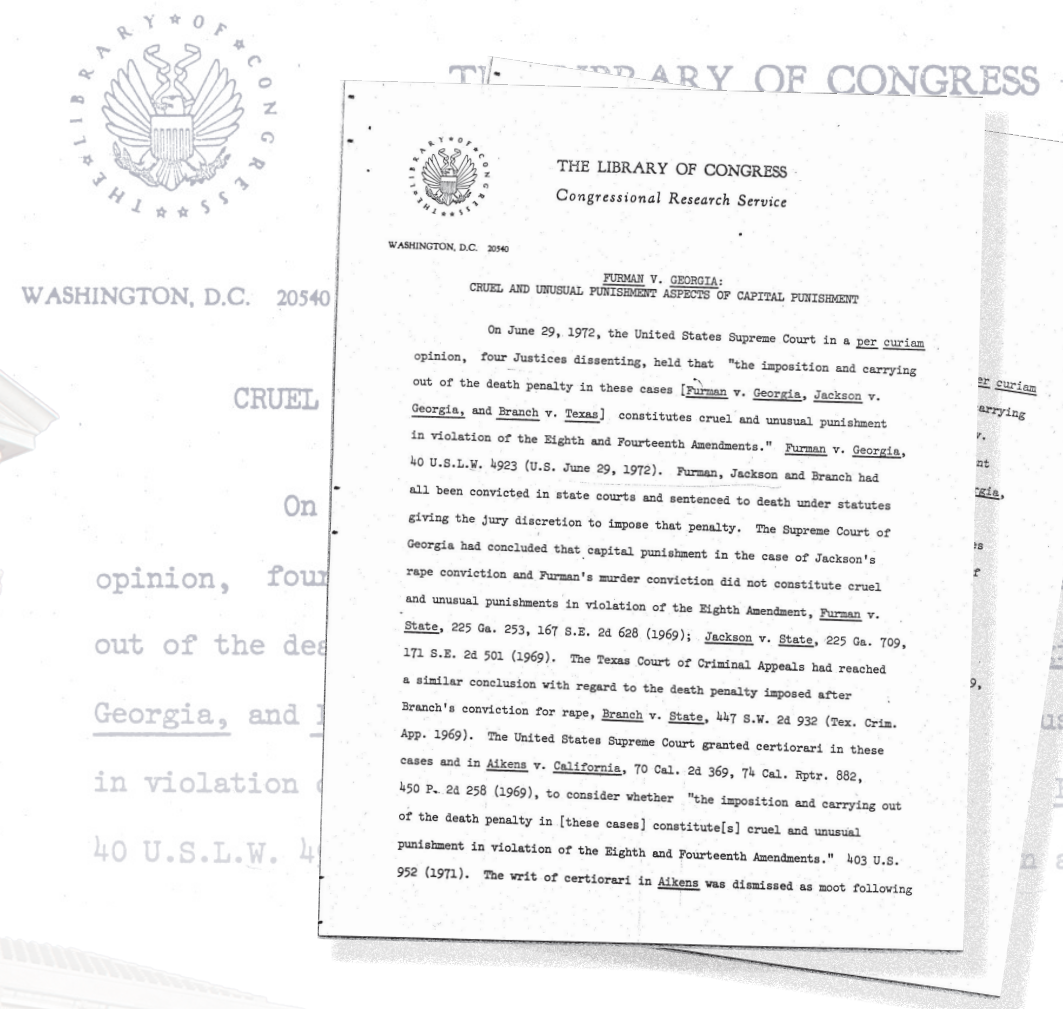
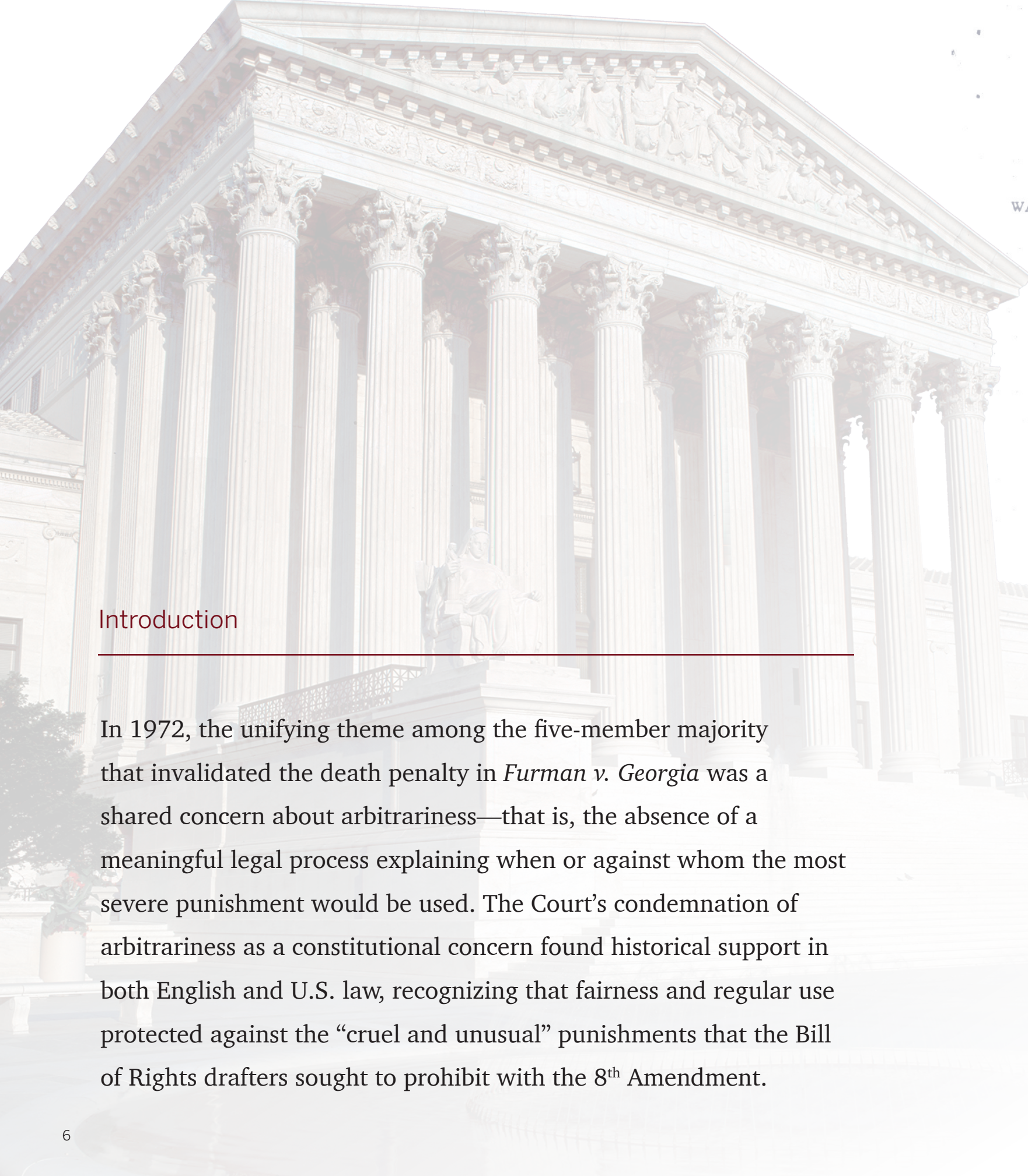


In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the [8th Amendment]—**that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.**



Justice William Brennan

concurring in *Furman v. Georgia*,
408 U.S. 238, 274 (1972) (*emphasis added*).



Introduction

In 1972, the unifying theme among the five-member majority that invalidated the death penalty in *Furman v. Georgia* was a shared concern about arbitrariness—that is, the absence of a meaningful legal process explaining when or against whom the most severe punishment would be used. The Court’s condemnation of arbitrariness as a constitutional concern found historical support in both English and U.S. law, recognizing that fairness and regular use protected against the “cruel and unusual” punishments that the Bill of Rights drafters sought to prohibit with the 8th Amendment.

In 1976, the Court voted 7-2 in *Gregg v. Georgia* to authorize the return of the death penalty when the majority decided that new due process safeguards in state statutes like Georgia’s satisfied the arbitrariness concerns of the *Furman* Court. But one unique aspect of the American criminal legal system—the election of prosecutors and state judges—remains unaffected by the procedural changes that were intended to minimize arbitrariness. No other country in the world elects prosecutors and almost none elect judges. Unlike other countries that use the death penalty¹, American electoral contests in state and local jurisdictions determine key decision-makers in the death penalty system. The behaviors of these powerful elected decision-makers are, unsurprisingly, influenced by the realities of politics: the need to fundraise, to campaign, to be held accountable by constituents, and to win votes. For these reasons, understanding and

responding to public opinion is critical for any successful politician.

This Report explores the influence of electoral politics on the behavior of elected officials in death penalty cases, finding that the consequences can be lethal when the result is unfairness and unpredictability—the very definition of arbitrariness. Using new and existing data, as well as examples of campaign rhetoric and outcomes, we show how politics affects the fates of those in the criminal legal system. Throughout our analysis, we also examine how changing public opinion and declining support for the death penalty are shaping election results and affecting the decisions of elected officials. We conclude by predicting that elected officials who understand why many Americans reject the death penalty as sound public policy will alter their behavior accordingly.

The Unique Role of Elections in the US Death Penalty

Globally, the United States is an outlier in the election of key decision-makers in its criminal legal system; it is the only country in the world to elect local prosecutors.² Outside the United States, the usual selection method for judges emphasizes specialized education and technical skill and insulates judges from popular will to ensure independence.³ While this is similar to the selection of federal judges in the United States, almost 90% of state judges are now elected through popular vote.⁴

The origin of popular elections for prosecutors and judges in the U.S. began with a series of state-based constitutional reforms from 1846 to 1860. By 1861, nearly three-quarters of U.S. states elected prosecutors. According to one expert, “In a period when prosecutors were gaining discretionary power, supporters of popular election sought to ensure that prosecutors would remain accountable to the local communities they served. In doing so, however, supporters of the elected prosecutor neglected to consider the effect elections would have on the administration of criminal justice.”⁵

Populist reformers also worried that judges were too dependent on the governors and legislators

who appointed them and argued that judges chosen by the people would be more faithful to the law.⁶ By the start of the Civil War, about two-thirds of the states provided for the public election of judges.⁷ But as the amount of money and partisan activity in judicial campaigns has increased, new concerns about the fairness and impartiality of the judiciary have emerged. “A regime of hotly contested, feverish judicial elections is dangerous in two ways that distort the role of the judge,” explains Professor Lawrence Friedman. “The first danger is that judges, facing or fearing opposition, will shy away from decisions that might make trouble at the polls. The second is that the judges are forced to campaign, **but campaigning costs money and money corrupts.**”⁸



Electoral Politics Affect Judicial Decision-Making



All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.

Supreme Court Chief Justice John Roberts

dissenting in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 891 (2009).

The public's confidence in the integrity of our justice system depends on judges to fairly and objectively apply the rule of law and set aside their own interests and biases. But research shows that the very real pressures and opportunities presented by election cycles inevitably affect even judges with the best of intentions. Unfortunately, the research also confirms that the consequences fall most severely on criminal defendants.



Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects... If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

Supreme Court Justice Sandra Day O'Connor

concurring in *Republican Party of Minnesota v. White*, 536 U.S. 765, 789 (2002).

Judicial candidates often run ads vaunting their “tough on crime” credentials while attacking their opponents as “soft.”⁹ The Brennan Center for Justice analyzed ten studies on judicial elections and criminal legal outcomes and concluded that “all found that the pressures of upcoming reelection and retention election campaigns make judges more punitive toward defendants in criminal cases.”¹⁰ The American Constitution Society also found a striking inverse relationship between the intensity of campaigning and the chances a defendant will prevail on appeal: as the number of TV ads during a state supreme court election *increased*, the likelihood that the justices would grant a criminal defendant’s appeal *decreased*.¹¹

This disparity is even more pronounced in death penalty cases. A 2015 *Reuters* investigation found that state supreme courts with *appointed* judges are more than twice as likely to reverse death sentences as state supreme courts with *elected* judges, a difference of 26% to 11%.¹² In other words, a death-sentenced prisoner in a state where judges must campaign for reelection has a much lower chance of winning relief on appeal. *Reuters* also found that this pattern cuts across partisan lines: the “election effect was a far stronger variable in determining outcomes of death penalty cases than state politics and even race.”¹³ Academic research confirms that election cycles have long impacted judicial decision-making in capital cases.¹⁴ Some judges have even signaled exactly how they will vote in order to win political support, as when three Tennessee Supreme Court justices facing retention elections in 2014 released ads boasting of their records “upholding nearly 90 percent of death sentences.”¹⁵

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Attack Ads Target Kansas Supreme Court

Kansas Supreme Court justices are nominated by a nonpartisan commission and formally appointed by the governor, but face retention elections after the first year and every six years thereafter.¹⁶ In 2016, interest groups spent more than \$2.5 million¹⁷ on ads, mailers, and campaigns as five of the seven justices faced retention. Alice Bannon of the Brennan Center for Justice described the campaign to *NPR*, saying, "It's essentially created an arms race, where you have a lot of money going in and interest groups basically trying to shape who's sitting on the courts and the decision that the courts are making."¹⁸

Ads from a group called Kansans for Justice urged voters to oust four justices who had voted to reverse death sentences.¹⁹ Another group, Kansans for Fair Courts, countered with ads calling the removal effort a "power grab" by the governor. Justices are barred from directly campaigning because, as

Chief Justice Lawton Nuss explained, "The U.S. Supreme Court said judges need to be indifferent to popularity. They are not politicians; they don't do what the people want, 'cause what the people want can change from week to week, month to month, year to year."²⁰

One of the Kansans for Justice ads displayed the names and photos of five people sentenced to death and stamped "overturned" on each.

Despite the significant attention and spending on the election, the outcome was the same as all previous Kansas Supreme Court elections: every justice was retained. In reaction, Chief Justice Nuss said, "The supreme court's ability to make decisions based on the rule of law—and the people's constitution—has been preserved."²¹



ANALYSIS

Election Years Affect How and When State Supreme Courts Decide Death Penalty Cases (Ohio, Georgia, and North Carolina)

The Death Penalty Information Center collected data on all death penalty cases heard by the Ohio, North Carolina, and Georgia Supreme Courts between January 1, 2013 and December 31, 2022, for a total of 110 cases. We chose these states for their similar size in population²² and because they are known as politically “purple” or “swing” states,²³ which would (in theory) increase the likelihood of competitive elections and the political weight of judicial decision-making. While it is impossible to select an “average” death penalty state given the differences in use, procedures, and practices,²⁴ these three states have sentenced to death²⁵ and executed²⁶ roughly similar numbers of people in the modern era post-*Gregg*. All three states elect Supreme Court justices, and at least one justice on each court is up for reelection every even-numbered year.²⁷ In our review of the data, each case was coded for a variety of variables including outcome, each justice’s vote, legal claims presented, facts of the crime, and characteristics of the prisoner.

