SHORT ARTICLE

Republican-Majority Appellate Panels Increase Execution Rates for Capital Defendants

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We use the quasi-random assignment of cases to three-judge panels on the US Courts of Appeals to assess the consistency of adjudication of death penalty appeals. We find clear evidence that panels apply different standards depending on whether a majority of the panel was appointed by Democratic or Republican presidents. Unlike previous work on panel effects in the US Courts of Appeals, we show that these effects persist to the end of the process of adjudication. Since the early 1980s, the probability of ultimate execution has been increased for inmates when their first court of appeals case was assigned to a panel with a majority of Republican appointees.

Capital punishment is the most punitive and irreversible form of judicial sanction. As a result, it is clear that its application must meet the very highest standards of fairness and justice. Indeed, it was out of a concern about unfair application of the death penalty that the US Supreme Court, in *Furman v. Georgia* 408 U.S. 238 (1972), struck down all death penalty statutes in the country. In a concurring opinion in that case, Justice Stewart wrote, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." When, just four years later, in *Gregg v. Georgia* 428 U.S. 153 (1976), the Supreme Court approved of newly written statutes governing sentencing procedures, the majority specifically argued that the new statutes addressed the problem of arbitrariness in death penalty sentencing.

There remains considerable disagreement as to whether these and subsequent reforms in capital sentencing indeed established a fair, even, and consistent application of the death penalty. As Baumgartner et al. (2018) argue, the spirit of the court's decisions validating new death penalty statutes in 1976 included the proposition that the imposition of the death penalty cannot be arbitrary or random. But recent research suggests juries and trials introduce wide variance in outcomes, including as a function of race (Alesina and Ferrara 2014; Anwar, Bayer, and Hjalmarsson 2012; Spurr 2002). Moreover, nearly all death penalty cases enter a long appeals process after the initial conviction and sentencing phase, which leads to a lengthy period of review (see Gelman et al. 2004). Of the six thousand individuals sentenced to death between 1973 and 1995, only 5% had been executed by 1995. Most of the remaining 95% of the sentences were either overturned or under continued appellate review. This appellate process was frequently characterized by claims that were very unlikely to prevail, and as a consequence Congress passed, in 1996, the Antiterrorism and Effective Death Penalty Act, which contained procedural hurdles including a one-year statute of limitations period for seeking habeas corpus, severely restricting

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the ability to file a second or successive petition for a writ of habeas corpus, and making it more difficult to meet the standards for a writ.

We examine one aspect of this capital sentence appellate process: the US Courts of Appeals, which, because of the limited number of cases heard by the US Supreme Court, are usually the courts of last resort for those who face execution. Generally speaking, death penalty cases reach the courts of appeals after the convicted defendant has exhausted all state-level appeals. Appellate decisions are almost always made by a panel of three judges selected from the pool of judges in the circuit.[1] These courts have the opportunity to correct for error and inconsistency that have occurred previously but also potentially to introduce inconsistency themselves. Previous work has demonstrated that the existence of three-judge panels reduces inconsistency in death penalty cases versus a hypothetical alternative of single-judge decisions in the courts of appeals (Beim and Kastellec 2014; Fischman 2015).[2] The deliberative process of collegial decision-making on these courts may help promote a uniform standard across the cases heard in a circuit. However, even such influence is not necessarily sufficient to achieve a uniform standard across a circuit if judges' predeliberation standards vary widely, because three-judge panels will frequently group judges with similar views together. Although we have an understanding of the consequences of judges' individual ideology on criminal justice outcomes (see, e.g., Cohen and Yang 2018; Huber and Gordon 2004) and on defendants' long-run outcomes (see, e.g., Aizer and Doyle 2015), and a notion of panel-effects influence how a case is ultimately resolved (Hall 2009), we do not have a firm understanding of the reduced-form, ultimate consequences of panel composition.

In this article, we quantify inconsistency in the implementation of the death penalty due to panel composition—both in case outcomes and in actual executions. Consistent with a generation of research on the relationship between partisan appointment, judicial ideology, and decision-making, we show predictable variation in the standards judges apply to death penalty cases. Panels with a majority of Democratic-appointed judges grant relief from a death sentence more often; panels with a majority of Republican-appointed judges grant relief less often. While the effects for execution are smaller than for relief (due to the remaining oversight mechanisms of en banc review and the Supreme Court), we nonetheless find evidence that panel composition predicts execution. This finding calls into question the extent to which the American legal system is meeting the standard that the Supreme Court has set out for the death penalty's conformity to the Eighth Amendment's prohibition on cruel and unusual punishment.

