"All Politics Is Local": The Politics of Merit-Based Federal Judicial Selection in Wisconsin

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I. INTRODUCTION

Thomas Jefferson had been in Paris during the Convention, serving as minister to France. When he returned, he asked George Washington over breakfast why the President had agreed to a two-house Congress. . . . Washington replied with his own question: "Why did you pour your tea into that saucer?" And when Jefferson answered, "To cool it," Washington said, "Just so. We pour House legislation into the senatorial saucer to cool it."2

The United States Senate's responsibility to act as a "cooling saucer" in its consideration of national issues does not apply solely to its role in the lawmaking process. Historically considered the more deliberative of the two houses of Congress, the Senate is also charged with the constitutional duty of giving the President "advice and consent" on major presidential appointments, including members of the federal judiciary.3

However, despite its reputation for cool-headed, fair-minded deliberation, in modern times, the Senate's consideration of judicial nominees has been anything but dispassionate or consistent. From staging a thirty-hour "talk-a-thon" on the Senate floor to draw attention to four filibusted judicial nominees while putting arguably more important spending legislation on hold,4 to hurling accusations of "anti-
Catholic bias” at their colleagues who opposed certain pro-life nominees, Senators on both sides of the aisle have allowed political considerations and partisan debate to overshadow the goal of selecting a highly qualified and independent judiciary. This strife surrounding judicial nominees further intensified in 2004 with President George W. Bush’s use of his recess appointment power twice in five weeks to

the Democrats’ partisan obstructionism,” Minority Leader Tom Daschle, echoing the sentiments of most Senate Democrats, dismissed the stunt as “a colossal waste of time.” Id.


6. In one prominent recent example, the Miguel Estrada nomination to the United States Court of Appeals for the District of Columbia Circuit was particularly contentious and ended with Estrada withdrawing his name after a two-year filibuster. This nomination was surrounded by a cloud of ugly racial politics from both sides of the aisle. In a March 2003 editorial, The Washington Post chided both parties for using the Estrada nomination as an issue to mobilize their political bases:

Mr. Estrada’s opponents demeaningly complain that he was nominated because of his Hispanic ethnicity, as though he were not an accomplished lawyer who would be qualified for the bench irrespective of his country of origin. Some Hispanic advocacy groups add the offensive complaint that Mr. Estrada is not Hispanic enough—a code for the conservative Mr. Estrada’s not sharing their politics. Mr. Estrada’s supporters, meanwhile, openly accuse the Democrats who oppose him of being anti-Hispanic, as though anyone could seriously believe that their opposition results from bigotry. And the White House . . . openly crows about having nominated the first Hispanic to the D.C. Circuit. How did all sides of this debate come to accept that the courts are part of some grand ethnic spoils system—that Mr. Estrada should be confirmed or rejected depending on what sort of Hispanic he is, rather than what sort of lawyer he is?

Editorial, Layers of Nonsense, WASH. POST, Mar. 3, 2003, at A18. Moreover, the use of judicial nominations for political gain is, at best, a questionable strategy because of the public’s relatively sparse knowledge of the issues involved in judicial selection. According to The Washington Post, “Republican pollsters, trying to determine whether the Estrada standoff was hurting Democrats with Hispanic voters, found that many respondents thought the questions concerned the ‘CHiPs’ actor Erik Estrada.” Mike Allen, GOP Plans ‘Marathon’ on Judges, WASH. POST, Nov. 8, 2003, at A1. Thus, Senators may expend a great deal of political capital on opposing or supporting a particular nominee, only to gain little in terms of voter support in return.

7. The Constitution authorizes the President to make appointments without Senate approval to fill any vacancy during a congressional recess. U.S. CONST. art. II, § 2, cl. 3. Unlike other federal judicial appointments, recess appointments are not permanent; they expire at the end of the congressional session in which they are granted. Id.
install controversial nominees Charles Pickering and William Pryor to the Fifth and Eleventh Circuits respectively, bypassing Senate approval over the objections of the majority of Democratic Senators.\footnote{Mike Allen, Bush Again Bypasses Senate to Seat Judge, WASH. POST, Feb. 21, 2004, at A1; John King, Pickering Appointment Angers Democrats, CNN.com, Jan. 17, 2004, at http://www.cnn.com/2004/ALLPOLITICS/01/17/bush.pickering/index.html. The battle over Pickering, a United States District Court judge from Mississippi nominated to the Fifth Circuit Court of Appeals, had waged for two years before his recess appointment. \textit{Id.} Democrats, concerned with Pickering's past stances on racial issues, had first blocked his nomination in Committee, and then, upon Pickering's renomination, filibustered the nomination on the Senate floor, despite Bush's belief that Pickering would have been confirmed on an up-or-down vote. \textit{Id.} Similarly, Senate Democrats had invoked the filibuster against Alabama Attorney General William Pryor, whose comments on abortion and homosexuals during his confirmation hearing led many Democrats to believe that his views were outside the mainstream. Allen, supra. In an editorial, The Washington Post called the Pickering recess appointment "another unwarranted escalation of the judicial nomination wars." Editorial, End Run for Mr. Pickering, WASH. POST, Jan. 17, 2004, at A24. Likewise, the \textit{Post} characterized the Pryor appointment as "more provocation" by the Bush Administration. Editorial, More Provocation, WASH. POST, Feb. 21, 2004, at A18.}