Our data show that the courts ruled in favor of the state the majority of the time, in 71.8% of cases. In cases in which the courts considered whether to affirm or reverse a death sentence, the courts ruled in favor of the state and affirmed the death sentence 77.2% of the time.

However, the Death Penalty Information Center found that the courts’ behavior changed in response to election cycles. The courts affirmed about *twice the number* of death sentences in election years compared to non-election years, a

median of 6 versus 3 death sentences. This result is statistically significant when controlling for the number of cases the courts considered each year, as well as other legal and factual characteristics of the cases.²⁸ The “election year” variable consistently had a strong predictive effect on the number of cases affirmed in a given year.

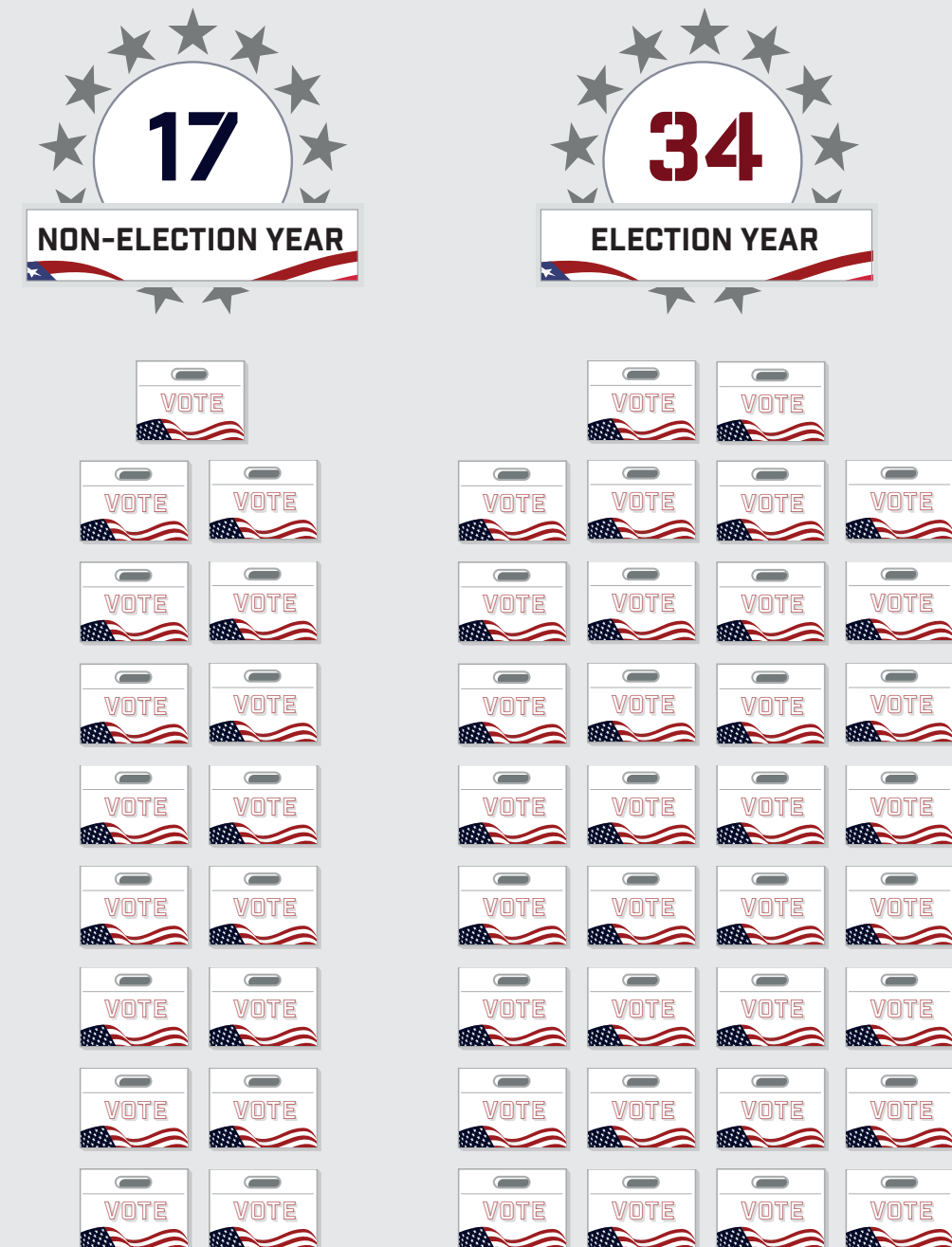
During election years, the courts in our data sample ruled in favor of the state 74.6% of the time compared to 66.0% of the time during non-election years. For cases in which the decision was between affirming or reversing a death sentence, the courts affirmed death sentences 81.0% of the time during election years compared to 70.8% of the time during non-election years.

Of the 51 cases in our sample in which a court affirmed a death sentence, 34 (two-thirds) of those decisions were issued during an election year.

These findings suggest that state supreme court justices are more likely to rule against death-sentenced prisoners when facing the increased scrutiny and pressures of an upcoming election. These findings also challenge Supreme Court Chief Justice John Roberts’ declaration that “judges are not politicians, even when they come to the bench by way of the ballot.”²⁹

Death Sentences Affirmed by Election Cycle

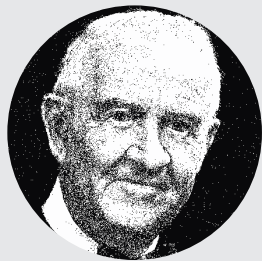
Sample: all death penalty cases decided by the Ohio, Georgia, and North Carolina Supreme Courts between January 1, 2013 and December 31, 2022.



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.

Justice John Paul Stevens

dissenting in *Harris v. Alabama*,
513 U.S. 504, 519-20 (1995).



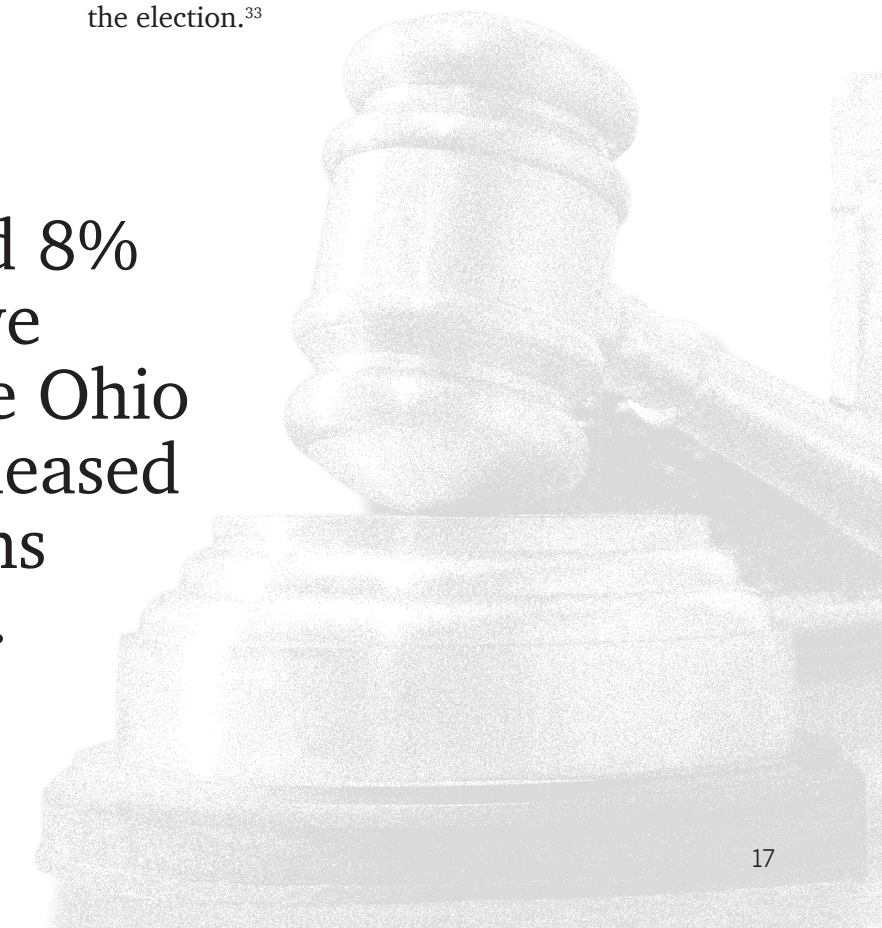
It appears that the practice of electing state supreme court justices has allowed the courts and political actors to maneuver toward preferred outcomes, and in doing so inject more arbitrariness into the legal process.

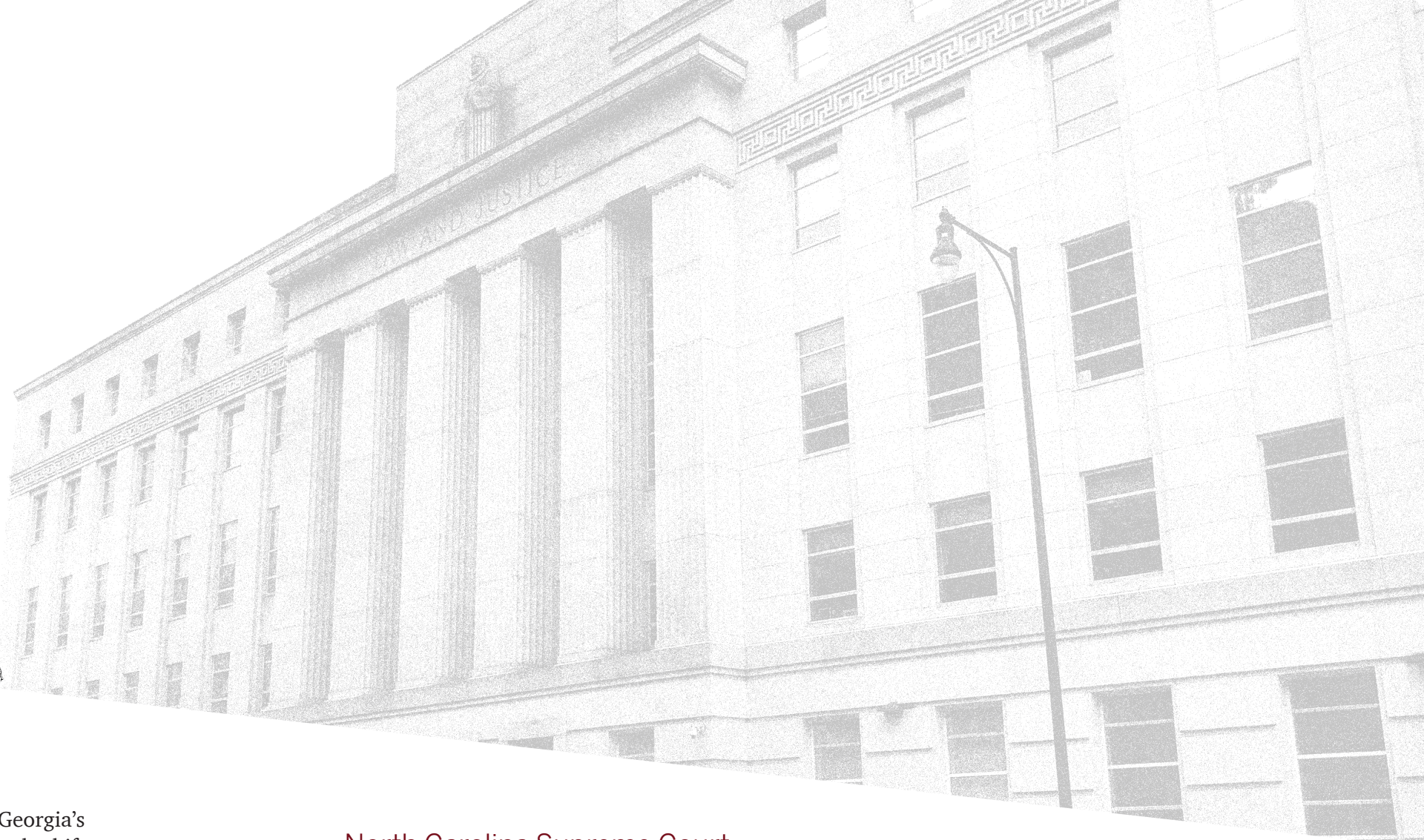
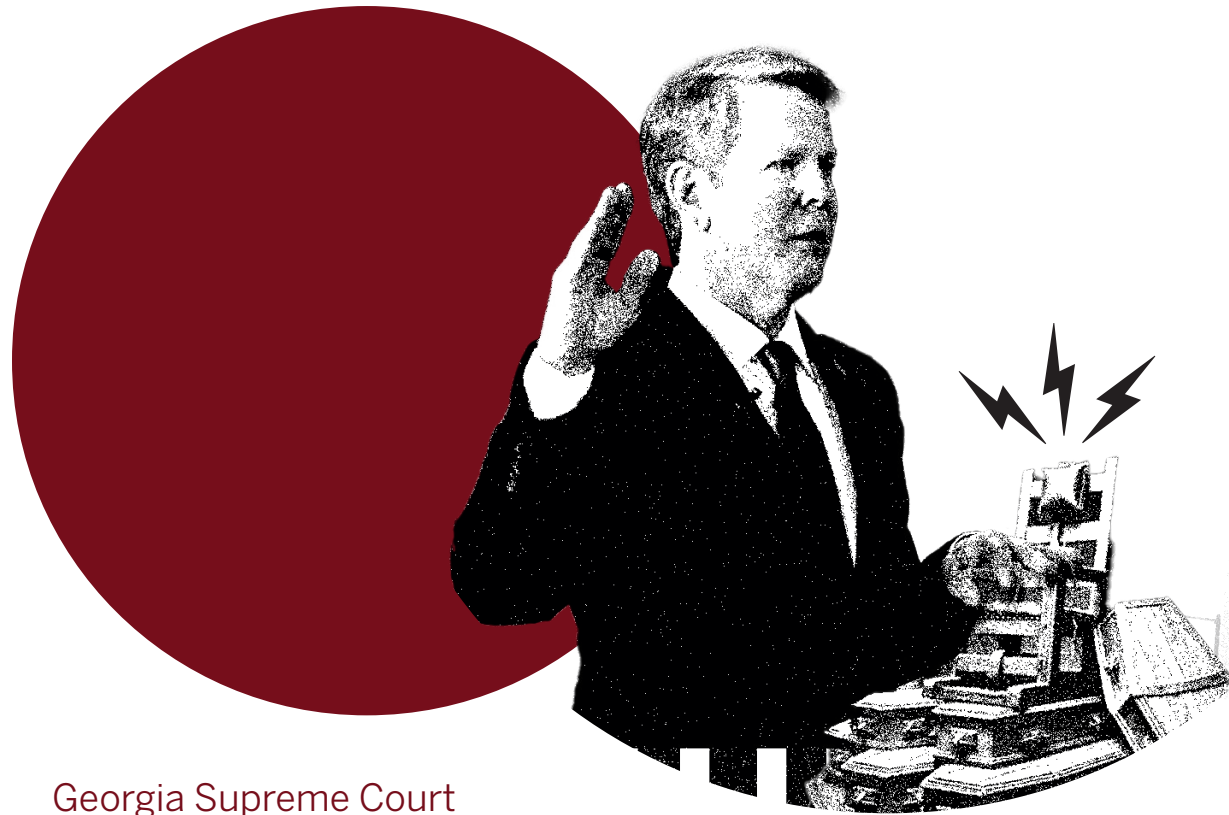
Ohio Supreme Court

In Ohio, the court has voted to reconsider cases after new justices are elected, then issued new decisions that overrule the judgments of the previous court—drawing criticism that the practice politicizes the court’s rulings. The “law and the entire state of Ohio benefit from stability and certainty,” wrote Justice Patrick Fischer in dissent from the court’s reversal of a decision in a capital case after an election.³⁰ Justice Fischer expressed “concerns with the practice of reconsidering cases at the beginning of a new term when this court’s membership has changed following a recent election.”³¹

Additionally, the data show that the Ohio Supreme Court decided a disproportionate number of cases in the two months immediately following the election, perhaps reflecting an effort to avoid additional scrutiny until after voters cast their ballots. This time period represents about 8% of the total time we examined, yet the court released 19% of its decisions during this period. While many of the cases affirm death sentences,³² at least one case involved a grant of relief in a high-profile death penalty case that could have been a source of media attention if decided before the election.³³

The “lame duck” period represented 8% of the total time we examined—yet the Ohio Supreme Court released 19% of its decisions during this period.





