Politics and the law

My judge is a party animal

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Representative democracy beats judicial independence

WHEN George Bush does eventually nominate a Supreme Court justice, there will be a lot of guff from both sides of America's political schism on two issues: whether the person concerned reflects the nation as a whole and whether he is concealing his politics. But what happens when you try to make judges represent the electorate and declare their politics?

Nine out of ten American judges stand for election. The theory is admirably democratic: if the people who make laws are elected, why shouldn't those who interpret them be too? But that theory is increasingly coming into conflict with the idea that judges should be impartial.

Until recently, judicial candidates were usually prevented from saying much, on the basis that it could later raise questions about the courts' independence. Conservatives have long fumed that such curbs have let “activist judges” hide their views on subjects such as abortion; the restrictions, they add, infringe free speech. In 2002 the Supreme Court agreed: in *Republican Party of Minnesota v White*, it struck down Minnesota's “announce clause” prohibiting judicial candidates from airing their views on disputed issues.

The *White* decision, as it is known, will surely help to speed up the politicisation of judicial elections. Already in some states it is common for prospective judges to run radio ads boasting of, say, their opposition to gay marriage or their views on tort reform. Meanwhile, special interests are pouring money into judicial races. In the 2004 campaign, two people running for a seat on the Illinois Supreme Court raised $10m—more money than was spent in 19 out of the 34 Senate races, according to Justice at Stake, a watchdog group.

Like other landmark decisions, *White* has set off a series of legal reverberations, with activists trying either to reinforce or increase its scope. For instance, an anti-abortion group has won a case in Kentucky challenging a local rule that banned judicial candidates from making specific pledges; similar “pledge” suits are pending in Alaska, Indiana and North Dakota.

Meanwhile, the *White* case itself is far from over. Although the Supreme Court ruled on Minnesota's announce clause, it asked the Eighth Circuit Court of Appeals to consider several other curbs in the state. At risk are rules that keep judicial candidates from seeking endorsements from outside groups, engaging in face-to-face fundraising and, crucially, declaring themselves “Republican” or “Democrat”.

A ruling from the Eighth Circuit is expected soon, but, from the point of view of judicial independence, any further relaxation would be worrying. Minnesota is one of 19 states that hold some non-partisan judicial elections (partly to stop judges becoming ensnared in parties' fundraising machines). Republican-Democrat judicial tussles tend to be more expensive and contentious than non-partisan ones.

Striking down the rule against face-to-face fundraising would also have wide ramifications. At present, most judges have to raise their money “blindly”, through committees that do not tell the candidates who has given them money. Allowing prospective judges to look donors in the eye while they make clear their stances on issues could well come dangerously close to judges selling pledges. Another appeals court, the 11th Circuit, has already struck down the face-to-face ban.

Is the judiciary becoming politicised by stealth? Roy Schotland of the Georgetown Law Centre blames the legal establishment. In most states, he says, the high courts and bar associations have generally opposed relaxing political curbs, but they have been “pathetically passive”. Meanwhile, conservatives have been fired up by recent liberal decisions by activist judges—notably the legalisation of gay marriage in Massachusetts.