

Politics and the Supreme Court

The two aren't supposed to mix, but they have in recent elections

By **Bob Evancho**

'We don't want to put party labels on judges. But let's face it, parties do stand for something.'

For the most part, outgoing Idaho Supreme Court Justice Cathy Silak speaks with equanimity about her ouster from the bench. She's a judge, after all, and judges are supposed to be impassive and restrained. And perhaps the sting of her lopsided defeat to 4th District Judge Daniel Eismann in the state's primary election three months earlier has abated somewhat.

Yet you can't help but get the impression that she feels she's been wronged — inaccurately portrayed, she and her supporters claim, as a die-hard liberal while her opponent made no secret of his judicial conservatism and straitlaced stands on hot-button issues such as abortion. From the 50-year-old justice's perspective, she was unfairly vanquished in her bid for re-election to the high court by the partisan nature of what was officially a non-partisan race, forced from the bench, according to the *Idaho Statesman*, by "a bitter battle of innuendo and accusation," and victimized by what the *Idaho State*



Journal called “false information passed on to voters prior to Election Day.”

“I am saddened by the fact that no political leader stood up during the election and said that we shouldn’t do this,” says Silak, referring to what she and her supporters considered questionable tactics and overt partisanship — despite Idaho’s constitutional mandate for nonpartisan elections of justices and judges — by the opposition during the campaign. “It’s not right. I gave a speech early in the campaign asking people to act as watchdogs for breaches of judicial ethics and the intrusion of political action groups [into the campaign], but the political leadership was silent.”

Indeed it was. And that certainly didn’t hurt Eismann’s efforts to capitalize on the conservative leanings of Idaho’s electorate to unseat Silak. Nor did the angry reaction by many state politicians and water users to her vote last fall in support of federal water rights in Idaho wilderness areas. In fact, Boise State political analyst Jim Weatherby calls the decision, in which Silak wrote the majority opinion in the 3-2 ruling, a “fatal mistake,” politically speaking, by the outgoing justice.

Fair or unjust, there is little dispute that politically motivated efforts played a role in Eismann’s victory. And whether you consider their associations overt or subtle, Silak and Eismann have ties to Idaho’s Democratic and Republican parties, respectively. And right or wrong, it’s safe to assume the dominance of the GOP in the state was a factor in Silak’s downfall.

“I certainly tried to keep my campaign on a nonpartisan basis. ... I never utilized a party structure,” says Silak, who on May 23 became the first sitting Idaho Supreme Court justice to be ousted in an election since 1944. “I think there is a trend in the United States for more highly contentious judicial elections because sitting judges make easy targets ... and we publicly issue decisions that are controversial. And in a judicial election, a candidate with the prevailing party becomes a very powerful weapon.”

But Eismann supporters and state Reps. Lenore Barrett (R-Challis) and Todd Hammond (R-Rexburg) don’t see it that way — nor do they have much sympathy for the ousted justice. “I suppose that’s what we’re going to hear until hell freezes over,” Barrett says. “That’s what the losers always say. But I don’t see this as a party



Silak maintains judges should “steer clear of expressing their personal opinions” during judicial elections.

issue; it’s more of an ideological issue.”

“We don’t want to put party labels on judges,” adds Hammond. “But let’s face it, parties do stand for something. Judge Eismann’s campaign was not some well-oiled machine that burst through Idaho. He won because he had a solid message that most voters agreed with.”

Even so, Weatherby, chair of Boise State’s public policy and administration department, expects to see the continuation of a trend where party lines are drawn in judicial races.

“Most races for justice positions have been nothing more than beauty contests where the incumbent wins and there is no discussion of the issues,” he says. “I expect now that we’ll see more partisanship injected into judicial races, as well as more focus on judicial races, particularly as the judiciary becomes a key player in our law-making process.”

Such conditions, adds Weatherby, make it increasingly difficult to separate politics from the law and force justices to act like politicians. “It’s a very thin line we’re trying to draw here,” he says. “Because on one hand we want to have an independent, nonpartisan judiciary, and on the other hand we want to have an accountable judiciary; we can’t have it both ways, and that’s part of the problem.”

By their very nature, primary elections exacerbate the problem, Weatherby adds. “What we’re trying to do here is hold one

nonpartisan election in a partisan primary, and it’s hard to maintain the nonpartisan character in what essentially is the nomination procedure for the parties,” he says. “It seems almost inevitable that partisanship is going to seep into all elections.”