Georgia Supreme Court

In Georgia, Governor Brian Kemp has taken advantage of a unique state judicial election loophole to maintain his party's dominance on the Supreme Court. Georgia justices serve six-year terms by election, but if a justice retires with less than six months of their term remaining, the election can be postponed until the next cycle two years later. After two justices announced that they would retire in 2020, Gov. Kemp canceled the June judicial election and appointed two new justices, Shawn LaGrua and Carla McMillian, who as a result "were gifted two free years on the bench before having to face voters."³⁴ The Georgia Supreme Court ruled in favor of Gov. Kemp in a lawsuit by two of the candidates set to run in the canceled election,³⁵ and the author of that opinion, Chief Justice David Nahmias, used the same maneuver two years later in 2022.³⁶ He resigned in his election year, and Gov. Kemp canceled the upcoming election and appointed Justice Nahmias' replacement just three days later.³⁷

In essence, Gov. Kemp has transformed Georgia's judicial election system into a makeshift appointment system that avoids the vetting and scrutiny that judicial appointment systems typically require.³⁸ Importantly, his appointed justices consistently voted to affirm death sentences in our sample. Within six months of Justices LaGrua and McMillian starting their tenure, the Court upheld Georgia's intellectual disability standard, the strictest in the nation for death-sentenced prisoners, requiring capital defendants to prove intellectual disability beyond a reasonable doubt.³⁹ Under this standard, *no* person convicted of an intentional killing⁴⁰ has been able to successfully prove at trial that they have intellectual disability—a finding that would exempt them from the death penalty. Justices LaGrua and McMillian joined two other justices in the plurality opinion upholding the current method, making their votes critical to maintaining this onerous and much-criticized legal standard.

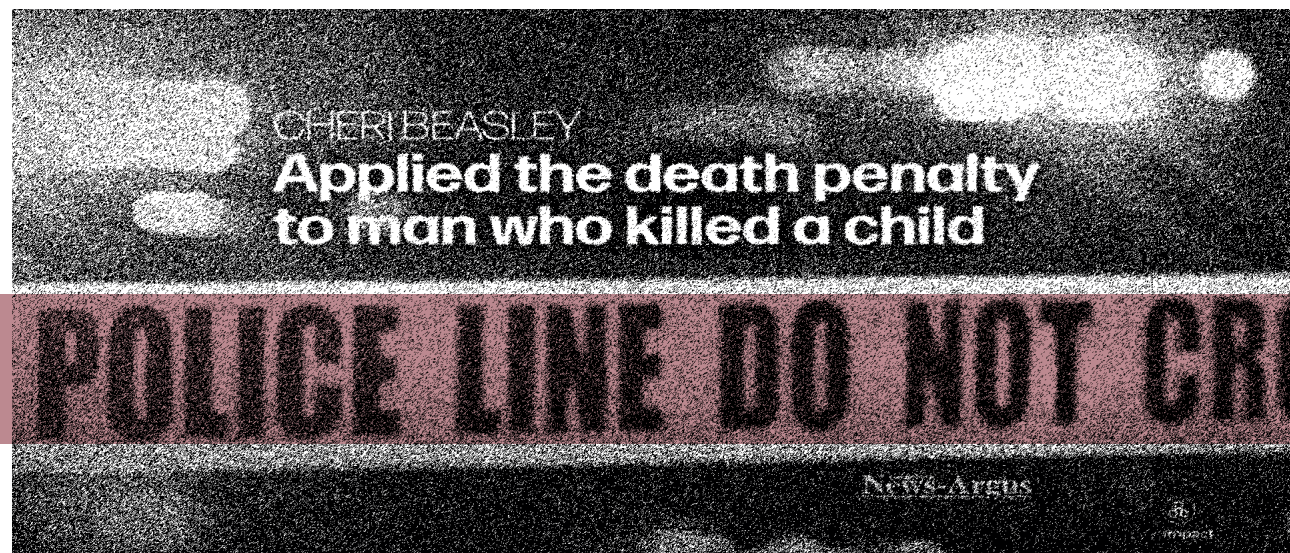
North Carolina Supreme Court

The North Carolina Supreme Court consistently sees tightly contested elections and large turnout⁴¹ but has experienced growing polarization in recent years,⁴² with life-or-death consequences for criminal defendants.

In 2019, when the Chief Justice announced his retirement, Governor Roy Cooper appointed associate justice Cheri Beasley to the Chief Justice position, making her the first Black woman to lead the North Carolina Supreme Court. Justice Paul Newby, the longest-serving associate justice and a staunch conservative, did not take the decision well. "Sadly today Governor Cooper decided to place raw, partisan politics over a non-partisan judiciary by rejecting the time-tested tradition of naming the Senior Associate Justice as Chief Justice," he tweeted.

"I look forward to placing my qualifications before the voters in 2020."⁴³

Justices Beasley and Newby had starkly different perspectives. Chief Justice Beasley, a former public defender, said at a 2020 press conference that Black Lives Matter protestors' "lived experiences reinforce the notion that Black people are ostracized, cast out, and dehumanized... [they] are more harshly treated, more severely punished, and more likely to be presumed guilty" in North Carolina courts.⁴⁴ On the other hand, former prosecutor Justice Newby said he doubted racial discrimination even existed.⁴⁵ While Justice Newby voted to affirm death sentences 100% of the time in our sample, Chief Justice Beasley voted to reverse a conviction or death sentence in all but one eligible case.



Just a few months before the 2020 election, the court decided a set of cases⁴⁶ regarding the Racial Justice Act (RJA) (2009), which provided death-sentenced prisoners the opportunity to challenge their sentence on racial bias grounds before it was repealed in 2013. Chief Justice Beasley authored the case ruling that prisoners who had successfully litigated RJA claims before the repeal would have their life sentences restored.⁴⁷ She described the “egregious legacy of the racially discriminatory application of the death penalty in this state,” including its history of jury discrimination, voter disenfranchisement, lynchings, and Jim Crow laws; her fellow Black Justices Anita Earls and Mike Morgan joined her opinion.⁴⁸ Justice Newby, who had previously blamed the RJA for halting executions,⁴⁹ dissented in both cases. He accused the three Black justices of “a larger purpose: to establish that our criminal justice system is seriously—and perhaps irredeemably—infected by racial discrimination.”⁵⁰

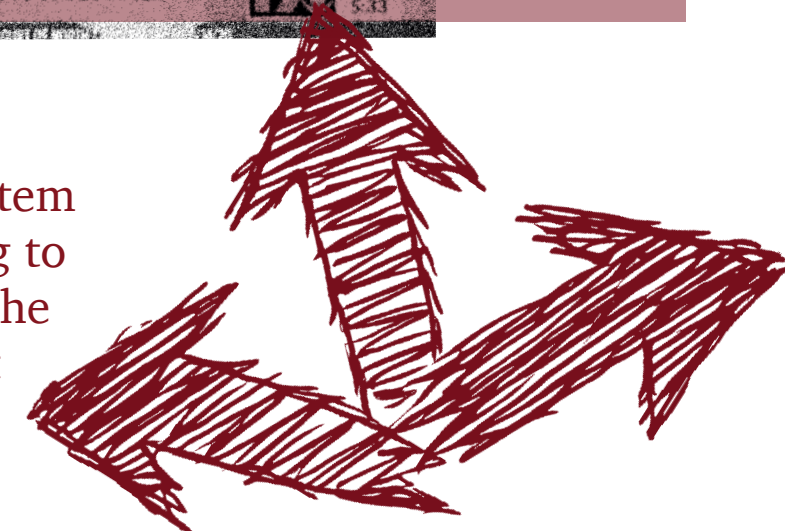
Justice Newby won the 2020 election by a slim margin of 401 votes out of about 5.4 million cast (0.008%),⁵¹ in a year with a record \$10.5 million in spending on the state’s supreme court races.⁵² Per North Carolina law, Chief Justice Beasley lost both her leadership position and her seat on the court. The new Chief Justice Newby’s tenure ushered in an era of unprecedented partisan

divisiveness, with decisions splitting along party lines in 33% of 2022 cases compared to fewer than 2% of cases in 2018.⁵³ Chief Justice Newby has also departed from established procedure by endorsing judicial candidates,⁵⁴ hearing cases involving companies in which he owned stock,⁵⁵ and reconsidering cases after the Court flipped to Republican control, including a series of cases expanding partisan gerrymandering and restricting voting rights.⁵⁶ Critics say that the current system skews judicial decision-making to partisan extremes and “feeds the perception that judges are just politicians in robes, which undermines the public’s trust in the judiciary.”⁵⁷

The political shift on the court has already affected the fates of death-sentenced prisoners like Russell Tucker, who had argued that prosecutors in his trial used a “cheat sheet” of “race-neutral” reasons to unlawfully exclude Black jurors.⁵⁸ Mr. Tucker’s appeal followed the first-ever instance of the North Carolina Supreme Court finding jury discrimination, in 2020.⁵⁹ But the court ruled against Mr. Tucker in December 2023. Justice Earls dissented, saying that Mr. Tucker’s case is “more similar...than it is different” to the 2020 ruling, decided when Chief Justice Beasley was still on the bench.⁶⁰



Critics say that the current system skews judicial decision-making to partisan extremes and “feeds the perception that judges are just politicians in robes, which undermines the public’s trust in the judiciary.”



The death penalty also became a political issue in former Chief Justice Beasley’s campaign for U.S. Senate in 2022, when state Republicans released an attack ad claiming she vacated the death sentence of a “murderer who shot a boy in the face”—referring to the decision in one of the RJA cases.⁶¹ The ad quickly drew wide criticism for being misleading, including a signed letter from six North Carolina sheriffs who called it “disgraceful” and “horrible.”⁶² In response, a Democratic PAC released a pro-Beasley ad celebrating her vote to affirm a death sentence.⁶³ Chief Justice Beasley ultimately lost the election by a slim three-point margin.⁶⁴

Ohio: Voting for Death While Campaigning

Ashford Thompson was convicted and sentenced to death in 2010 for killing a police officer during a traffic stop. The Ohio Supreme Court issued a decision upholding his conviction and death sentence by a vote of 4-3 on October 29, 2014⁶⁵—just six days before two of the justices in the majority stood for reelection. *Reuters* reported that one of the justices, Judith French, who authored the majority opinion, released campaign ads that same month saying she was “tough” and highlighting her vote to uphold a previous death sentence.⁶⁶ Justice French was reelected with 56% of the vote.⁶⁷ “There are men all over the U.S. who are going to die because of politics. That’s a basic component of the death penalty,” said Mr. Thompson’s attorney Tim Young.⁶⁸ Justice French voted with the majority to affirm death sentences 100% of the time in our sample.

There are men all over the U.S. who are going to die because of politics. That’s a basic component of the death penalty.

Tim Young

Mr. Thompson’s attorney



How Campaign Contributions Affect Judicial Behavior and Case Outcomes

Judicial elections have become very expensive, in part because of the U.S. Supreme Court’s 2010 decision in *Citizens United*,⁶⁹ which ushered in an era of special interest campaign spending.

The Brennan Center for Justice has tracked the increase in spending⁷⁰ among the 38 states that elect judges to their highest courts; for example, Wisconsin’s April 2023 Supreme Court election resulted in over \$30 million in spending,⁷¹ making it one of the most expensive state supreme court

elections in history. In Alabama, candidates have historically invested millions of dollars in races for a single seat on the Supreme Court.⁷² In November 2023, Pennsylvania’s partisan Supreme Courtrace resulted in at least \$22 million in spending.⁷³

“ I never felt so much like a hooker down by the bus station in any race I’ve ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it’s hard to say. ”

Justice Paul Pfeifer

Ohio Supreme Court⁷⁴





We have created a system that allows payments that would otherwise be bribes and legalized the ‘bribes’ as campaign contributions.⁸⁰

Professor David Barnhizer

Cleveland State University



“A \$1 DONATION BY AN ATTORNEY YIELDS \$27.95 IN REVENUES”

Elected judges in Texas often solicit and receive campaign donations from lawyers who practice in their courts, then appoint those same lawyers as counsel for indigent defendants, resulting in a system some experts call “judicial pay to play.” A study by Professors Neel Sukhatme and Jay Jenkins in 2021 revealed that Harris County (Houston) judges “typically award their donors more than double the cases they award to non-donors, with the average donor attorney earning greater than a twenty-seven-fold return on her donation.”⁷⁵ This result “can be interpreted as a return on investment—a \$1 donation by an attorney yields \$27.95 in revenues.”⁷⁶

Overall, attorneys who donate to assigning judges “earn on average about \$17,089 more than non-donor attorneys.”⁷⁷ The authors found that the judges did not appear to be assigning cases based on skill or experience; “if anything, defense attorneys who donate to judges are less successful than those who do not in terms of attaining charge reductions, dismissals, and acquittals, or avoiding prison sentences for their clients.”⁷⁸ The study concludes that the donations function as “entry fees from attorneys who have recently become eligible for indigent defense appointments.”⁷⁹

The risks of this arrangement become clear when viewed in light of numerous studies confirming that the quality of defense counsel has everything to do with whether a defendant receives a death sentence.⁸¹ To the extent that judges preferentially appoint counsel who contribute to their campaigns, regardless of counsel’s skill, experience, and qualifications, there will be consequences for the defendant they represent. This effect is more problematic when judges are self-described tough-on-crime candidates because they may be incentivized to appoint defense counsel who will ask for fewer resources and perform less than zealously. Defense counsel who seek future appointments may also be financially invested to behave in ways that will appease an appointing judge rather than benefit their client, or take on more cases than is ethically or professionally appropriate⁸² in order to maximize profits. In any of these scenarios, the case outcome may be influenced by these realities as much as the facts and law in the case.

