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Kicked Out of the Robe: Will Judges Be Targeted with Recall Campaigns?

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That may be changing.*

By JOSHUA SPIVAK

While federal and state judges are finding themselves at the center of political debates, California is taking it a step further. On June 5th, California will be the site of the first recall election of a full-time judge in the U.S. since 1982. For judges, this could be an ominous sign of an expanded electoral focus on their positions.

The recall itself, against Santa Clara County Superior Court Judge Aaron Persky, has received an avalanche of national news coverage. Persky has been under fire since his sentencing of a Stanford University swimmer to six months in jail for rape.

His opponents, led by Stanford professor Michele Dauber, have managed to raise nearly a million dollars thanks to a viral campaign. They also performed the difficult feat of collecting 95,000 signatures, well over the 58,000 they needed to get the election scheduled.

Despite this effort, Persky may survive the vote, though he does face some serious odds. Generally, about 60 percent of elected officials lose their seats in a recall vote.

What is surprising is not that a judge was targeted. There have been plenty of attempts to recall judges throughout the country—including the judge who granted O.J. Simpson custody of his children and the judge who ruled in favor of California's domestic partnership laws in 2004. It is that the recall made the ballot.

Historically, there has been an aversion to recalling judges. When California looked to adopt the recall back in 1911, the effort flew through the legislature, but almost floundered over the issue of whether judges should be included (a late breaking state Supreme Court scandal sealed it).

President William Howard Taft vetoed the Arizona Constitution because it included a recall of judges' provision. Just last year, the Nevada Supreme Court threw out the portion of its recall law that could be used against judges.

The last time a recall of a judge got on the ballot was in Wisconsin in 1982, and that judge survived the vote. The last judge to be kicked out by a recall was in 1977, also in Wisconsin (both of those efforts were focused on rulings and statements regarding sexual assault victims).

California hasn't seen a recall against a judge since 1932. Controversial Supreme Court Chief Justice Rose Bird had five attempts against her—and they all failed to get enough signatures (though Bird was kicked out in a retention election race).

While most recall attempts against any official fail to get enough signatures to make the ballot, this has been particularly true for judges. It's not clear why, but one obvious reason is that recalls against judges usually run into a very basic monetary problem. When a governor, mayor or city councilmember is kicked out, there is frequently a policy and personnel change in government. Therefore it is easier to raise funds for a recall effort. Not so with a judge, especially a lower-level court one. These officials rarely set policy, so the effort is not usually seen as worth it by donors and volunteers.

But judges have good reason to be worried that this is changing. The Persky recall effort was flooded with donations. And voters throughout the country are becoming more acclimated to electoral fights over judges. A same-sex marriage vote led to Iowa kicked out three Supreme Court justices in a 2010 retention election. Other states have had big Supreme Court election battles, notably Wisconsin, which just saw the Democrats win an open seat. And President Trump hasn't been shy about lambasting judges who rule against him on both policy and business litigation.

What this may mean is that voters will be more use to seeing judges as vulnerable to electoral defeat, and that recalls can be fueled by complaints that go viral.

Politicians are increasingly seeing judges as a legitimate targets. And fund-raising may be easier than ever to undertake. For judges, this could mean they need to be even more careful about their decisions in order not to start a recall avalanche.

Joshua Spivak is a public relations executive and a senior fellow at the Hugh L. Carey Institute for Government Reform at Wagner College. He writes the Recall Elections Blog. He can be reached at joshuaspivak@gmail.com.

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