Weatherby’s colleague Gary Moncrief is a bit more blunt in his assessment. While noting that Idaho and about a dozen other states hold nonpartisan judicial elections, the Boise State political science professor says it’s unrealistic to assume that any campaign for public office can be conducted completely above the fray that is modern-day American politics.

At the very least, political undercurrents are at play — even in judicial races, Moncrief asserts. “I think politics always enter into campaigns,” he says. “It’s not a matter of should or ought — they do. The notion that you can take politics out of a campaign is ludicrous, regardless of the office.”

Nevertheless, Eismann maintains that it’s “probably inaccurate” that partisan politics were a factor in his victory over Silak. He points out that after Silak was appointed to the Supreme Court in 1993, she retained her seat in the following year’s election by decisively defeating challenger Wayne Kidwell, a former Republican state attorney general who, like Eismann, made no attempts to conceal his conservative bent.

“She won by about 25,000 votes,” notes the justice-elect, “and people obviously knew he was a Republican and that she was a Democrat because she was appointed by [then-Gov.] Cecil Andrus [a Democrat]. Yet that wasn’t sufficient to get Wayne elected then.”

“In my opinion, if someone is identified as a Republican, that is not enough of an issue to get voters involved in a judicial election; it didn’t help Wayne against Cathy, and he had statewide recognition.” (Kidwell subsequently became a justice in 1999 when he defeated Boise city councilman and former Idaho Democratic Party chairman Mike Wetherell for a vacancy on the high court in another politically charged race.)

So how was Eismann able to unseat Silak this time around?

In general, the liberal tendencies of Democrats are more likely to be in philosophical agreement with justices and judges like Silak who foster judicial activism, Eismann says, while the GOP is more inclined to side with judicial conservatives like himself. While those differences in and of themselves may not be enough to depose a sitting justice in an election, Eismann acknowledges that there were other factors that contributed to his victory in the primary.

“There were several decisions she authored that revealed her judicial philosophy, and I think that philosophy is not what the majority of Idahoans want in a justice,” Eismann says, referring to Silak’s role in

the water-rights ruling along with a school-funding decision by the high court in which he criticized the justices for attempting to rewrite the Idaho Constitution.

Barrett agrees. "It's not a political party thing, but a matter of being an activist judge or a constitutionalist," says the Challis lawmaker. "And that's why I could comfortably support Judge Eismann. He is certainly a constitutionalist, and that is what made him so appealing to a lot of people in Idaho."

"I don't think that if [Silak] had made those [water rights and other] decisions that she would have had any competition in the election," adds Hammond. "But judges have to be held accountable."

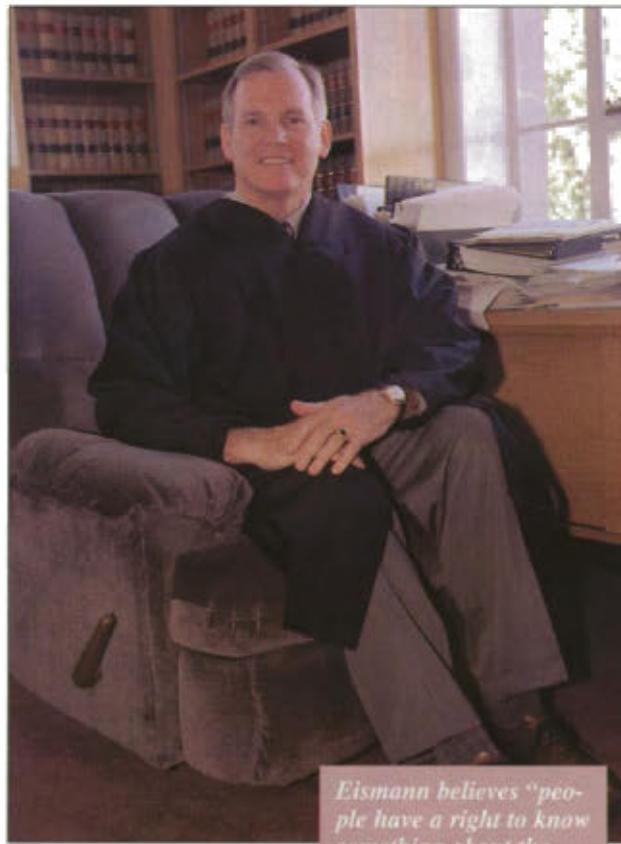
Boise State graduate and State Rep. Bill Sali (R-Kuna) agrees. "In my mind, Daniel Eismann appeals to John Q. Public. If you look at his [campaign] literature, I think it has appeal to the common citizen. Did he align himself with Republicans? I think a lot of Republicans aligned themselves with him. He didn't ask me for help. I went to him and said, 'How can I help you?'"