One prominent example was Houston attorney R.P. “Skip” Cornelius, who represented indigent capital defendants for decades under the appointment system; at least ten of his clients were sentenced to death.⁸³ One of Mr. Cornelius’ clients was Jeffery Prevost, whose death sentence was recently overturned based on Mr. Cornelius’ ineffective performance. A judge held that Mr. Cornelius “carried an excessive caseload” during Mr. Prevost’s trial and failed to present available evidence of severe trauma and abuse.⁸⁴ Judge Mark Ellis presided over Mr. Prevost’s capital trial in 2014.⁸⁵ Mr. Cornelius’ law firm donated \$150 to Judge Ellis in 2006, and Mr. Cornelius personally

donated \$1000 to Judge Ellis’ reelection campaign in 2016.⁸⁶ At a 2021 hearing in Mr. Prevost’s case, Mr. Cornelius testified that professional caseload standards from the state bar and the American Bar Association are “basically ridiculous” and he does not “pay any attention to them at all.”⁸⁷

Mr. Cornelius was also appointed to represent Obel Cruz-Garcia by Judge Renee Magee. An in-depth investigation by *HuffPost* found that Mr. Cornelius missed critical opportunities to undermine the state’s case against Mr. Cruz-Garcia in his 2013 capital trial.⁸⁸ Mr. Cornelius also regularly billed at least four hours per day to other cases and claimed at least 29 fees for appearing in court for other cases during Mr. Cruz-Garcia’s capital trial.⁸⁹ In total, Mr. Cornelius billed \$33,000 in fees for work on other cases during Mr. Cruz-Garcia’s trial—the “equivalent of an entire other death penalty case,” said Mr. Cruz-Garcia’s current appellate lawyers.⁹⁰ Mr. Cornelius then donated \$300 to Judge Magee’s reelection campaign in 2016.⁹¹

In total, Mr. Cornelius donated over \$17,000 to judicial candidates between 2004 and 2021.⁹² A 2009 investigation found that Mr. Cornelius “worked with case load amounts well above the national guidelines” and was making an average of \$237,500 per year representing indigent clients.⁹³ He made \$393,708 in 2014 alone, the year he lost Mr. Prevost’s case.⁹⁴ However, he denied any financial motive in his judicial donations. “I give money to people running for judge out of friendship and because I believe they are a good Judge, or will be, and for no other reason,” he said.⁹⁵

New Hampshire: Kelly Ayotte

In 2019, New Hampshire voted to end capital punishment but did not apply the new law to its only death row resident, Michael Addison.¹⁰¹ In addition to being a statistical anomaly, Mr. Addison became the person on whom one New Hampshire politician staked her career: former state Attorney General, U.S. Senator, and 2024 gubernatorial candidate Kelly Ayotte.

Two years into her tenure as the first female Attorney General, Ms. Ayotte announced that she would seek the death penalty for Mr. Addison, accused of killing police officer Michael Briggs. She rejected Mr. Addison's offer to plead guilty to capital murder and serve life without parole, and personally prosecuted the case. He was sentenced to death in December 2008, becoming the first person in the modern era of the death penalty to receive a death sentence in New Hampshire.¹⁰²

Emails from Ms. Ayotte reveal that she saw prosecuting Mr. Addison as a boon to her political ambitions. Just 11 days after the murder, Ms. Ayotte responded to an email from political adviser Rob Varsalone, subject line "Get Ready to Run," about her possible Senate candidacy.¹⁰³

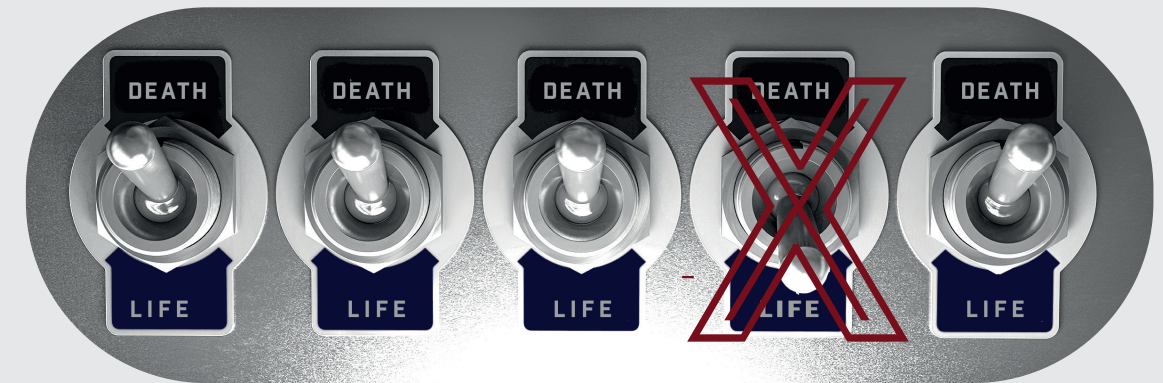
Ms. Ayotte followed through on her plans to run for Senate in 2010 and released two campaign ads about the case. "She wasn't above using a murder case and a death penalty case as a springboard for her personal, political ambitions," argued her opponent Paul Hodes.¹⁰⁴ Ms. Ayotte defeated Mr. Hodes and served in the Senate for one term before losing reelection in 2016.¹⁰⁵

AYOTTE

Have you been following the last 2 weeks? A police officer was killed [sic] and I hannounced [sic] that I would seek the death penalty?

VARSALONE

I know, I read about it. Where does AG Ayotte stand on the Death Penalty? **BY THE SWITCH.**



Only a month after Ms. Ayotte won her Senate race, the Commission to Study the Death Penalty in New Hampshire, composed of elected officials and stakeholders, released its report. Ten commission members released an opinion identifying Ms. Ayotte's behavior as a reason to abolish the death penalty in the state:

"By its nature, a decision to seek the death penalty appears to inject a political element into the criminal justice system. Concerns have arisen regarding the possible effect of politics on the charging decision in the Addison case. In seeking higher office, the former Attorney General released two television commercials that heralded her decision to charge and prosecute Michael Addison for capital murder. In addition, an e-mail made public by the Justice Department caused concerns that politics influenced the Addison death penalty decision. Whether real or imagined, even the appearance of politics influencing a decision of this magnitude in the New Hampshire criminal justice system serves to diminish confidence in the integrity of the system itself."¹⁰⁶

On appeal, Mr. Addison also pointed to AG Ayotte's emails. The New Hampshire Supreme Court granted Mr. Addison's request for more discovery regarding whether "personal or political goals may have influenced Ayotte's decision to seek death for Addison" and remanded to the trial court for a hearing. However, the trial court ultimately held that the emails were not relevant to Mr. Addison's arguments. "Courts have held that a prosecutor's political ambitions do not rise to the level of unconstitutional conduct or even a conflict of interest," the trial court wrote. The state supreme court affirmed that decision in 2013, citing case law holding that "[p]olitically ambitious and aggressive prosecutors are by no means uncommon."¹⁰⁷

Ms. Ayotte has announced plans to run for Governor of New Hampshire in 2024. Officer Briggs still features in her campaign materials, appearing twice on her website—once in her personal bio and once in her platform.¹⁰⁸

Politically Charged Prosecutorial Decision-Making

Decades of research have established that many prosecutors are influenced by factors such as race,⁹⁶ gender,⁹⁷ geography,⁹⁸ budget,⁹⁹ and public opinion¹⁰⁰ when making decisions about seeking a death sentence.

While legally irrelevant, these factors can be influential and even decisive for one reason: every prosecutor needs to win reelection.¹⁰⁹ In a system where voters have few clear measures of job performance besides the number of convictions and sentences, many prosecutors naturally do what they believe will help them keep their jobs—an imperative that can lead to arbitrary results and injustice.¹¹⁰ Very few academic studies have explored the effect of election cycles on prosecutor behavior, but

existing research confirms that prosecutors alter their behavior during election years. An analysis of North Carolina prosecutorial elections from 1997-2009 found that the number of convictions obtained from jury trials increases in election years by at least 24% when the incumbent faces a challenger, while the percentage of convictions resulting in community diversion agreements decreases.¹¹¹ A separate North Carolina study found that defendants were more likely to be convicted and less likely to have all charges

dismissed during prosecutorial election years.¹¹² Multiple studies, including a national analysis of prosecutorial elections from 1986-2006, found that the number of people sent to prison increased during election years.¹¹³ The literature diverges on how election year affects sentence length: at least one study found that sentence length increases during election years,¹¹⁴ while several others found that sentence length decreases because prosecutors bring “weaker” cases to trial in an effort to inflate their jury conviction rates, including cases that would likely have been plea-bargained in a non-election year.¹¹⁵

Similar to judicial elections, media coverage of prosecutorial elections often disproportionately focuses on violent crime. The University of North Carolina (UNC) Law School’s Prosecutors and Politics Project found that in the 2020 prosecutorial elections, a quarter of all articles about incumbent prosecutors mentioned a homicide, despite homicides occurring at a much lower rate than drug and property crimes.¹¹⁶ The volume of coverage also appeared to influence results: “In every contested election for an open seat...the candidate with the most media mentions won.”¹¹⁷ A finding in a 1931 national report on prosecutors appears to hold true in today’s media environment: “The ‘responsibility to the people’ contemplated by the system of frequent elections does not so much require that the work of the prosecutor be carried out efficiently as that it be carried out conspicuously.”¹¹⁸

Professor Isaac Unah describes the incentive structure for an elected prosecutor considering a death sentence in North Carolina:

“Because Durham district attorneys are publicly elected as are district attorneys across North Carolina, they may respond to political pressure from constituents. Such pressure will likely vary according to numerous factors, including the demographic and ideological composition of the prosecutor’s judicial district, the level of media attention that a crime receives, the race and gender configuration of the victim and defendant, the victim’s standing in the community, etc. Moreover, the ideology of individual prosecutors and their natural affinities for different types of victims and defendants can potentially influence capital charging decisions. Therefore, it is possible that legally similar crimes and criminals will receive different treatment in fact.”¹¹⁹

Observers have long noted the distorting effects of election cycles on prosecutor behavior, with future Supreme Court Justice Harlan Stone remarking in 1924 that elections open prosecutors to “untoward political influences.”¹²⁰ About half of the people on death row today were sentenced in the 1980s and 1990s, when seeking death was a winning campaign promise for elected prosecutors.¹²¹ Justice Byron White, voting to reauthorize use of the death penalty in *Gregg*, was not persuaded by the argument that the amount of discretion in the administration of the death penalty made it unconstitutional. “Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it,” he wrote. “Mistakes will be made, and discriminations will occur which will be difficult to explain.”¹²²



Arizona: Rachel Mitchell

Before September 27, 2018, most Americans had never heard of Rachel Mitchell, a longtime prosecutor in Maricopa County, Arizona with a specialty in sex crimes. That changed when she was selected as investigative counsel by U.S. Senate Republicans to question Supreme Court nominee Brett Kavanaugh’s accuser Christine Blasey Ford during highly publicized, televised hearings.¹²³ Within a year of the Kavanaugh hearings, she was promoted to Chief Deputy of the Maricopa County Attorney’s Office and then assumed the role of Acting County Attorney a few weeks later. In 2022, she won a close special election for County Attorney with 52.8% of the vote.¹²⁴

DA Mitchell, now running for reelection for a full term in office in 2024, has used her zealous support for the death penalty as a central issue in her campaign. In May, she publicly released a letter demanding that Arizona Attorney General Kris Mayes seek new death warrants, calling the AG’s promise to resume executions in the first quarter of 2025 “hollow.”¹²⁵ DA Mitchell also declared botched executions to be a “false narrative” and accused the AG of “complicity” in the failure to resume executions. Asked for comment, her primary challenger Gina Godbehere initially questioned why DA Mitchell had publicized the letter, then responded: “It must be campaign season.”¹²⁶

Arizona’s death penalty is currently on hold pending a review of the state’s methods of execution. Despite this, on June 5, 2024, DA Mitchell filed a motion asking the Arizona Supreme Court to set an execution date for Aaron Gunches. In response, AG Mayes issued a statement: “Make no mistake, I will vigorously defend the authority of this office — and will not stand by as the Maricopa County Attorney attempts to create chaos to save her political career.”¹²⁷



Make no mistake, I will vigorously defend the authority of this office — and will not stand by as the Maricopa County Attorney attempts to create chaos to save her political career.

Kris Mayes

Arizona Attorney General
(emphasis added)



Re: Death penalty
Dear County Attorney Mitchell:

Thank you for your letter from several months ago. I write to you today to ensure that you understand my position and plans regarding death sentences in Arizona.

Hon. Rachel Mitchell
May 16, 2024
Page 2 of 2

sufficient time to prepare for the warrant

procedures for carrying out the

sentences in appellate court and prepare for the warrant preparation and entailed

further, please let me know how happy to discuss with you. I am open to reproductive health care less of a defendant’s



OFFICE OF THE ARIZONA ATTORNEY GENERAL
STATE OF ARIZONA

May 16, 2024

KRIS MAYES
ATTORNEY GENERAL

VIA EMAIL

The Honorable Rachel Mitchell
County Attorney
Maricopa County Attorney’s Office
225 West Madison Street
Phoenix, Arizona 85003

Re: Death penalty

Dear County Attorney Mitchell:

Thank you for the ongoing dialogue we have had about the death penalty over the last 17 months. I write this letter to ensure that you understand my position and plans regarding death sentences in Arizona.

First, I wish to reiterate that my office continues to defend death sentences obtained by county attorneys in Maricopa County and elsewhere. Lawyers in my office continue to defend more than 100 death sentences through the appellate, post-conviction, and habeas corpus processes in state and federal court. Indeed, earlier this year, my Section Chief for Capital Litigation argued *Thornell v. Jones* in the United States Supreme Court. This is a case in which the Ninth Circuit vacated a death sentence and I made the discretionary decision to request that the Supreme Court overturn that decision and reinstate Jones’s death sentence.

As I have conveyed to you multiple times now, including when we met in January of this year, I respect the role of the death penalty in Arizona’s laws. And I understand that many family members of victims continue to await closure in these (often decades-old) cases. As the chief law enforcement officer of the State, it is my intent to enforce Arizona law, whether that be through the defense of lawfully imposed death sentences on appeal or the seeking of warrants in a timely manner once a defendant has exhausted his appeals and ADCRR is prepared to carry out the warrant lawfully.