In September 2003, in the midst of this politically charged debate, the Republican White House, with the blessing of Wisconsin's two Democratic Senators, announced the nomination of a conservative judge to fill a vacancy of a Wisconsin seat on the United States Court of Appeals for the Seventh Circuit.\footnote{Steven Walters, Justice Sykes to Be Bush's Pick for U.S. Appeals Court, MILW. J. SENTINEL, Sept. 24, 2003, at 1A.} Hailed by the \textit{Milwaukee Journal Sentinel} as "a rare bipartisan decision,"\footnote{Gregory Stanford, Editorial, A Rare Bipartisan Decision, MILW. J. SENTINEL, Sept. 25, 2003, at 28A.} the nomination of Wisconsin Supreme Court Justice Diane Sykes to the Seventh Circuit seemed to embrace a spirit of cooperation and contemplation consistent with the "senatorial cooling saucer" deliberative ideal, "in contrast to others that foundered in a fierce partisan storm."\footnote{Id.}

Justice Sykes was one of four names recommended to the White House by the Wisconsin Federal Nominating Commission, a merit selection panel that, through screening, interviewing, and recommending applicants for the Seventh Circuit vacancy, played a large role in the seemingly bipartisan nature of the Sykes nomination.\footnote{David Callender, Sykes is 7th Circuit Finalist, CAPITAL TIMES (Madison, Wis.), Aug. 5, 2003, at A3.} On the surface, it seemed as if Wisconsin's United States Senators Herb Kohl and Russ Feingold, through the use of this local bipartisan merit selection committee, had found a way to sidestep the partisan perils of
the national nomination process that had plagued so many of their Senate colleagues in recent years.

In fact, the Wisconsin Federal Nominating Commission has existed in some form since its inception in 1979.\textsuperscript{13} Created to assist Wisconsin Senators in the advice and consent process by assessing and recommending qualified individuals to fill open seats on the Wisconsin federal bench, the Federal Nominating Commission was also established to aid in the elevation of minorities and women to the federal judiciary.\textsuperscript{14} Additionally, Wisconsin elected officials prominently tout the Commission's role in "depoliticiz[ing]" judicial selection, avoiding the public disputes that have characterized the process recently.\textsuperscript{15} However, over the past twenty-five years, the results of the Commission's attempt to achieve a system of federal judicial selection focusing on merit, independence, diversity, and nonpartisanship have been mixed.

This Comment will trace the development of the Wisconsin Federal Nominating Commission and assess its role in the federal judicial selection process since its inception in 1979. Part II will briefly discuss the Commission's origins and history. Part III will discuss the contention that the Commission depoliticizes the selection process, citing specific examples where political considerations played a large role in the process despite the use of the Commission. Part IV will contend that the federal judicial nomination process most likely will always be political to some degree and will conclude that, although its record over the years has been mixed, the Federal Nominating Commission indeed plays a beneficial role in Wisconsin legal and political life by restoring civility to the selection process and legitimacy to the federal bench.

II. THE ORIGINS OF THE FEDERAL NOMINATING COMMISSION: A BRIEF HISTORY

The Federal Nominating Commission has played a role in almost all of the federal judicial appointments to Wisconsin seats since Senators William Proxmire and Gaylord Nelson, both Democrats, instituted the first version of the Commission in 1979.\textsuperscript{16} Senators Proxmire and Nelson

\textsuperscript{13} John W. Kole, Selection Panels Near, MILW. J., Feb. 4, 1979, Accent, at 1.
\textsuperscript{14} \textit{Id}.
\textsuperscript{16} Press Release, Office of Sen. Russell Feingold, Kohl, Feingold, and Sensenbrenner
established the Commission in response to an Executive Order issued by President Jimmy Carter in 1978 encouraging Senators to establish local merit-based commissions to select federal district court judges whenever vacancies occurred in their home states.