IDENTIFICATION, DATA, AND METHODS

We estimate the consequences of panel composition on decisions and executions by comparing cases that were assigned to different judges. Like much previous research, our study relies on the assumption that as-if-random assignment of cases to panels holds for these cases. Internal assignment rules vary by circuit, but while there is evidence that panels are not randomly constructed from the set of possible judges given the area of law (Hall 2010; Levy 2017), there is no evidence that cases are systematically assigned to judges in a way that relates to their relative merits within that area of law. It is not a problem for our identification strategy if panels themselves are not randomly constructed, so long as cases are assigned to those panels without respect to the facts of those cases. The most serious threat to our inferential strategy would be if cases are assigned in a way that causes some judges to get systematically weaker cases than other judges, because those judges would spuriously appear more conservative by virtue of more frequently denying relief. In the domain of death penalty cases, previous research has indicated that Republican and Democratic appointees are equally likely to see defendants who won at the district court level (Beim and Kastellec 2014).

As-if-random assignment only plausibly holds for the first case involving a given death-row inmate before the courts of appeals and only when comparing such cases heard in the same year in the same circuit. Some inmates have multiple cases heard over a period of years, but whether further cases are heard for the same inmate can be an outcome of the initial case, panel assignment is not independent across these cases, and the strength of such cases is unlikely to be independent either. Different circuits have different mixes of cases coming up from their constituent states and also different mixes of Democratic- and Republican-appointed judges. Within each circuit, the mix of cases and the mix of appointed judges potentially change over time. Further, the Supreme Court precedents that the courts of appeals apply are also changing over time. Taking these points together, among the set of first appearance cases considered at the same time by the same appellate court, the expected strength of the cases heard by any possible three-judge panel is the same. This means that we must analyze each circuit separately and also adjust for the average "case strength" at any given moment in time in order to isolate the causal effect of the panel assignment.

1. The US Courts of Appeals are arranged into 12 geographically defined circuits. Active judges from the relevant circuit are the primary pool for any case; however, judges from US district courts, from other circuits of the US Courts of Appeals, and retired judges from the circuit sometimes sit "by designation" as one of the three judges.

2. Although see also Sunstein et al. (2006), which argues that judges do not influence one another's decision-making in death penalty cases.

Existing databases of death penalty appeals did not link all the information we required for our analysis. We performed an overinclusive Westlaw search for all cases that could be a case from a death row inmate before any circuit in the US Court of Appeals following the procedures in Fischman (2015) and Beim and Kastellec (2014). This procedure yielded more than twenty thousand cases between 1983 and 2012. Each case was then read, individually, by a member of our research team that comprised law students, graduate students in political science, and undergraduate students. Each case was assessed for whether it was a death penalty case. The vast majority of the cases in our data are initial federal habeas petitions. As such, these cases typically cover issues such as (*a*) prosecutorial misconduct; (*b*) improprieties related to the jury; (*c*) ineffective assistance of counsel; and (*d*) constitutional challenges to the death penalty, such as claims that the defendant is ineligible for execution. We retained each case decided by a three-judge panel (i.e., we exclude cases decided en banc) and recorded a number of pieces of information, which we describe below.[3] As a result, our data include those individuals who appeared with death-penalty-related cases for the first time before the courts of appeals between January 1, 1983, and December 31, 2012.[4]

Because some states sentence far more people to death than others and circuits are organized geographically, cases are very unevenly distributed across circuits. The DC Circuit, and the First, Second, and Third Circuits (covering the mid-Atlantic through New England) yield too few cases for us to study. Therefore, we focus on the eight circuits—the Fourth through Eleventh, inclusive—that handle nearly all death penalty cases. The resulting data include 1,991 initial death penalty cases decided in the court of appeals between 1983 and 2012. For each case, we recorded the judges on the panel, how each judge voted (whether to support any relief at all for the defendant), and whether the decision supported any relief at all for the defendant.