To that end, I intend to begin seeking warrants no later than the first quarter of 2025, so long as ADCRR is capable of carrying out a lawful execution at that time. By then, I anticipate that Judge Duncan will have completed his independent review and that ADCRR will have had

Uncontested Prosecutorial Elections

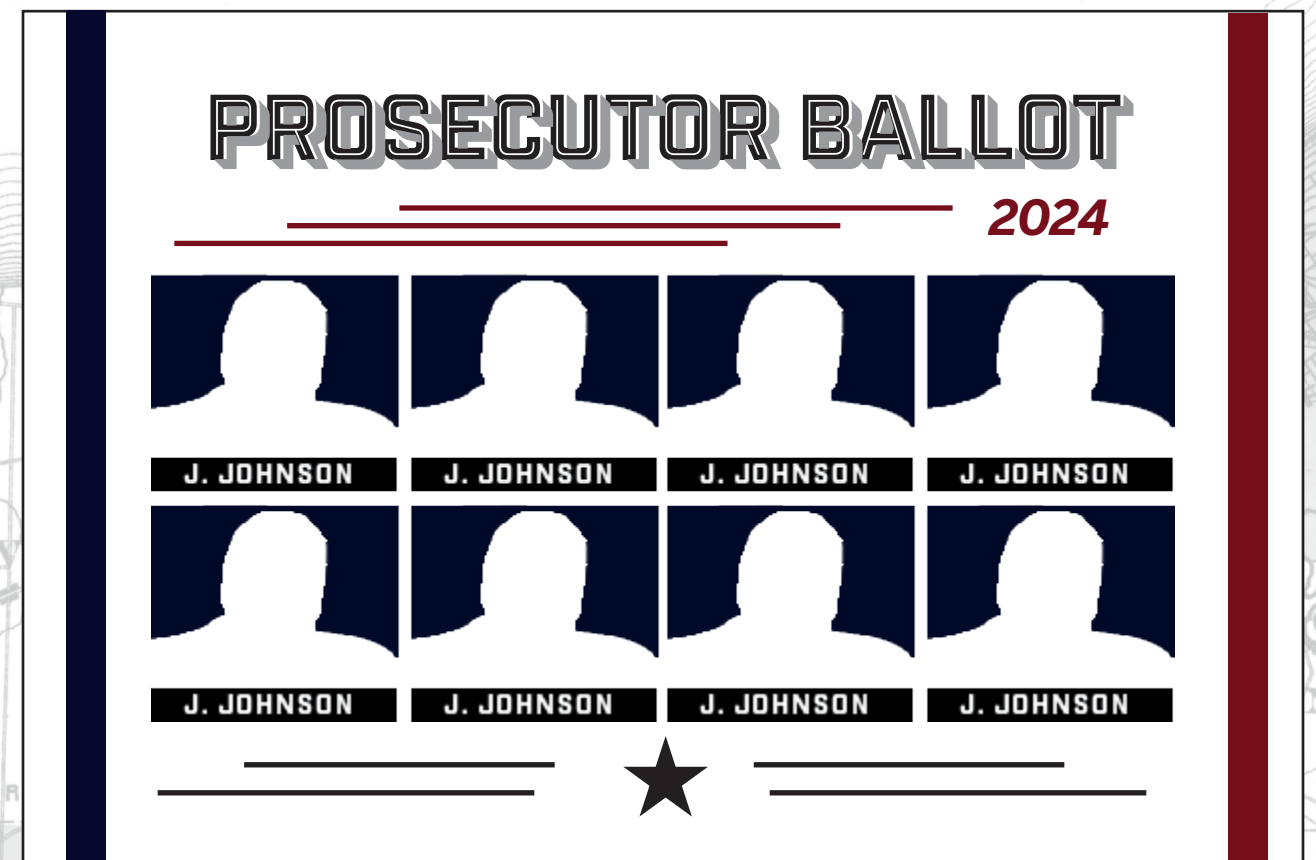
Elections can be a meaningful check on prosecutorial behavior—but not when the candidate has no competition.

A comprehensive UNC study found that a stunning 82.2% of prosecutorial elections are uncontested, and incumbent races are only a third as likely to be contested as open races, suggesting that “incumbents are successful in ‘scaring-off’ not only quality challengers but also any potential challengers at all.”¹²⁸ As many as 95% of incumbents win reelection.¹²⁹ This result means that “when prosecutors do exercise poor judgment, they are rarely punished politically through electoral defeat.”¹³⁰ In Ohio, a *Bolts* investigation found that 73 of 88 counties (83%) had only one candidate file to run for prosecutor in 2024.¹³¹ Several incumbents had faced prominent allegations of misconduct but still drew no challengers.¹³² The UNC study concluded that “uncontested elections may be the worst of both worlds—prosecutors are neither held accountable nor are they independent.”¹³³

One candidate who sought to disrupt that pattern in 2024 did so in part because of the death penalty. Matthew Ahn, a professor and former public defender, challenged longtime Cuyahoga County (Cleveland) prosecutor Michael O’Malley in the Democratic primary¹³⁴ after Cuyahoga County led the nation in new death sentences in 2019. Mr. O’Malley had also resisted relief for wrongfully convicted death-sentenced prisoners and joined a bipartisan group of prosecutors to unsuccessfully oppose a bill exempting people with serious mental illness from execution.¹³⁵ “Everybody else has

realized that the death penalty is a policy failure on every level,” Mr. Ahn said in a primary debate, noting its increased costs, lack of deterrent effect, and vulnerability to error.¹³⁶ “I will not seek the death penalty as your Cuyahoga County prosecutor because it does not keep our community safe and does not make our community stronger.”¹³⁷ Mr. Ahn garnered enough support from the local Democratic Party that its members declined to issue an endorsement in the race, which was seen as a “snub” to the incumbent Mr. O’Malley.¹³⁸

Although Mr. O’Malley defeated Mr. Ahn in the primary by a 59-41 margin, Mr. Ahn saw his campaign as worthwhile in creating public discourse around criminal legal reform. “I thought that just even having this conversation is a public good for the voters of Cuyahoga County, for us to think about how we can actually promote public safety,” he said before the vote.¹³⁹ In tacit acknowledgement of Mr. Ahn’s argument, Mr. O’Malley said during the campaign that his “feelings have certainly evolved” on the death penalty and emphasized that he had not sought a death sentence in several years.¹⁴⁰ On election night, Mr. Ahn told supporters that he believed his views on criminal justice would eventually prevail: “Things feel impossible until they happen. And the same is going to come for this prosecutor’s position. Whether it is in three hours after we’ve all gone to bed, or four years or eight years or 12 or 20, it’s going to happen.”¹⁴¹



Election Results Reflect Changes in Public Opinion

Twenty-five years ago, about 300 people were being sentenced to death each year and support for the death penalty was nearly compulsory for elected officials, regardless of their political party affiliation. Today, declining public support, serious doubts about its fairness and accuracy, and record low numbers of new death sentences and executions mean that the death penalty no longer has the political power with voters that it once did.

Diminishing Appeal for Voters

According to Gallup, support for the death penalty hovered between 76% and 80% from 1988 to 1995. By 2023, just 53% of Americans said they support use of the death penalty—the lowest level since 1966.¹⁴²

State polling has confirmed not only declining support for the death penalty but also declining interest as a political issue. On Election Day 1988, 27% of voters said that a candidate's position on the death penalty was "very important" to them in choosing the president; the only issue that ranked ahead of the death penalty was abortion.¹⁴³ But by 2002, a New Jersey poll found that just 12% of voters said they had ever "voted for or against a candidate for public office based largely on the candidate's position on the death penalty."¹⁴⁴ Nearly two-thirds (64%) said that if their state legislator voted for a suspension

of executions, it would have no impact on their vote. Two years later, a North Carolina poll found similar sentiments.¹⁴⁵ Fifty-nine percent of voters said that a candidate's support for suspending executions would make no difference in their voting decision. In 2015, a Nebraska poll asked voters which of six issues was most important in deciding how to cast their vote for state senator. Just 4.4% of voters selected the death penalty from that list.¹⁴⁶ Among Utah voters in 2017, just 1% selected the death penalty as their top issue, placing it far behind voters' identification of the economy, healthcare, education, taxes, and the environment as priority issues.¹⁴⁷ A September 2023 poll by Vera Action found that 56% of voters preferred a comprehensive approach to criminal justice over a traditional "tough on crime" approach (43%).¹⁴⁸



While the political playbook on crime remains stuck in the 1980s with Willie Horton-style attacks, voters have evolved.

Insha Rahman

director of Vera Action and vice-president for advocacy and policy at Vera Institute of Justice.¹⁴⁹



Growing Bipartisan Opposition

Shifting political norms around the death penalty are also evident in the growth of public, bipartisan efforts to reform or repeal capital punishment. The death penalty is not a “red” or “blue” issue. A 2017 report from Conservatives Concerned About the Death Penalty found that the number of Republican sponsors of death penalty repeal bills in the 2015-16 state legislative sessions was 11 times higher than it was in 2001-02.¹⁵⁰ Just six Republican legislators sponsored or co-sponsored legislation to end the death penalty from 2001-2002, compared to 69 Republican sponsors 14 years later.

Elected officials from both major political parties have called for reform and re-examination of the death penalty in light of high-profile innocence cases in Alabama, Texas, and Oklahoma. The case of Toforest Johnson, an Alabama death-sentenced prisoner who maintains his innocence, has drawn the attention of current and former elected officials. The sitting District Attorney in Jefferson County, where Mr. Johnson was convicted, filed an amicus brief on May 21, 2024 calling Mr. Johnson’s conviction “fundamentally unreliable.”¹⁵¹ In 2021, more than a dozen former Alabama prosecutors, judges, and state bar association presidents also filed briefs in support of Mr. Johnson. Former Attorney General Bill Baxley, a Democrat, wrote in an op-ed, “[a]s a lifelong defender of the death penalty, I do not lightly say what follows: An innocent man is trapped on Alabama’s death row.”¹⁵² Two former Alabama governors, one Democrat and one Republican, cited Mr. Johnson’s case in an op-ed urging the commutation of every death sentence imposed by judicial override or a non-unanimous sentencing recommendation.¹⁵³

Republican Texas Representative Jeff Leach said that the state’s efforts to execute Melissa Lucio

and Rodney Reed, who he believes are wrongly convicted, shook his faith in the criminal legal system. Though he maintains his support for the death penalty, in 2021 he was a primary sponsor on a bill to end death penalty eligibility for felony accomplices,¹⁵⁴ and in a 2022 interview expressed his support for a moratorium.¹⁵⁵ His public skepticism about the death penalty apparently did not affect his appeal with voters; he was reelected in 2022 with 59.2% of the vote.¹⁵⁶

Similarly, Republican Oklahoma Representative Kevin McDugle has vocally supported Richard Glossip’s innocence claims and spearheaded legislative efforts to conduct an independent review of the case.¹⁵⁷ “If we put Richard Glossip to death I will fight in this state to abolish the death penalty simply because the process is not pure,” Rep. McDugle said in 2022.¹⁵⁸ A few months later, he won reelection by a 76-24 margin.¹⁵⁹

Rise of “Progressive Prosecutors”

Prosecutors from both political parties were once reliably strong supporters of the death penalty, but a wave of progressive, reform-minded prosecutors elected since 2016—even in high-use death penalty counties like Philadelphia and Los Angeles—has changed that expectation.¹⁶⁰ The election of prosecutors like Larry Krasner (Philadelphia, Pennsylvania), George Gascón (Los Angeles, California), and Mark Gonzalez (Nueces County, Texas) proves that today’s voters choose candidates who promise to reduce or eliminate death sentences and investigate the death-seeking practices of their predecessors.

Changing Presidential Politics

In 1988, Democratic presidential candidate and Massachusetts Governor Michael Dukakis

famously doubled down on his opposition to the death penalty during a presidential debate when presented with the hypothetical scenario of his own wife’s rape and murder.¹⁶¹ His response to that question was seen as a mistake that gave his opponent endless opportunities to portray him as soft on crime. Rightly or wrongly, it was also a statement that many believed contributed to his defeat to George H.W. Bush—a lesson that subsequent presidential candidates heeded.

Four years later, when Arkansas Governor Bill Clinton was seeking the Democratic nomination for president, he publicly stepped away from his campaign to fly home and oversee the execution of Ricky Ray Rector, a Black prisoner with brain damage so severe he didn’t eat the dessert from his last meal because he was “saving it for later.” Commentators derided Bill Clinton’s actions as an effort to bolster his tough-on-crime bona fides. The *Washington Post* quoted Jay Jacobson, a former prosecutor and then-head of the Arkansas affiliate of the American Civil Liberties Union in October 1992, who said, “You can’t law-and-order Clinton. If you can kill Rector, you can kill anybody.”¹⁶² In 2019, Ohio State University law professor Douglas Berman reflected on the time period, telling *Governing* magazine, “Democrats were still supportive of the death penalty. They certainly believed it would be a political killer not to be vocal in saying that, at least in some cases, the death penalty would be appropriate.”¹⁶³ After becoming President, Clinton also supported a huge expansion of the federal death penalty to sixty offenses, including some crimes in which no murder had occurred.¹⁶⁴

In 1996 and 2000, both major political party platforms had tough-on-crime stances,¹⁶⁵ but by 2012 their positions had changed, with Democrats saying the death penalty “must not be arbitrary” and Republicans simply stating it should be an

option in capital murder cases. In 2016 and 2020, the Democratic Party unambiguously called for the abolition of the death penalty in its national platform, with every Democratic Presidential candidate in 2020 supporting abolition of the federal death penalty. Republicans also pivoted, staking out a position on state sovereignty but also declaring, “The constitutionality of the death penalty is firmly settled by its explicit mention in the Fifth Amendment.”¹⁶⁶

The 2024 presidential election campaign is now underway, and recent polling finds no mention of the death penalty on any list of voter priorities.¹⁶⁷ Early results may also confirm the diminishing appeal of candidates who support the death penalty. Presidential candidate and Florida Governor Ron DeSantis ran on a tough-on-crime record that included a dramatic return to executions in Florida and personal support for new death penalty legislation. The *Associated Press* called the legislation part of “an aggressive conservative agenda on crime and other issues ahead of his expected candidacy as he seeks to bolster support among the Republican base.”¹⁶⁸ But these efforts did nothing to reverse the downward trajectory of his popularity,¹⁶⁹ which culminated in his withdrawal from the Republican primary in January 2024.¹⁷⁰

The presumptive Republican candidate, former President Donald Trump, presided over 13 federal executions while in office. One conservative organization suggests that he resume federal executions should he be reelected¹⁷¹ and Trump himself has floated the idea of conducting group executions of drug dealers,¹⁷² despite the fact that public support for the death penalty is at its lowest point since 1966.¹⁷³ President Joe Biden campaigned in 2020 on a promise to end the federal death penalty¹⁷⁴ but has thus far not taken any public steps to fulfill this promise.

