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COVER STORY

## The Battle Over The Courts

**How politics, ideology, and special interests are compromising the U.S. justice system**

Like priests, rabbis, and mullahs, judges go to work in robes. Their long black gowns are intended to convey the prestige, seriousness, and scholarliness of their calling. This message is reinforced by everything that surrounds them: the Lady Justice statues, the classic Greek revival courthouses, the people calling them "Your Honor." When you get right down to it, all of these trappings are designed to build faith in the core ideals of the American judiciary: that judges are fair, objective, principled, and nonpartisan.

That's the theory. For a dose of reality, go to the Green Grill in Centralia, Ill., where Gordon E. Maag is telling a dozen or so people why he should be elected to the state's Supreme Court. Over a dinner of fried catfish and Budweiser (**BUD**) longnecks, the state appeals court judge lets listeners know that he isn't necessarily neutral about every issue, declaring that he's both pro-gun and anti-abortion. Maag and opponent Lloyd A. Karmeier, who holds a slightly lower-ranking seat, are locked in one of the ugliest judicial races in U.S. history. In May, someone rummaged through the Karmeier campaign's trash, digging up, among other things, campaign thank-you notes written inappropriately on official state letterhead. After the papers were delivered anonymously to the local press, Karmeier's backers responded with radio ads featuring two garbage men slamming Maag. "Judge Gordon Maag's supporters have literally taken his opponent's trash," the ad says. "That kind of dirty politics makes us garbage men seem clean."

### **Bitter Polarization**

This kind of behavior is hardly confined to rural Illinois. In the 38 states where judges are elected, as opposed to appointed, it is becoming increasingly routine for judicial candidates to run attack ads, fill out questionnaires detailing their beliefs, and hit up big donors on the phone -- all things that were once considered beneath the dignity of the office. The process of installing federal judges, meanwhile, has become a tawdry affair. Liberals and conservatives bash one another with distorted accusations of racism, sexism, and religious intolerance. And last year, marking a new low point, Republican staffers for the Senate Judiciary Committee secretly infiltrated the computer files of their Democratic counterparts and reviewed thousands of confidential strategy documents.

The bottom line is that the same bitter polarization that has poisoned Presidential and congressional politics is starting to seep into the one branch of government that is supposed to be immune from it. Disregarding the unique professional culture of the judiciary, which has traditionally been valued across the ideological spectrum, special interests are increasingly turning to the courts to advance goals they can't win legislatively. So the U.S. Chamber of Commerce, frustrated in its attempts to pass

meaningful state or federal tort reform, has spent an estimated \$50 million on judicial races since 1998, while plaintiffs' lawyers fight back with multimillion-dollar war chests of their own. Parallel battles rage between groups fighting over issues from gay marriage to abortion to medical malpractice reform.

All the crossfire is driving away potential judges, making the partisan credentials of nominees more important than intellectual heft, putting pressure on jurists to favor contributors, eroding public respect for the bench, and little by little diminishing the ability of the courts to fulfill their constitutional role as a check on the power of the elective branches. It is a measure of how bad things have become that even the usually reticent American Bar Assn., the attorney trade group that has a history of shying away from controversial legal reform, is starting to worry about the problem. "We hope the major parties will agree to focus on a discussion of issues and not resort to name-calling and finger-pointing," says Dennis W. Archer, former mayor of Detroit and immediate past president of the ABA. "It undermines our system of justice."

The acrimony will only intensify when the next Supreme Court justice retires. Although the issue has received little attention so far in this year's Presidential campaign, the winner could be in a position to fill as many as four seats. That puts some of the most explosive policy issues in contemporary America up for grabs in this year's election. If the conservative wing of the court, led by Justices William H. Rehnquist, Antonin Scalia, and Clarence Thomas, gains one vote, it's entirely plausible that affirmative action could be outlawed, states could further limit the availability of abortion, and the new McCain-Feingold campaign-finance restrictions could be overturned. On the other hand, if a new liberal justice joins Ruth Bader Ginsburg and Stephen G. Breyer, it would probably become harder to impose the death penalty, and some environmental regulation could be strengthened. So no matter who wins the White House, it seems inevitable that the national mall in Washington will be hosting some massive protest marches over the next few years by one side or the other.

