

# The myth of Dem, GOP justice

## ■ Surprisingly little political poison on the federal bench

By MARTIN J. SIEGEL

**T**HE past few years have seen a poisonous politicization of the process by which federal judges are appointed, confirmed and then (shabbily) treated by politicians and the media afterward.

It is often assumed that judges appointed by Republican presidents will be mindlessly conservative, distorting the law to reach ends that please their right-wing masters, and that judges appointed by Democrats are hopelessly liberal and "activist," ignoring the text of the law to advance preferred social policies. With this assumption in the background, the appointments and decisions of judges have become, more than ever, political footballs and rallying cries in Congress, electoral campaigns and shock television.

Two recent decisions by the U.S. Court of Appeals for the Fifth Circuit, the federal appellate court covering Texas, Louisiana and Mississippi, belie this simplistic and harmful notion.

In the first, a three-judge panel of the court upheld a suit brought by the Texas Democratic Party to prevent the Republican Party from replacing Rep. Tom DeLay, R-Sugar Land, on the ballot in the upcoming general election for Congress. Both the trial judge and one member of the appellate panel were appointed by Republican presidents, yet they sided with the Democrats and two Fifth Circuit judges appointed by President Bill Clinton in holding that it would violate Texas election law and the U.S. Constitution to allow the replacement.

The Republicans appealed to Justice Antonin Scalia for a stay of the ruling — surely the Republican fix was now in! — but Scalia summarily denied the application.

In the second case, a panel composed of three judges appointed by President Ronald Reagan held that a display of a

Bible in front of a state courthouse in downtown Houston violates the First Amendment's ban on the establishment of religion. One judge dissented and would have allowed the display. Again, one might have expected Republican appointees to side with conservatives who favor greater promotion of religion in public life, or at least the elected Republican officials pressing this position in court. But the judges simply applied the law as they understood it.

most cases of any complexity are susceptible to different but fully defensible legal interpretations — they illustrate that federal judges are rarely the ideological automatons or partisan hacks conjured by political and media caricature. The Constitution's ingenious system for selecting federal judges, placing them safely in an equal and independent branch of government and insulating them with life tenure results in judges who do their best to

categorization based on political labels.

The scorched earth battles over the appointment and confirmation of judges, which have persisted through several administrations now; proposals to create inspectors and ombudsmen to police the judiciary; hyperbolic calls for impeachment based on stray decisions in isolated cases rather than actual misconduct — all these erode respect for the judiciary and are founded on an inaccurate conception of how most judges make their decisions.

Likewise, when the media report a decision and call the judges "Republican" or "Democratic" — shorthand references to the party of the president who made the appointment, sometimes decades earlier — they further the damaging fiction that decisions flow from political platforms rather than the law.

Instead, we should significantly lower the temperature surrounding judges, concentrate primarily on their legal qualifications for office when selecting and confirming them, and strive to strengthen rather than undermine judicial independence.

It will help in this to recognize that, once on the bench, federal judges almost never behave as spineless creatures of party, but as servants of the Constitution and laws doing their duties as best they know how.

In the *Federalist Papers*, Alexander Hamilton observed that "the independence of judges is equally requisite to guard the Constitution and the rights of individuals."

In their own small ways, these recent Fifth Circuit decisions confirm that, despite the political noise that sometimes engulfs federal judges, we are fortunate to have the judiciary Hamilton and our other Founders understood to be essential.

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This unpredictability of judicial decision-making works both ways. Justice Byron White, a Democratic appointee, often hewed to the right while on the Supreme Court, voting against expanded constitutional protection for abortion, homosexual rights and flag burning. Justice Stephen Breyer, appointed by President Clinton, recently cast the deciding vote upholding a Ten Commandments display on the grounds of the Texas Capitol in Austin.

Agree or disagree with these Fifth Circuit decisions — and

follow the law, not political actors.

This is not to say that judges do not inevitably bring different philosophies and ideologies to bear on their work, or that the political parties do not promote or oppose nominees based on what they know about their outlooks toward the Constitution and important legal issues. It is only to point out that, for the most part, federal judges scrupulously exercise the independence of their office without regard to partisanship, and defy lazy