From the “Queen of Death” to the “Unicorn”: Changing Politics in Philadelphia

In the 1990s, the “Deadliest DA” in the country hailed from deep-blue Philadelphia.¹⁷⁵ Democrat Lynne Abraham’s notorious zeal for the death penalty led her to “overwhelming political success”¹⁷⁶ and earned her the nickname the “Queen of Death.”¹⁷⁷ “No prosecutor in the country uses the death penalty more...Abraham’s office seeks death virtually as often as the law will allow,” the *New York Times* reported in a 1995 profile.¹⁷⁸ She was elected to the District Attorney’s office four consecutive times by wide margins¹⁷⁹ and secured 108 death sentences by the end of her nineteen-year tenure.¹⁸⁰ “When it comes to the death penalty, I am passionate. I truly believe it is manifestly correct,” she said.¹⁸¹

However, Ms. Abraham faced a changed electorate when she ran for Philadelphia mayor in 2015. While Philadelphia supported the death penalty by margins of 75-80% in the 1990s,¹⁸² a poll two months before the 2015 primary election found that a majority of Pennsylvanians preferred life in prison over the death penalty, and only 3% said that the death penalty was their most important issue as a voter.¹⁸³ Accordingly, Ms. Abraham softened her stance when asked about her death penalty legacy on the campaign trail.¹⁸⁴ “I’ve said many times...if the Commonwealth of Pennsylvania abolishes the death penalty, I’m fine with that,” she told a reporter.¹⁸⁵ Though Ms. Abraham was the only woman in the race, Philadelphia’s National Organization

for Women chapter endorsed her competitor and eventual winner Jim Kenney in part based on Ms. Abraham’s controversial death penalty record.¹⁸⁶ She ultimately lost, finishing third out of six candidates in the Democratic primary with just 9% of the vote.¹⁸⁷

“The changing political landscape has already made long-time former District Attorney Abraham a likely impossible choice for 2015. In the 1990s, she was dubbed the nation’s ‘deadliest DA’ for vociferously seeking the death penalty, and has been criticized for turning a blind eye to police abuses and perjury. [...] In reality, it is political opportunism that may turn out to cost the most.” – *Bloomberg* (2015)¹⁸⁸

An even stronger sign of changing public opinion came with Larry Krasner’s successful campaign for District Attorney in 2017. Mr. Krasner was a criminal defense attorney and civil rights litigator who had sued the Philadelphia Police Department over 75 times, and he ran on a platform of systemic criminal justice reform.¹⁸⁹ He pledged in a campaign video that he would “never seek the death penalty—ever.”¹⁹⁰ On the day of the Democratic primary election, *The Intercept* published an interview with Mr. Krasner asking him about his choice to publicly oppose the death penalty during an election cycle.¹⁹¹

THE INTERCEPT

You oppose the death penalty and said that you will never pursue it. Pennsylvania has only executed three people since 1976 (three individuals that waived their appeals and asked for the executions to be carried out). Why do people still believe that you can’t win an election if you oppose the death penalty?

KRASNER

I was consistently told that I needed to decide whether I wanted to win this election or be the unicorn. And that if I want to be the unicorn, then I could raise my fist and say no death penalty, but if I want to win, I shouldn’t say that. I said it anyway, just because that’s what I believed for 30 years and it just didn’t make any sense to me to start lying now. It’s controversial, I suppose, but it’s also really dumb that it’s controversial.



Mr. Krasner defeated six opponents in the primary,¹⁹² and went on to win the general election with 74% of the vote.¹⁹³ He acted on his death penalty promise during his first term by declining to seek the death penalty, re-examining previous death penalty cases, and conceding error in the appeals of some capital cases.¹⁹⁴ Then, in 2019, his office filed a motion asking the Pennsylvania Supreme Court to declare the death penalty unconstitutional.¹⁹⁵ He cited an internal study finding that 72% of all Philadelphia death penalty cases had been overturned, and 91% of Philadelphia prisoners on death row were people of color, giving the DA’s office “no confidence that capital punishment has been carefully reserved for the most culpable defendants.”¹⁹⁶

Voters got their first opportunity to issue a referendum on DA Krasner’s actions when he ran for reelection in 2021. He was challenged in the Democratic primary by Carlos Vega, a former prosecutor who spent decades under Ms. Abraham before he was fired by DA Krasner in his first week in office.¹⁹⁷ Mr. Vega had a record of seeking the death penalty¹⁹⁸ and ran a “tough on crime” campaign with the backing of the police union.¹⁹⁹ “This is a showdown between the past and the future,” DA Krasner said.²⁰⁰ DA Krasner “trounced” Mr. Vega with two-thirds of the vote²⁰¹ and went on to win reelection by over 40 points.²⁰²

The Journey from Attack Ads to Abolition in Virginia

The 2005 Virginia gubernatorial race, which pitted Republican Jerry Kilgore against Democrat Tim Kaine, focused in part on the candidates' support for the death penalty. That year, between 72-76% of Virginians polled supported the use of capital punishment for individuals convicted of murder.²⁰³ Jerry Kilgore, the former Attorney General of Virginia, portrayed his opponent as an anti-death penalty liberal in attack ads.²⁰⁴

Mr. Kilgore's ads featured victims' family members criticizing Mr. Kaine because he had "voluntarily" represented a death-sentenced prisoner during his time as a criminal defense attorney.²⁰⁵ In one of Mr. Kilgore's ads, Kelly Timbrook, the widow of a Virginia policeman killed in the line of duty, asks, "how could you not think the death penalty was appropriate? That's not justice. When Tim Kaine calls the death penalty murder, I find it offensive."²⁰⁶ In another ad, which sparked much greater debate, Stanley Rosenbluth, whose son and daughter-in-law were killed by a man that Mr. Kaine's law firm colleagues represented on appeal, said, "Tim Kaine says that Adolf Hitler doesn't qualify for the death penalty. This was the...worst mass murderer in modern times."²⁰⁷ This statement misrepresented an answer from Mr. Kaine to a hypothetical proposed by a journalist during an interview.²⁰⁸

In response to these ads, Mr. Kaine's campaign released a political commercial in which he promised to uphold Virginia's death penalty law. "As governor, I will carry out death sentences handed down by Virginia juries, because that's the law,"

he proclaimed.²⁰⁹ He went on to win the election in November by 5.7 percentage points²¹⁰ and later presided over 11 executions during his tenure as governor,²¹¹ despite his stated religious opposition to the practice. In an interview years after his term ended, Mr. Kaine told reporters that it was "very, very difficult to allow executions to go forward" as governor.²¹²

Less than two decades after this contentious gubernatorial election centered on who would use the death penalty better, Virginia became the first former Confederate state to abolish it.²¹³ Twelve elected prosecutors, representing over 40% of the state's population, supported the bill.²¹⁴ At the time of abolition, two people remained on death row; their sentences were commuted to life imprisonment without parole.²¹⁵ According to a 2021 survey of Virginians registered to vote conducted by The Wason Center, a majority of participants supported repealing the death penalty (56%).²¹⁶ This shift in public opinion, in conjunction with a unified bicameral legislature, ultimately resulted in abolition in the state with the greatest number of executions in United States history.²¹⁷ All subsequent efforts to reinstate the death penalty in Virginia have been unsuccessful.²¹⁸



So much of the discussion about [death penalty abolition] was whether or not you could get reelected if you voted to get rid of it. And when I look back on this, it's disappointing to realize that that was the driving force for keeping it in place for a lot of people.

Kenneth Plum

longest serving member of Virginia House of Delegates, on Virginia abolishing the death penalty²¹⁹



The Declining Political Power of the Death Penalty in Harris County

**20
PERCENT**

of Houston area residents favored the death penalty in 2020, down from 41% in 2000.

Harris County, Texas, home to Houston, was once known as the “capital of capital punishment” in the United States.²²⁰ Since 1977, Harris County has sent 133 prisoners to the death chamber—the most in the nation and twice as many as the next closest county.²²¹ If Harris County was a state, it would rank second in the country in number of executions behind only Texas itself.²²²

Its reputation as the execution capital of the U.S. was built in no small part by District Attorney Johnny Holmes, who proudly sent over 200 people to death row during his 1979-2000 tenure.²²³ He ran uncontested or was elected by wide margins in each of his five terms²²⁴ and landed on the “Deadliest Prosecutors” list for his enthusiastic use of the death penalty.²²⁵ DA Holmes was followed by his hand-picked successor, Chuck Rosenthal, who shared Holmes’ views about the death penalty. DA Rosenthal boasted in his 2000 campaign ads that he had personally put 14 people on death row “where they belong”²²⁶ and won with 54% of the popular vote.²²⁷



Hey, let me run look at my gun, see how many notches are in it.

Former District Attorney Johnny Holmes

when asked in an interview about death penalty statistics.²²⁸

Public opinion on the death penalty started to evolve during the 2000s with new developments, including a growing number of exonerations of death-sentenced people and the Texas legislature’s approval of life without parole as a sentencing option in 2005.²²⁹ With new doubts about the accuracy of the death penalty, public support for its most zealous advocates declined.²³⁰ After DA Rosenthal resigned amidst corruption allegations in 2008, Harris County voters elected Republican Patricia Lykos on a reform platform that included a promise to create a post-conviction review unit.²³¹ In 2016, voters elected Democrat Kim Ogg, who pledged to seek the death penalty sparingly and continue reform efforts.²³² While in office, DA Ogg dropped death penalty charges in several high-profile cases.²³³ “I don’t think that being the death penalty capital of America is a selling point for Harris County,” she said in 2017.²³⁴ That same year was the third year in a row without a new death sentence in Harris County.²³⁵

Local polling confirms Harris County voters’ declining interest in the death penalty. Rice University’s Kinder Institute found that Houston area residents’ approval of the death penalty dropped from 75% in 1993 to 56% in 2019. When given a choice between the death penalty, life without parole, or life imprisonment as the most appropriate punishment for murder, just 20% of Houston area residents favored the death penalty in 2020, down from 41% in 2000.²³⁶

Despite DA Ogg’s initial popularity in Harris County, she eventually ran afoul of local voters who believed she had failed to live up to reform promises and abused her political power.²³⁷

In 2024, former prosecutor Sean Teare challenged DA Ogg in the Democratic primary. Mr. Teare said in a debate that while he would mirror DA Ogg in seeking the death penalty sparingly, he would commit to expanding the conviction integrity unit to review all Harris County convictions, including cases that resulted in death sentences.²³⁸ On March 5, Mr. Teare defeated DA Ogg by a margin of over 50 points to advance to November’s general election.²³⁹

She’s turned into a politician and not a DA, and not a very good politician.

Dan Cogdell

Houston attorney, discussing DA Ogg.²⁴⁰

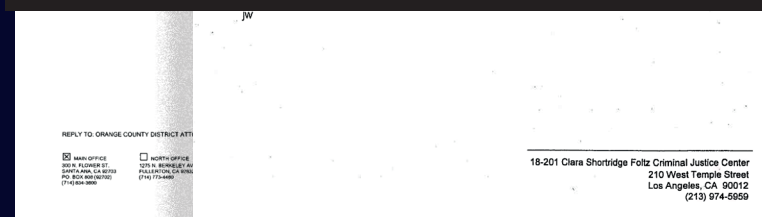
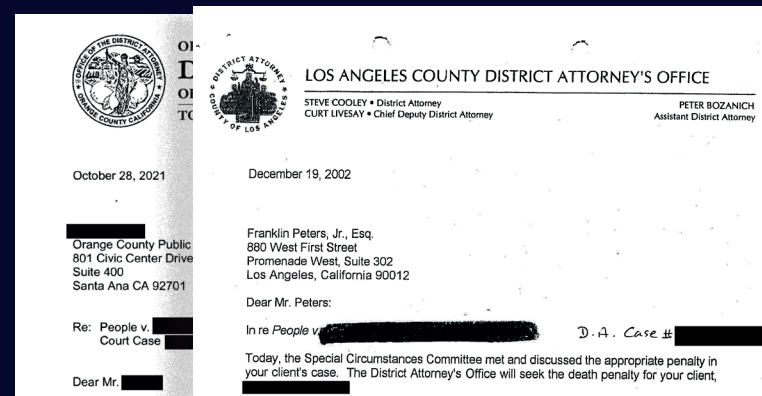
It appears that zealous use of the death penalty is no longer a winning issue for prosecutors in Harris County. Instead, voters in the former “buckle” of the “death belt” now elect candidates who acknowledge serious problems with capital punishment and commit to reforms.

Troubling Lack of Transparency

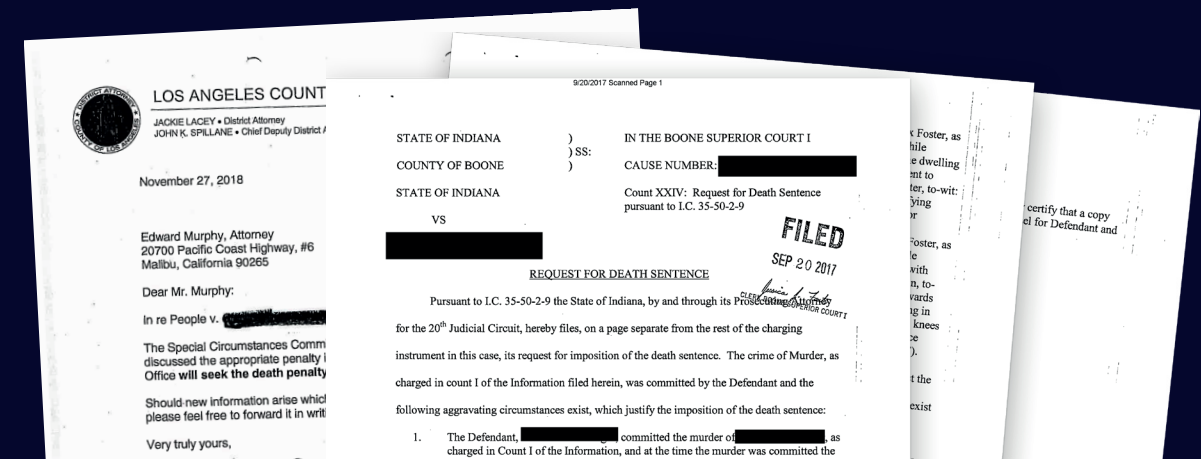
The Death Penalty Information Center faced serious barriers in our research efforts to understand prosecutorial decision-making. We sought death-charging records from district attorneys in over a dozen jurisdictions, but the vast majority either did not respond to multiple requests or told us they did not maintain records of which cases they had sought death. While DA Ogg's office replied to our request with a list of death-sought cases since 2017, they advised that the list was "not necessarily comprehensive" and that the Harris County District Attorney "does not actively track or maintain comprehensive historic lists of when and where we sought the death penalty."²⁴¹ Many cases that ended in a death sentence did not include a notice of intent to seek death (NOI) on file in online records, preventing us from securing a complete understanding about when and why the DA's office made the decision to seek death.