Of course, the courts have never been entirely divorced from politics. The reason so many states allow voters to select judges, after all, is to ensure that judges are, at some level, held publicly accountable for their rulings. Supreme Court confirmation battles have been raging since 1795, when the Senate rejected George Washington's bid to name John Rutledge to be Chief Justice of the Supreme Court. And the people who are appointed to be judges, on the federal courts and in states without elections, are usually politically connected. Sometimes they're even politicians. Supreme Court Justice Sandra Day O'Connor was a state senator in Arizona from 1969 to 1975.

So the hallowed ideal -- that judges are cloistered legal technicians, above the rough-and-tumble of politics -- has never really existed. "When I started practicing law in Chicago [in 1952], the idea of an independent state court judge was almost impossible to imagine," recalls Abner J. Mikva, a former federal appeals court judge, congressman, and White House counsel. "It was a patronage operation, and you became a judge by kowtowing to the powers that be. It was not at all unusual for police captains to call a judge and tell him how to rule on a case."

But while politics has always played a role in the courts, it has never been as influential as it is today. In a poll of 894 elected judges conducted in 2001 and 2002 by Justice at Stake Campaign, a nonpartisan watchdog group in Washington, 48% felt a "great deal" of pressure to raise money during election years. Asked how much influence contributions

had on their decisions, 4% said "a great deal of influence," 22% said "some influence," and 20% said "just a little influence." Those statistics should scare anybody who has a case pending before these judges because the right answer is supposed to be "no influence at all," which garnered a mere 36%. The moral in these states is clear: It pays to hire a lawyer who has donated to your judge's campaign.

This isn't a problem just in a few places where court elections have become circuses. As the judiciary becomes politicized, lawmakers are more willing than ever to criticize judges for controversial decisions. Although federal judges are given life tenure to help them ignore these types of pressures, the static isn't always so easy to tune out. These days, ambitious district court judges who want to be elevated to appellate seats are watching their words more closely, steering clear of controversy, and retreating from the intellectual life of the profession. "The best way a judge can get nominated and confirmed is to have as little a paper record as possible," says Mikva. "Judges aren't writing as many law review articles, and their decisions are much narrower than they used to be."

One by one, many of the special unwritten traditions of civility and nonpartisanship that give the judiciary its moral authority are starting to erode. For instance, over the past four years, the White House and Senate have cast aside many of the informal rules that once governed the judicial confirmation process. President Bush has broken with his predecessors and won't consult with Democratic leadership on potential nominees. A custom that judicial nominees win at least one vote from the minority party has been discarded. And the Democrats are making unprecedented use of its filibuster power to block controversial Bush candidates.

Meanwhile, the combatants in the judicial wars are slowly but surely enlarging the battle zone into new states, lower courts, and other parts of the judicial selection process. TV ads were unheard-of in state judicial races until about a decade ago. This year, for the first time ever, spots are becoming common even in primaries. Big money is at stake in these seemingly small-time elections. In Illinois, where one court recently handed down a \$10.1 billion damage award against tobacco giant Philip Morris, the Magg-Karmeier race has become a surrogate for the furious national debate over tort reform. In fact, both candidates complain that they do not have control over some of their more fanatical supporters. "This is not a political race, but we're being forced into the politics of it," says Karmeier, the pro-business Republican.

The force driving many of these changes is the same one that has played such a corrosive role in America's broader political culture: special interest groups. Increasingly, they have come to view the judiciary as something to be gamed and captured -- just like Congress or the State House. The political patronage that once existed in Mayor Richard J. Daley's Chicago is being replaced by a new form of interest-group patronage. The list of organizations that have jumped into America's judicial wars is long and growing. Generally, they fall into two broad categories.