The first outcome of interest is the panel's immediate decision to grant or deny relief to a death-row prisoner. This allows us to focus on the reduced-form effects of inconsistency, knowing that suppressed dissents, bargaining, and other interjudge dynamics may influence the decisions that we observe. The second outcome of interest is whether the death-row prisoner is ultimately executed. We used the list of executions maintained by the Death Penalty Information Center (https://deathpenaltyinfo.org), current as of 2017, which we verified by cross-referencing against states' websites listing executions. We then matched each execution to an inmate appearing in our data. Inmates who were granted relief are not necessarily removed from death row, and inmates granted relief may still ultimately be executed. For example, "relief" may take the form of a remand, but the outcome of the remand may once again be the death penalty. Nevertheless, whether an inmate is granted relief in their initial appeals court case and whether they are ultimately executed are highly correlated outcomes. In most circuits, the relief denial in the initial panel decision is associated with a roughly 30 percentage point difference in ultimate execution rates.[5]

Our analysis focuses on a reduced-form identification of the causal effect of having different panel compositions on grants of relief y_j and ultimate execution z_j in cases j. This approach has the advantage of generating comparable estimates of the causal effect of panel composition on both the relief and the execution outcomes. The latter effect is likely to run partly, but not entirely, through the immediate decision of the panel on whether to grant relief. However this is not the only causal pathway because the same panel is more likely to hear subsequent appeals from that defendant and the identities of the assigned judges may influence the subsequent oversight process via en banc or Supreme Court review. It is the very complexity of this subsequent process that makes the reduced-form analysis attractive: it allows us to estimate whether there is a causal effect of initial panel assignment on execution, regardless of the relative importance of the various causal pathways through which that effect could arise.

Our primary treatment variable is whether a panel has a majority of Democratic-appointed judges, $T_j = 0$, or a majority of Republican-appointed judges, $T_j = 1$. The key identifying assumption is that this treatment assignment is as-if-randomly assigned. As discussed above, this assumption is only plausible conditional on circuit and date. Therefore, we estimate regression models separately for each circuit with year fixed effects. Year fixed effects provide the most credible causal estimates, as they allow for potentially different baseline

3. We then further examined all cases identified by a similar search decided between July 2, 1976 (when the Supreme Court decided *Gregg v. Georgia*) and December 31, 1982, to see if any of our death penalty defendants had a case in the court of appeals before 1983. If they did, we excluded them from our data as their first appearance in our data set was not their first appearance at the court of appeals.

4. Our data exclude all cases in which a person was sentenced to death if that sentence was commuted before the appeal. Our data also exclude cases brought by next friends and cases in which the person on death row does not seek relief (such as cases about prison conditions).

5. Table A1 (tables A1, A2 are available online) reports the proportion of inmates ultimately executed in each circuit (as of 2017) divided into those who were granted relief at their first appeal before the court of appeals and those who were not. The baseline rates at which inmates are granted relief and the rates at which they are executed vary over the period we study within and across circuits (see fig. A1; figs. A1, A2 are available online).

rates of grant denial and ultimate execution for cases that first reached the courts of appeals in each individual year. A total of 89% of cases across all circuits are in a circuit year where there is at least one Democratic-majority case and at least one Republican-majority case.

Our analysis only estimates variation in decision-making that is a function of the treatment variable. This means that we cannot detect inconsistency that is associated with "within-party" variation in the standards judges apply. The analysis also does not take a position on the mechanism creating partisan differences, although we note that past research has voluminously documented that Democratic and Republican appointees hold different views on the application of constitutional law, both in general and regarding the death penalty. We are estimating an average treatment effect in each circuit, but the treatment effect may itself vary over the period under study. These limitations cannot lead us to overestimate inconsistency in decision-making. However, if judges vary within appointing party (which they surely do) or over time (which they likely do) that implies greater inconsistency in decisions than we estimate, albeit inconsistency that is not straightforwardly associated with whether there is a Democratic- or Republican-appointed majority on the panel.

In the appendix (available online), we present additional checks and alternative analyses. First, we report intercoder reliability statistics. Second, we show that the state from which each case arose is not systematically associated with having a Republican majority once we condition on circuit and year. Third, we show that the surname-predicted race of the inmates (Imai and Khanna 2016) does not predict receiving a Republican-majority panel once we condition on circuit and year. Fourth, we show results of an analysis using four treatment levels, corresponding to 0, 1, 2, or 3 Republican-appointed judges on the panel, and find that differences in outcomes as a function of majority party (0 or 1 versus 2 or 3) are far larger than the differences between homogenous and heterogenous panels with the same majority party (0 versus 1 or 2 versus 3). Fifth, we split the analysis according to the party of appointment of the chief judge of the circuit in the year that the case was decided (the chief judge nominally administers the process of assigning cases to panels; Hettinger, Lindquist, and Martinek 2003) and find negligible differences. Sixth, we discuss in further detail why it is substantively implausible to think that there is a mechanism that systematically assigns stronger appeals to Democratic-majority panels, particularly if it were really the case that there was no causal effect of panel majority on the decision-making.