The failure to maintain accurate records and refusal to be transparent about decision-making are not consistent with principles of good governance. In addition, secrecy increases the risk of arbitrariness and inhibits the public's ability to hold prosecutors accountable for their decisions—one of the principal justifications for popularly electing prosecutors.²⁴² A 2018 nationwide survey of prosecutors' offices by the Urban Institute found that less than half of prosecutor offices maintained records about the number of cases entering the office, the number of charges, and the case outcome.²⁴³ Transparency issues have also likely contributed to the dearth of academic research about how elections influence prosecutorial behavior. Among the few studies that have addressed election cycles and prosecutor charging decisions, virtually all note that information is incomplete and the topic requires more study.²⁴⁴ The "virtually unlimited

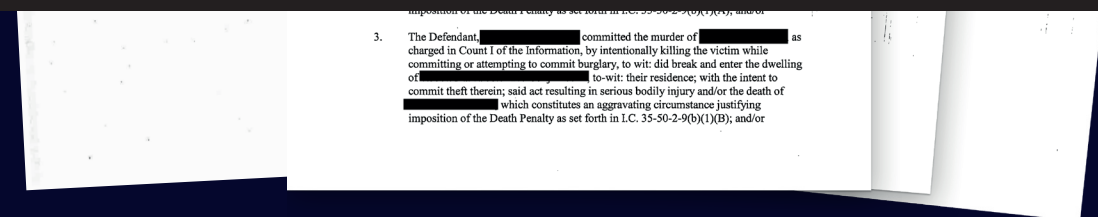
discretion exercised by district attorneys in the selection of capital cases raises the potential for extra-legal bias," Professor Unah writes, but "the prosecutor enjoys a tremendous informational advantage where only the prosecutor knows the true strength of her case,"²⁴⁵ creating a black box effect around charging decisions. This problem is then compounded when prosecutors do not keep detailed records or refuse to share them with researchers. With this Report, we emphasize the need for future academic research on this and related topics.



Most prosecutor offices are not transparent about what factors would lead them to which charging decision—and that's assuming that the office even has uniform standards," wrote law professor and former federal prosecutor Paul Butler. "Many don't and they decide these issues on an ad hoc basis, which risks allowing inappropriate considerations like race to influence who gets charged."²⁴⁶



Please note that our office does not actively track or maintain comprehensive historic lists of when and where we sought the death penalty. After a reasonably diligent and good-faith search,



ANALYSIS

Executives Grant Clemency for Death-Sentenced Prisoners More Often When They Will Not Face Voters for Reelection

It's wholly dependent on what the governor wants to do, who the governor is, and how safe, politically, the governor feels.

Former Maryland Governor Bob Ehrlich

on clemency decisions.²⁴⁷

For most death-sentenced prisoners, a plea for clemency is the very last possible opportunity to avoid execution. These final decisions are typically made by elected political actors, usually by the governors in the state. The importance of clemency in the death penalty system cannot be overstated; it is a unique opportunity for prisoners to appeal for mercy without the constraints of legal procedures that too often prevent access to the courts. Clemency has also been called a “fail safe” of the death penalty system that can be used to prevent miscarriages of justice,²⁴⁸ though many observers note that for a variety of reasons, chiefly political, clemency decisions do not operate adequately as such.²⁴⁹ Ultimately, clemency decisions have been found to be discretionary, unpredictable, and arbitrary.²⁵⁰

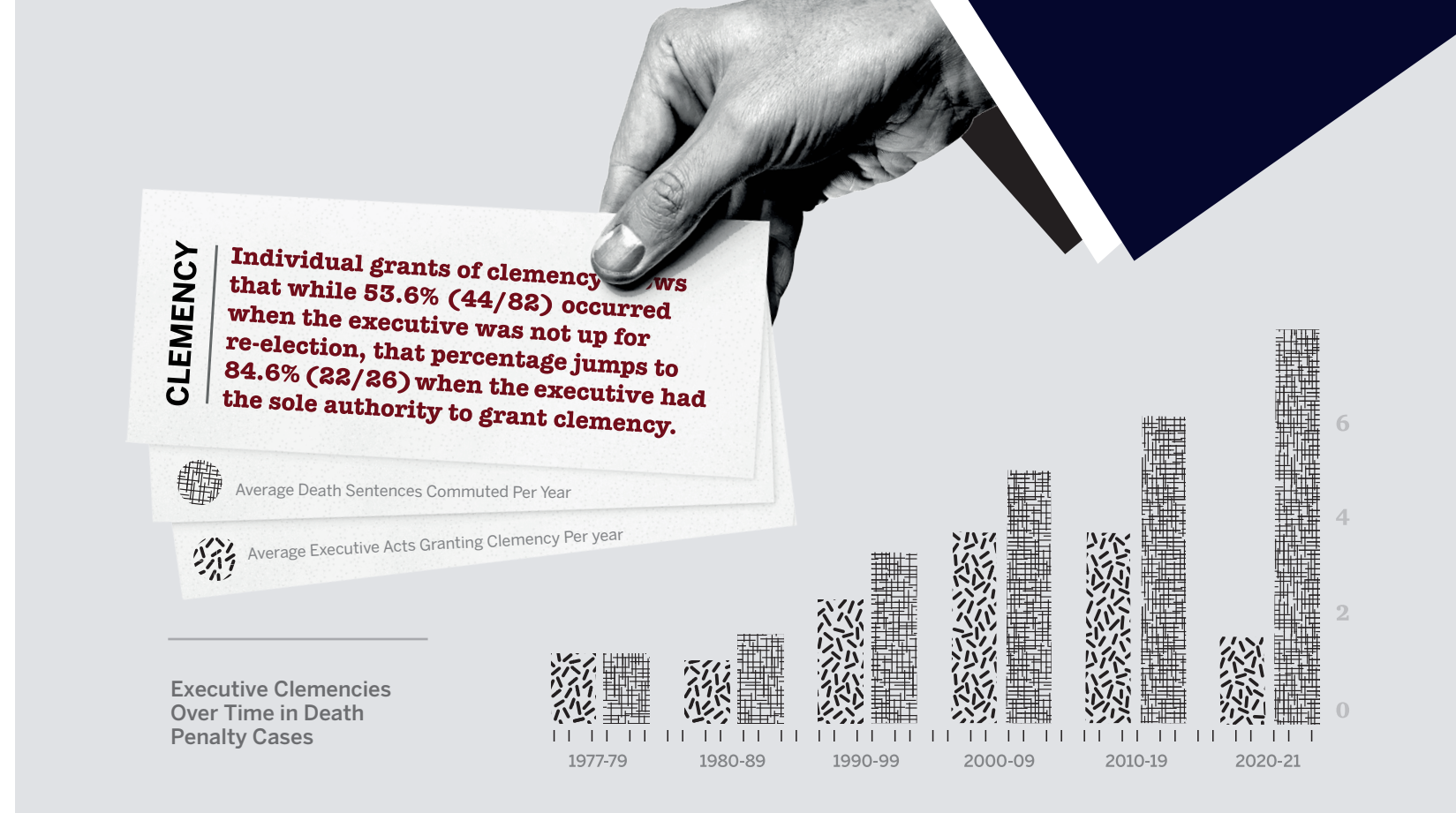
We were curious to explore how elections affect clemency decisions in death penalty cases. Experts have previously observed that “lame duck” executives are more likely to grant clemency.²⁵¹ Using our own data, we examined all state clemencies granted in death penalty cases from 1977-2023, for a total of 146 cases, excluding the mass clemency grant in Illinois in 2003.²⁵² These

146 cases include individual grants and “mass” grants of clemency for more than one person. We coded each case for a number of variables, including election cycles, structure of clemency system, and defendant characteristics.

The data show the influences of politics and elections on clemency decisions, as well as an overall increase in the number of prisoners benefiting from clemency grants during the past 47 years.

For example, the majority (56.2%) of clemency grants (both mass grants and individual grants combined) were made by executives who were not running for reelection. This percentage increased to 63.4% (52/82) when the executive had the sole authority to grant clemency, e.g., was not dependent on a parole board's recommendation.

Looking only at individual grants of clemency, however, shows that while 53.6% (44/82) occurred when the executive was not up for reelection, that percentage jumps to 84.6% (22/26) when the executive had the sole authority to grant clemency.²⁵³ This means that



executives with sole authority to grant clemency almost exclusively used their power when they did not have to face voters. When they did face reelection, these executives granted individuals clemency only four times over five decades.

One explanation for this data is the concern of some executives that voters will negatively react if they grant clemency. This belief has no known empirical basis, and recent data indicate that voters generally favor the use of executive clemency power for a variety of reasons.²⁵⁴ In addition, 50% of the American population now doubts that their government can use the death penalty fairly.²⁵⁵ Declining political support for use of the death penalty also means that many more voters will support clemency decisions, as opposed to past years when support for the death penalty was higher.

Concerns about voter reaction may have influenced political decisionmakers in the past and affected the timing of clemency grants. Our data

show that the months with the highest number of clemency grants were December (26%) and January (21.9%), which also correlate to election timing and the end of terms.

The largest mass commutation of death row in U.S. history, the Illinois grant by Governor George Ryan, occurred just two days before Gov. Ryan left office. Of the eight mass grants of clemency to all or most prisoners on a state's death row, five (62%) occurred when the governor was not running for reelection. A number of other clemency grants by state and federal executives were made on the last day or last week the executive was in office.²⁵⁶

The data also show an increase in the overall number of prisoners benefiting from clemency grants in recent years, owing to the increase in mass grants of clemency.²⁵⁷ The increase in mass grants of clemency may also be the result of changing public opinion, which may reassure executives who wish to take bold action.

Conclusion

The changeable, sometimes corruptive nature of elections adds elements of unpredictability and unfairness into the already-flawed administration of the death penalty. As a consequence, the behaviors of too many officials are more heavily motivated by electoral goals instead of by ethical, professional, or legal rationale—to the clear detriment of those in the criminal legal system without resources, influence, or advocates. For the vulnerable people who face the death penalty, the timing and nature of electoral politics represent lightning strikes of variability that can literally mean the difference between life or death.

This Report describes how one powerfully motivating aspect of elections—public opinion—has begun to level the playing field. As public support for the death penalty continues to decline and doubts about fairness and accuracy increase, elected officials are taking notice. Their behavior reflects the fact that, in many places, their constituents no longer prioritize or value zeal for the death penalty. Understanding these changes should lessen the pressure on elected officials to act reflexively and punitively.

But so long as we continue to elect decision-makers, and empower them with the discretion to make life-or-death decisions, there will be a continuing danger that political aspirations will take priority over considerations of humanity, dignity, and justice. This is one of the great weaknesses of the U.S. death penalty.

The influence of elections on officials in the death penalty system is deserving of greater study. We encourage elected officials to be open and transparent about their decision-making so that academics and researchers can more closely examine these issues and share their findings with an interested public.