In one, partisans battle over tort reform. The U.S. Chamber of Commerce; big companies such as Home Depot ([HD](#)), Wal-Mart Stores ([WMT](#)), and American International Group; ([AIG](#)) and some small businesses are in one camp. Plaintiffs' law firms and the Association of Trial Lawyers of America make up the other. These two sides focus largely on state judges, who hear the majority of the big product-liability and consumer-protection cases that make Wall Street shudder. For the past decade or so momentum has

been on the side of the business community, which helped oust incumbents in Alabama, Mississippi, and North Carolina in 2000. This year the Chamber will be active in about half the nation's court races. "We've declared war on judges who aren't doing their duty," says Bernard Marcus, co-founder of Home Depot Inc., who has worked closely with the Chamber.

### **Money Soaring**

The other broad group focuses on social controversies such as abortion, affirmation action, and gay marriage. Lining up on the Right are the Christian Coalition, Family Research Council, the American Conservative Union, and the Committee for Justice. Their ideological opponents include Alliance for Justice, a broad coalition of women's, labor, environmental, and civil rights groups, and groups such as People for the American Way. When Republican and Democratic senators ambush court candidates with unsavory biographical details, often one of these groups has done the research.

The amount of special interest money pouring into judicial battles is soaring -- though it is impossible to get a complete picture of who's contributing what at either the state or federal level. According to the Brennan Center for Justice, a judicial watchdog group based at New York University School of Law, candidates for the highest courts in 20 states raised \$45.6 million in 2000, a 61% rise from two years earlier. No comprehensive spending studies have been undertaken since, but based on early advertising "it's not rash to predict we're going to see record numbers this year," says Brennan Center Director Deborah Goldberg. "It's just through the roof."

Above and beyond their financial contributions, special interests are also shaping the debate about who should be a judge. This is especially true in the states, where a little-publicized 2002 Supreme Court decision is shaking up the old rules of judicial campaigning. In *Republican Party of Minnesota v. White*, the court overturned a state law that forbade candidates on the stump from taking positions on controversial issues that they might be asked to consider on the bench. Writing for a 5-4 majority, Scalia reasoned that the rule violated the free-expression rights of would-be judges.

By making it easier for candidates to comment on policy issues, the *White* decision gives aspirants the ability to send signals to special interests about how they would rule in particular types of cases. That, in turn, is prompting interest groups to elicit candidates' views on such hot-button issues -- and use the information to decide who gets money.

The corporate-backed Illinois Civil Justice League, for instance, sent a questionnaire to all judicial candidates in the state this year asking them 12 multipart questions about their views on everything from class-action rules to the constitutionality of punitive damages. In Alabama, the League of Christian Voters is asking state supreme court candidates to provide written answers to 10 questions, including whether they are born-again Christians, go to church, and define marriage as a "union between one man and one woman." In Georgia, the Christian Coalition asks candidates whether they agree with the majority's opinion or the dissent in such controversial cases as the U.S. Supreme Court's 2003 gay-rights decision *Lawrence v. Texas*.

What's so bad about elected judges telling the public where they stand? If candidates for President, the Senate, Congress, and state offices do it, why can't judges? Because, according to critics of the *White* decision, judges aren't meant to be politicians. Unlike their counterparts in the political branches, whose job is to advance the interests of those

who vote for them, judges do not represent anybody. Their job is to represent the law itself -- to follow the principles laid out in cases and statutes regardless of the popularity of the outcomes.

So when judges declare their positions on issues before they assume the bench, there is a danger that those commitments will sway their decisionmaking and prevent litigants from receiving a fair hearing. "When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave," wrote Justice Ginsburg in dissent in *White*. This logic explains, in large part, why almost no other country in the world allows judicial elections.

Alarmed at what's happening in the states, the ABA is pushing for publicly financed elections. This year, North Carolina became the first state to fully fund judicial campaigns. Ohio, Michigan, and Wisconsin are investigating ways to make private contributions more transparent. Several state bar associations are creating bipartisan watchdog panels that chastise candidates who cross the line with misleading ads, overtly partisan rhetoric, or positions that cast doubt on their ability to rule impartially. On Aug. 24, the Illinois State Bar Assn. said it will begin monitoring the Karmeier and Maag campaigns in an effort to bring civility to the race. A prominent new recruit to the state judicial election-reform bandwagon is Senator John McCain (R-Ariz.), who told *BusinessWeek* that he worries that "the extreme amount of big money in this year's judicial elections will only reduce public trust in the courts."