RESULTS AND DISCUSSION

Table 1 shows the estimated effect of a change from a Democratic-appointed panel majority to a Republican-appointed panel majority on the probability of relief denial and execution in each of the circuits we consider. Republican-majority panels are associated with higher relief denial rates and higher probability of ultimate execution in most circuits. In the fixed effects model the circuit-level point estimates vary from a .00 to a .31 higher

Table 1. Estimated Treatment Effects

	Circuit										
Outcome	4	5	6	7	8	9	10	11	Avg. Effect	Total Effect	95% CI
Relief denial:											
Without year FE	.14	.07	.30	.23	.12	−.01	.03	.16	.12	232	152–313
	(.04)	(.04)	(.07)	(.14)	(.07)	(.08)	(.07)	(.04)	(.02)	(41)	
With year FE	.18	.09	.31	.19	.17	.00	.04	.08	.12	235	149–322
	(.05)	(.04)	(.07)	(.15)	(.08)	(.10)	(.08)	(.04)	(.02)	(44)	
Execution:											
Without year FE	.08	.12	.12	.13	.10	.00	.07	.04	.09	169	76–263
	(.06)	(.05)	(.07)	(.16)	(.09)	(.07)	(.08)	(.05)	(.02)	(48)	
With year FE	.02	.14	.17	−.07	.12	−.12	.03	.05	.07	143	42–244
	(.07)	(.05)	(.07)	(.16)	(.10)	(.09)	(.09)	(.05)	(.03)	(52)	
N	244	600	168	78	188	152	159	402	1,991	1,991	

Note. Estimated treatment effects in each circuit for a change from a Democratic-majority to a Republican-majority panel, as differences in proportion of negative outcome for the inmate. Total effect is the implied difference in the total number of negative case outcomes over all circuits. Standard errors in parenthesis. FE = fixed effects; CI = confidence interval.

probability of a relief denial with a Republican-appointed majority versus a Democrat-appointed majority panel. For execution, the estimates range from −.12 to .17. Each of these circuit-specific estimates is relatively imprecise, but they are independent from one another and so the collective evidence they provide about the full set of circuits is much stronger. If we weight the circuit-level estimates by the number of cases decided in those circuits, we can construct an estimate of the average treatment effect of going from a Democratic-appointed majority to a Republican-appointed majority for all death penalty cases in our data set. For relief denial, the average treatment effect is .12; for execution, it is .07.[6] These average treatment effects of 12 and 7 percentage points correspond to 235 additional relief denials (95%: 149–322) and 143 additional executions (95%: 42–244) out of 1,991 total cases in a world where all panels had Republican majorities versus a world where all panels had Democratic majorities. The *p* value for the null hypothesis that there was no average treatment effect on switching between Democratic- and Republican-majority panels across all circuits is .003 for executions and negligible for relief denial.

Because the death penalty entails such a high degree of punitiveness and irreversibility, its exercise requires the highest level of legal scrutiny to ensure its application does not violate individual rights. In the United States, the Supreme Court has held that the constitutional prohibition on cruel and unusual punishment requires the death penalty to not be administered randomly or in a way affected by factors that are orthogonal to the legal merits of the crime and defendant. Our analysis demonstrates two findings that call into question the extent to which the death penalty is administered to this standard. First, we find that judges apply different standards that correlate with partisanship in deciding cases that are, in expectation, equally strong on the merits. Second, we show a causal effect of the partisan composition of appeals court panels persists for the ultimate fate of the litigants coming before the court. If the identity of the judges influenced how panels decided cases but the institutions of judicial oversight remedied this variation before execution, one could argue that such variation is of limited normative concern. What we find instead is that being randomly assigned to differently composed panels has a causal effect on whether an individual lives or dies.

6. In the appendix, we show that the circuit-level estimates are largely consistent (given their estimation precision) with the average effect. Nonetheless, it is very likely that treatment effects are heterogenous across circuits and across time, and we know that appeals have faced different probabilities of having panels with Republican or Democratic majorities across circuits and across time.

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