Endnotes

- 1 The only other retentionist country whose judges are theoretically subject to popular approval is Japan. Japan's Supreme Court justices are first appointed by the Cabinet (the chief justice by the Emperor, upon designation by the Cabinet). In the first general election following the appointment of a justice, the electorate is allowed to voice its approval or disapproval; the electorate reviews the status of a justice every 10 years. Shigenori Matsui, [Why is the Japan Supreme Court So Conservative?](#), 88 Wash. U. L. Rev. 1375, 1377 (2011).
- 2 Rebecca Blair and Miriam Aroni Krinsky, [Why Attacks on Prosecutorial Discretion are Attacks on Democracy](#), 61 American Criminal Law Review 1, 2 (2024).
- 3 Adam Liptak, [Rendering Justice, With One Eye on Re-election](#), The New York Times, May 25, 2008.
- 4 See [Judicial Election Methods by State](#), Ballotpedia, accessed May 28, 2024.
- 5 Michael J. Ellis, [The Origins of Elected Prosecutors](#), 121 Yale Law Journal 1528, 1568 (2012).
- 6 John Kowal, [Judicial Selection for the Twentieth Century](#), Brennan Center for Justice (2016).
- 7 Kermit L. Hall, [The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860](#), 45 The Historian 337 (1983).
- 8 Lawrence M. Friedman, [Benchmarks: Judges on Trial, Judicial Selection and Election](#), 58 DePaul Law Review 451, 460 (2009).
- 9 Scott Greytak, Alicia Bannon, Allyse Falce, and Linda Casey, [Bankrolling the Bench: The New Politics of Judicial Elections 2013-14](#), Justice at Stake, Brennan Center for Justice, and National Institute on Money in State Politics (2015).
- 10 Kate Berry, [How Judicial Elections Impact Criminal Cases](#), Brennan Center for Justice (2015), at 1. See also Carlos Berdejó and Noam Yuchtman, [Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing](#), 95 Rev. Econ. & Stat. 741 (2013); Equal Justice Initiative, [The Death Penalty in Alabama: Judge Override](#) (2011); Gregory A. Huber and Sanford C. Gordon, [Accountability and Coercion: Is Justice Blind when It Runs for Office?](#), 48 American Journal of Political Science 247 (2004).
- 11 Joanna Shepherd and Michael S. Kang, [Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases](#), American Constitution Society (2014).
- 12 Dan Levine and Kristina Cooke, [In states with elected high court judges, a harder line on capital punishment](#), Reuters, September 22, 2015.
- 13 *Id.*
- 14 See, e.g., Brandice Canes-Wrone, Tom S. Clark, and Jason P. Kelly, [Judicial Selection and Death Penalty Decisions](#), 108 American Political Science Review 23 (2014) (finding that "the rise of expensive, policy-oriented judicial campaigns has created incentives for judges in the most low-information election environments to cater to majority sentiment on the salient campaign issue of the death penalty"); Paul Brace and Brent D. Boyea, [State Public Opinion, the Death Penalty, and the Practice of Electing Judges](#), 52 American Journal of Political Science 360 (2008) (finding that, in state supreme court capital cases from 1995-97, public opinion on the death penalty influences voting behavior of elected judges but not unelected judges); Melinda Gann Hall, [Justices as Representatives: Elections and Judicial Politics in the American States](#), 23 Am. Pol. Q. 485 (1995) (finding that, in state supreme court decisions from 1983-88, rates of affirming death sentences were associated with electoral politics and competitive races); Melinda Gann Hall, [Electoral Politics and Strategic Voting in State Supreme Courts](#), 54 J. Pol. 421 (1992) (using same dataset, finding that justices with ideological differences are more likely to vote with majority when facing competitive reelection).
- 15 Greytak et al., *supra*, at 27; see also Berry, *supra*, at 5-6. To view the complete ad, see "July 29 – Truth Test," [Buying Time 2014 – Tennessee](#), Brennan Center for Justice, August 7, 2014.
- 16 [Supreme Court](#), Kansas Judicial Branch, accessed June 5, 2024.
- 17 [Buying Time 2016 – Kansas](#), Brennan Center for Justice, May 30, 2017.
- 18 Ashley Cleek, [State Judicial Elections Become Political Battlegrounds](#), NPR, November 2, 2016.
- 19 [Buying Time 2016 – Kansas](#), *supra*.
- 20 Cleek, *supra*.
- 21 Sam Zeff, [All Kansas Supreme Court Justices Retained](#), KCUR, November 9, 2016.
- 22 According to the U.S. Census, the estimated 2023 populations for the three states are:
 - Ohio: 11,785,935 (3.5% of U.S. total)
 - North Carolina: 10,835,491 (3.2% of U.S. total)
 - Georgia: 11,029,227 (3.3% of U.S. total)See State Population Totals and Components of Change: 2020-2023, United States Census Bureau, accessed May 31, 2024.
- 23 All three states have state and federal elected officials from both political parties. As of May 2024, Ohio has a Republican governor, one Republican U.S. Senator, and one Democratic U.S. Senator; North Carolina has a Democratic governor and two Republican U.S. Senators; and Georgia has a Republican governor and two Democratic U.S. Senators. North Carolina and Georgia are regularly included in media lists of "swing states" in 2024. See, e.g., Mike Allen and Jim VandeHei, [Behind the Curtain: 6% of six states](#), Axios, May 6, 2024; Domenico Montanaro, [The states to watch on the 2024 electoral map](#), NPR, April 23, 2024; Elliott Davis Jr., [7 States That Could Sway the 2024 Presidential Election](#), U.S. News & World Report, April 3, 2024. While Ohio is now considered a more conservative state, it was historically a key swing state and "bellwether" for the presidential winner. See Ron Elving, [Ohio has been a bellwether and a battleground: What is it telling us now?](#), NPR, March 23, 2024.
- 24 See Death Penalty Information Center, [The Death Penalty in 2023: Year End Report](#) (2023) (finding that only five states conducted executions in 2023, seven states imposed new death sentences, and only ten states have conducted executions in the past ten years); Death Penalty Information Center, [The 2% Death Penalty](#) (2013) (finding that 2% of counties were responsible for the majority of executions since 1976).
- 25 Number of people sentenced to death by state as of January 1, 2022:
 - Ohio: 443 (5.0% of total)
 - North Carolina: 544 (6.1% of total)
 - Georgia: 352 (4.0% of total)See Death Penalty Information Center, [Death Penalty Census Database](#), accessed June 4, 2024.
- 26 Number of people executed in the modern era by state as of October 1, 2023:
 - Ohio: 56 (3.55% of total)
 - North Carolina: 43 (2.73% of total)
 - Georgia: 76 (4.82% of total)See Legal Defense Fund, [Death Row U.S.A. Fall 2023](#) (2024), at 3.
- 27 See [Ohio Supreme Court](#), Ballotpedia, accessed May 31, 2024; [Supreme Court of North Carolina](#), Ballotpedia, accessed May 31, 2024; [Georgia Supreme Court](#), Ballotpedia, accessed May 31, 2024.
- 28 See Death Penalty Information Center, [Lethal Election: Methodology](#) (2024).
- 29 [Williams-Yulee v. Florida Bar](#), 575 U.S. 433 (2015). In this case, the Court ruled that states could prohibit judicial candidates from personally soliciting campaign funds in order to "preserve public confidence in the integrity of their judiciaries."
- 30 [State v. Braden](#), 158 Ohio St.3d 462, 475 (Ohio 2019) (Fischer, J., dissenting).
- 31 *Id.* Justice Fischer, a Republican, cited three other criminal cases in which he had made the same argument, including one which drew additional bipartisan dissents about the reconsideration. See [State v. Gonzales](#), 150 Ohio St.3d 276 (Ohio 2017). "The state's motion for reconsideration is a transparent attempt to win this case, not based on the merits of its arguments, but based on the change in the makeup of this court following the 2016 election," wrote Justice William O'Neill, a Democrat, in dissent. *Id.* at 294.
- 32 See, e.g., [State v. Sowell](#), 148 Ohio St.3d 554 (Ohio 2016) (affirming death sentence of man convicted of killing 11 women in decision released one month after election); [State v. Cepec](#), 149 Ohio St.3d 438 (Ohio 2016) (affirming death sentence of man convicted of murdering 73-year-old man after escaping from halfway house in decision released one month after election).
- 33 Damantae Graham, a 19-year-old Black man, was convicted and sentenced to death for his participation in the robbery and murder of an 18-year-old white college student. The Court reversed Mr. Graham's death sentence, holding that the aggravating factors in the case were outweighed by the mitigating factors, including Mr. Graham's childhood abuse, mental health, addiction, and youthfulness. [State v. Graham](#), 164 Ohio St.3d 187 (Ohio 2020).
- 34 See Daniel Nicheanian, ['Dystopian' Loop-hole for Georgia Judicial Elections Gives Brian Kemp the Last Laugh](#), Bolts, March 21, 2022; Jay Willis, [Brian Kemp's Sham Democracy in Georgia, The Appeal](#), May 13, 2020. Justice Keith Blackwell announced before the June election that he would retire in November 2020, a

- month before his term would have ended but just past the threshold for him to receive his state-guaranteed pension.
- 35 *Barrow v. Raffensperger*, 842 S.E.2d 884 (2020).
- 36 *Chief Justice Nahmias's Last Day on the Bench*, Supreme Court of Georgia, June 23, 2022.
- 37 Bill Rankin and Greg Bluestein, *Gov. Kemp Taps Andrew Pinson to Succeed David Nahmias on High Court*, The Atlanta Journal-Constitution, February 15, 2022.
- 38 Appointment systems are typically based on “merit selection,” requiring a nominating commission to evaluate and identify a predetermined number of suitable candidates from which the chief executive will choose. See, e.g., Sanford C. Gordon, *Democracy Reform Primer Series: Elect-edvs.Appointed Judges*, University of Chicago Center for Effective Government, February 20, 2024; The Fund for Modern Courts, *Methods of Judicial Selection*, accessed June 20, 2024.
- 39 *Young v. State*, 312 Ga. 71 (2021).
- 40 Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond A Reasonable Doubt Standard To Determine Intellectual Disability In Capital Cases*, 33 Georgia State University Law Review 553, 582 (2017); Zachary Folk, *Georgia Set to Execute Willie James Pye, But Lawyers Say He Is Mentally Disabled*, Forbes, March 20, 2024. One person facing the death penalty was found to have an intellectual disability beyond a reasonable doubt, but because she was convicted of felony murder, the case did not involve an intentional killing. See Lucas, *supra*, at 576; *Marshall v. State*, 276 Ga. 854 (2003).
- 41 See *North Carolina judicial elections*, Ballotpedia, accessed May 21, 2024.
- 42 Jeffrey Billman, *The Most Important Election You Know Nothing About*, The Assembly, October 6, 2022.
- 43 *Cheri Beasley to become first African American woman Chief Justice of the North Carolina Supreme Court*, ABC 11 News, February 12, 2019.
- 44 Kyle C. Barry, *Civil Rights Loom Large in North Carolina's Supreme Court Elections*, Bolts, October 22, 2020.
- 45 *Id.*; see also Will Doran, *A reversal on racial justice reforms at North Carolina's Supreme Court?*, WRAL News, April 12, 2023. In response to a question about racial injustice in a 2020 candidate forum, Chief Justice Newby asked, “Where’s the evidence we’re not treating everyone the same?” See The Federalist Society, *North Carolina Supreme Court Candidate Forum*, YouTube, September 14, 2020, at about 56:00. He also referred to Justice Anita Earls as an “AOC person,” referencing Congresswoman Alexandria Ocasio-Cortez, a progressive Latina Democrat. See Patricia Timmons-Goodson, *Newby's comments about other justices undermine the court*, Raleigh News & Observer, August 2, 2019.
- 46 See *State v. Ramseur*, 374 N.C. 658 (N.C. 2020); *State v. Burke*, 374 N.C. 617 (N.C. 2020); *State v. Robinson*, 375 N.C. 173 (N.C. 2020); *State v. Augustine*, 375 N.C. 376 (N.C. 2020); *State v. Golphin*, 375 N.C. 432 (N.C. 2020).
- 47 *Robinson*, 375 N.C. 173.
- 48 *Robinson*, 375 N.C. at 175-78; see also Matthew Burns, *NC supreme court fractures over repealed racial bias law*, WRAL News, August 14, 2020. For an in-depth examination of North Carolina’s history of racism in the use of the death penalty, see Center for Death Penalty Litigation, *Racist Roots*, accessed June 11, 2024.
- 49 See William H. Westermeyer, *BACK TO AMERICA: IDENTITY, POLITICAL CULTURE, AND THE TEA PARTY MOVEMENT 15657* (2019). At a Tea Party event during Justice Newby’s campaign for his 2012 reelection, in response to a question about when the state would resume executions, he said: “Now the problem is that you have this Racial Justice Act.... It’s as if race were relevant to any of this. I have discussions with people who say that there are too many black people in prison. I don’t disagree with that, there are. But they are not there because they are black. They are there because they committed a crime.”
- 50 *Robinson*, 375 N.C. at 194 (Newby, J., dissenting).
- 51 *North Carolina Supreme Court Chief Justice Contest*, Nov. 03, 2020 - Certified Results, North Carolina State Board of Elections (2020).
- 52 See Douglas Keith and Eric Velasco, *The Politics of Judicial Elections, 2019-20*, Brennan Center for Justice 3-4 (2022).
- 53 Billman, *supra*; see also Will Doran, *Advocates fear reversal on racial justice reforms at North Carolina Supreme Court*, WRAL News, April 12, 2023; Billy Corriher, *North Carolina's progress on criminal justice at stake in high court election*, Facing South, September 15, 2022; Billy Corriher, *N.C. chief justice removes court officials and judges who anger the GOP*, Facing South, April 7, 2022.
- 54 Colin Campbell, *Are judges allowed to endorse if they're not on the ballot this year?*, North Carolina Tribune, March 29, 2022.
- 55 Aaron Mendelson, *Not just the U.S. Supreme Court: Ethics troubles plague state high courts, too*, NC Newline, December 12, 2023.
- 56 See Tierney Sneed, Ariane de Vogue, and Ethan Cohen, *GOP-controlled North Carolina Supreme Court reverses rulings that struck down partisan gerrymanders by Republican lawmakers*, CNN, April 28, 2023; Caroline Sullivan, *The North Carolina Supreme Court's Three-Part Attack on Democracy*, Democracy Docket, May 2, 2023.
- 57 Billman, *supra*.
- 58 Theresa Opeka, *Death row inmate argues black jurors were excluded from his trial*, The Carolina Journal, February 13, 2023.
- 59 See Corriher, *North Carolina's progress*, *supra*; *State v. Hobbs*, 374 N.C. 345 (N.C. 2020).
- 60 *State v. Tucker*, 385 N.C. 471, 522 (N.C. 2023).
- 61 See *Robinson*, 375 N.C. 173.
- 62 See CBS 17, *Democratic nominee Cheri Beasley attack ad*, YouTube, May 18, 2022; Marshall Terry, *Fact Check: Claims in ad attacking Cheri Beasley's judicial rulings are only half true*, WFAE, May 25, 2022.
- 63 Team Punchbowl News, *Senate Majority PAC ad backs Beasley as tough on crime*, YouTube, May 23, 2022.
- 64 Deepa Shivaram, *Republican Ted Budd takes North Carolina Senate seat, beating Democrat Cheri Beasley*, NPR, November 8, 2022.
- 65 Kathleen Maloney, *Court Upholds Conviction and Death Penalty in 2008 Shooting of Twinsburg Police Officer*, Court News Ohio, October 29, 2014.
- 66 Levine and Cooke, *supra*.
- 67 *Ohio Supreme Court elections, 2014*, Ballotpedia, accessed June 25, 2024.
- 68 Levine and Cooke, *supra*.
- 69 *Citizens United v. FEC*, 558 U.S. 310 (2010).
- 70 Douglas Keith, *The Politics of Judicial Elections, 2021-2022*, Brennan Center for Justice, accessed May 29, 2024. The 2021–2022 cycle of state supreme court elections broke numerous records: In total, candidates, interest groups, and political parties spent \$100.8 million on state supreme court elections. This was nearly twice the spending in any prior midterm cycle, after adjusting for inflation.
- Outside interest groups spent more than ever before, accounting for \$45.7 million — or 45.3 percent — of all money spent, a larger share of the spending than ever before.
- Several states saw their most expensive judicial election cycles ever, including Kentucky, Montana, North Carolina, and Ohio.
- For the first time, interest groups on the left and right spent almost the same amount on supreme court elections, though the balance varied significantly across states.
- 71 Reid Epstein, *Costly Court Race Points to Politicized Future for Judicial Elections*, The New York Times, March 28, 2023.
- 72 *Alabama Judicial Races Are Most Expensive in the Nation*, Equal Justice Initiative, February 22, 2011.
- 73 Stephen Caruso and Kate Huangpu, *Spending on Pa. Supreme Court race broke records, set precedent for outside influence*, Spotlight PA, November 15, 2023.
- 74 Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, The New York Times, October 1, 2006.
- 75 Neel Sukhatme and Jay Jenkins, *Pay to*
- Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel*, 70 Duke Law Journal 775 (2021).
- 76 *Id.* at 822.
- 77 *Id.* at 820.
- 78 *Id.* at 783.
- 79 *Id.* at 776.
- 80 David Barnhizer, *“On the Make”: Campaign Funding and the Corrupting of the American Judiciary*, 50 Catholic University Law Review 361, 370 (2001).
- 81 Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 1994; see also American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) (“ABA Guidelines”).
- 82 See ABA Guidelines, *supra*, Guideline 10.3, *Obligations of Counsel Respecting Workload*; ABA Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*.
- 83 Jessica Schulberg, *A Matter of Life and Death*, HuffPost, March 12, 2023.
- 84 Jessica Schulberg, *Judge in Nation's Execution Capital Recommends Overturning Death Sentence*, HuffPost, February 29, 2024.
- 85 *Ex parte Prevost*, No. 1414421-A, *Trial Court's Findings of Fact, Conclusions of Law, and Recommendation on Application for Writ of Habeas Corpus*, February 2, 2024, at 2.
- 86 Mark Ellis, *Candidate/Officeholder Campaign Finance Report*, Texas Ethics Commission, covering January 27, 2006 to February 25, 2006, at 7; The Honorable Mark K. Ellis, *Judicial Candidate/Office-*

- holder Campaign Finance Report, Texas Ethics Commission, filed July 15, 2016, at 4.
- 87 Schulberg, *Judge in Nation's Execution Capital*, *supra*.
- 88 *Id.*; Adam Liptak and Ralph Blumenthal, [New Doubt Cast on Testing in Houston Police Crime Lab](#), *The New York Times*, August 5, 2004.
- 89 *Id.*
- 90 *Id.* Mr. Cruz-Garcia is currently on death row and maintains his innocence.
- 91 The Honorable Holly R. "Renee" Magee, [Judicial Candidate/Officeholder Campaign Finance Report](#), Texas Ethics Commission, filed October 11, 2016, at 17; The Honorable Holly R. "Renee" Magee, [Judicial Candidate/Officeholder Campaign Finance Report](#), Texas Ethics Commission, filed January 14, 2016, at 12.
- 92 Schulberg, *A Matter*, *supra*.
- 93 KHOU Staff, [Experts: Harris Co. taking risks with lawyer appointment system](#), KHOU 11, October 26, 2009.
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