Another contributing factor, Silak's supporters claim, was the involvement of third parties such as the religious right and other special-interest conservatives that aligned themselves with Eismann. Amid questions of judicial propriety during the campaign, Eismann did little or nothing to disassociate himself from such groups. He also made clear his anti-abortion sentiments and responded to an issues questionnaire circulated by the Idaho Christian Coalition — all of which drew considerable criticism from Silak's supporters.

"During the campaign it appeared to me that Judge Eismann was taking positions on issues that could eventually come before him in the court," says former state Sen. Sue Reents, a Boise Democrat who served on the Idaho Judicial Council from 1983-89. "As a former member of the council, I think it needs to expand its authority to take action in judicial elections where a candidate may be violating the judicial canon of ethics during the campaign."

But Eismann says his opinions and answers were based on philosophy, not legal viewpoints. "As judges, it is our responsibility to put aside our own beliefs to the extent we can when ruling on a case," he says. "For example, I think abortion is morally wrong, but I have to follow the decisions of the U.S. Supreme Court in that area. Besides, I think people have a right to know something about the judges they are electing."

Silak says she declined to answer the questionnaire or publicly state her opinion on controversial issues during the campaign because she believes it is inappropriate for a judge or judicial candidate to do so. "I am not going to criticize anything Judge Eismann has said or done, but I chose not to state my position on the issue of abortion," she says. "It is not purely a religious, philosophical or moral issue.



CHUCK SCHEER PHOTO

Eismann believes "people have a right to know something about the judges they are electing" to sit on the bench.

There are laws pertaining to abortion for our state and other states, and revealing a personal bias in that area could tend to call into question [judges'] impartiality later if they are hearing a case on that subject. Whether it's abortion, creationism or some other high-profile issue, I think they need to steer clear of expressing their personal opinions."

But Barrett, Hammond and Sali disagree. "We have a right to know about who we are electing," says Barrett. "Good lord, just because a judge has personal feelings, that doesn't mean he or she can't making rulings and apply the law."

"It isn't a matter of party affiliation, but of core philosophy," adds Hammond. "If we don't know where the candidates stand, how can we make an informed vote?"

Adds Sali, "What kind of informed vote can I make if I don't know where a person stands? I think judges *should* tell voters what their personal biases are."

The problem, Silak and her supporters claim, is that her personal biases were inaccurately portrayed by some of those opposed to her re-election. Media accounts would seem to agree. An editorial in Pocatello's *Idaho State Journal* ripped a group called Concerned Citizens for Family Values by using "the broad stroke of guilt by association to paint Silak as a knee-jerk liberal who supports partial-birth abortions and gay marriages — stances the ousted judge never actually took" and for

supporting Eismann's campaign "by resorting to what amounts to slander."

Andrus is equally outspoken in his criticism of not only what he considers a breach of ethics, but also a threat to the independence of the state's judicial branch of government. The former governor asserts that the campaigns that led to the elections of both Kidwell and Eismann to the state Supreme Court "dwelled on their Republican affiliations and not their judicial preparation or qualifications."

Andrus maintains that the incursion of partisanship into these elections has "made a seat on the highest tribunal a political position, not a nonpartisan position." What this means in the future, he continues, "is that all the emotional issues that come before the court will cause those members to look over their shoulders at the political ramifications of their decisions, which they've never done

before."

He uses Eismann's election as an example. "[The judge's supporters] didn't talk legal backgrounds or constitutional precedence. They talked emotional issues to [rally] Republican voters," he says. "It's a sad day, not because of the membership of the court; it's a sad day in the history of the court because we have become so politicized."

What about the fact that Andrus appointed Silak to both the Idaho Court of Appeals in 1990 and the Supreme Court in 1993? "Sure, I knew she had Democratic ties," he says. "But I chose her because of her legal credentials. I have never asked about party affiliation with [the justices] I have appointed. I appointed [current Chief Justice] Linda Copple Trout because of her legal expertise and I appointed [retired Justice] Byron Johnson because of his brilliant mind."

Even so, Hammond notes that several influential Democrats contributed to Silak's failed campaign. "When you get Cecil Andrus and his wife and [the late U.S. Sen.] Frank Church's wife [Bethine] and [former justice and gubernatorial candidate] Bob Huntley marshaling their resources, only a naive person is going to think it isn't political," he says. "Elections are political; you can't get away from it."

"Sure, it got political on both sides. I don't see how anybody can claim innocence on either side." □