So some restraint may be coming at the state level. But in the federal arena, belligerents on both sides are escalating their brinksmanship. The central image in a liberal ad opposing federal appeals court nominee Charles W. Pickering, who has support from many Democrats and prominent blacks in his home state of Mississippi, is a group of Klansmen surrounding a fiery cross -- because he once reduced the jail sentence of a cross-burner.

And things are coming to a head in the Senate, where Democrats have relied on filibusters to block right-wing candidates for appeals court positions. In the coming months, Senate Majority Leader Bill Frist (R-Tenn.), with the backing of the White House, plans to make a new rule forever banning filibusters of judicial nominees -- a hardball parliamentary tactic. But if he exercises what pols are calling the "nuclear option," Democrats have threatened to bring all business in the Senate to a halt.

Meanwhile, in an attempt to outflank judges who may one day write decisions encouraging gay marriage, some GOP lawmakers are trying to prevent federal courts from considering the issue at all -- a creative use of legislative power, called court stripping, that could provoke a furious Constitutional battle. Led by Majority Leader Tom DeLay of Texas, the House voted on July 22 to limit the jurisdiction of federal courts to hear cases involving gay weddings. The GOP is also pondering using this strategy in cases involving abortion, obesity suits, and the Pledge of Allegiance.

### **Funding Crunch**

In fact, Congress has grown quite fond of telling judges how to behave. Representative Tom Feeney (R-Fla.) doesn't like the way U.S. courts are increasingly referring to foreign legal authority -- as the Supreme Court did in *Lawrence* when it cited European courts when overturning a Texas anti-sodomy law. So in March, Feeney introduced a nonbinding resolution protesting the use of overseas legal precedents. In August, House

Republicans announced a new task force to scour the output of federal judges for evidence of what they call "judicial abuse." According to Stephen P. Burbank, professor for the administration of justice at the University of Pennsylvania Law School and head of a task force on judicial independence at the American Judicature Society, "the relationship between the federal courts and the Congress is the most poisonous I've seen it in 30 or 40 years."

One byproduct of that tension: a clampdown on court funding by Congress. Since 1990 the nation's 160 federal appellate court judges have witnessed a 40% rise in the number of cases considered -- with no increase in funding for more judges. Although the Administrative Office of the U.S. Courts has asked Congress to fund 54 new judgeships, it's unlikely to get any more cash. So courts across the country are shutting their doors one day a week, putting trials on hold, and deferring payments to court-appointed attorneys. And pay for federal district judges is \$158,100 -- several hundred thousand dollars a year less than many could make in private practice. When New York City-based federal judge John S. Martin Jr. left the bench in 2003, he cited low pay as one of the key reasons. "The thing that really galled me was that I was making \$150,000 less than Major League Baseball umpires," says Martin.

The crucial question isn't whether there is going to be an exodus of federal judges but whether politics is diminishing the ability of the courts to play their constitutional role. Under the U.S. system of separate powers, the judiciary is charged with ensuring that the principles embedded in the Constitution, statutes, and common law are honored regardless of what the majority thinks. Nan Aron, president of the left-leaning Alliance for Justice, fears politics may prevent judges from fulfilling this critical duty. "The courts in this country have really been the only forum to provide redress to people of color, women, environmentalists, consumers," she says.

Conservatives are also concerned about the impact of political pressure on the courts. But they fear that liberals and tort lawyers are pushing too far toward the creation of new rights that were never envisioned by the Founding Fathers. "What Republicans think endangers the judiciary are litmus tests applied by the Democrats," says C. Boyden Gray, founder of the Committee for Justice. "They will only appoint judges who are totally pro-choice on abortion and anti-choice on schools."

So here's where things stand: Conservatives blame liberals for the current debauched state of judicial politics, and liberals fault conservatives. The truth is that both sides are culpable -- and seem to be racing to see who can capture lower ground. So long as the two sides remain locked in partisan warfare and the country's overall civic culture continues to degenerate into ever more antagonism, there seems little reason to hope that politics will soon loosen its tightening grip on the judiciary.

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