President Carter, who had utilized similar merit panels to select judges as Governor of Georgia, first instituted national selection commissions for the United States circuit courts of appeals four weeks after being sworn into office. The district court merit selection panels, modeled after these national circuit court commissions, were to be instituted on a voluntary basis by senators from each state, and were to encourage selection of judges based not on political patronage, but instead on merit. In 1978, Carter signed legislation that expanded the federal judiciary by roughly thirty percent. As he promised in his presidential campaign, Carter attempted to use the commissions to fill these seats "strictly on the basis of merit, without any consideration of political aspects or influence." Carter hoped that localized merit-based selection, coupled with an active consideration of race and gender in the selection process, would lead to a more independent, representative, and highly qualified judiciary than the past products of political patronage.

Although not every state's Senate delegation responded to the Carter Administration's call for reform of the district court judicial selection process, Wisconsin's Senators created a commission that endured and evolved to become a distinctive part of Wisconsin's legal history. The Wisconsin Federal Nominating Commission survived even after President Carter left office and President Ronald Reagan


23. Id.
25. Bell, supra note 19, at 27.
disbanded the circuit court commission reform scheme, consciously shifting the emphasis away from merit and toward ideology. The modern version of the Wisconsin Federal Nominating Commission is a remnant of the Carter-era federal judicial selection reforms, working toward achieving the same ideals of merit and diversity on the federal bench that President Carter championed.

Today, Wisconsin's Senators activate the Federal Nominating Commission, a panel composed of ten legal experts and chaired by one or both of the Deans of Marquette and Wisconsin Law Schools, whenever a vacancy on the federal bench in Wisconsin occurs. The Commission screens the applicants for a judgeship or U.S. Attorney position, narrowing the list of potential names from which the White House will choose its nominee. This screening process consists of notifying the public of the vacancy, collecting applications from all interested candidates, interviewing selected applicants, and generating a list of four to six qualified individuals, which the Commission submits to the two Senators. The Senators may elect to strike one or more of the names from the list and, after approving the final list, forward the names to the President of the United States for consideration.

26. Goldman, supra note 24, at 290-91. Since Carter left office, the Federal Nominating Commission has been used for every Wisconsin federal court vacancy, with the exception of the 1981 nomination of John L. Coffey to the Seventh Circuit Court of Appeals. See Part III, infra.


28. Id. §§ IV(d)(i)-(iii). When the vacancy in question is in the Western District of Wisconsin, the Dean of the University of Wisconsin Law School (or his or her designee) will chair the Commission; when the vacancy is in the Eastern District, the Dean of Marquette Law School (or his or her designee) will be chair. Id. When the vacancy is on the Seventh Circuit, the chair position alternates between the Deans. Id. However, when the Commission was activated in 2003 for the most recent Seventh Circuit vacancy, the Deans served as cochairs of the Commission.

29. Wisconsin Federal Nominating Commission Charter, supra note 27, § III. Although the Commission is activated to fill U.S. Attorney positions as well, this Comment will address the role of the panel only as it pertains to judicial nominations.

30. Id. §§ II, III, VII, VIII.

31. Id. The Commission process does not ensure that the senators—even when they are of the same political party—will agree on the final list of names to submit to the President, however. According to the Milwaukee Journal Sentinel, “federal judicial appointments have been a rare source of public disagreement between [Democratic Senators] Kohl and Feingold. In 1994, Kohl recommended that Clinton appoint [U.S. District Judge Terence] Evans to the 7th Circuit, while Feingold forwarded to Clinton the names of all six finalists recommended by the nominating commission. Earlier, the two Senators differed on who should become the U.S. attorneys in Milwaukee and Madison.” Marilynn Marchione, List for U.S. Bench Cut to Five Finalists, MILW. J. SENTINEL, Mar. 3, 1997, at 1A. As a matter of Senate procedure, the
The Senators' activation of the Federal Nominating Commission, as well as the President's cooperation with this judicial selection scheme, is wholly voluntary. The Commission has always operated solely by tradition, and neither the Senators nor the President are bound to follow the procedures outlined in the Wisconsin Federal Nominating Commission Charter.\textsuperscript{32} In fact, the Charter is the only written set of guidelines governing the process, as the Commission "exist[s] not by statute but by agreement of the political actors involved."\textsuperscript{33}

All Commission proceedings are closed to the public,\textsuperscript{34} and the final list of recommendations is the only written statement that the Commission must release.\textsuperscript{35} The Federal Nominating Commission Charter requires that all other proceedings, applications, or information submitted to the Commission remain confidential.\textsuperscript{36} All voting is performed by secret ballot.\textsuperscript{37}

The political makeup of Wisconsin's federal congressional delegation, as well as which party controls the White House, determines who sits on the Federal Nominating Commission and presumably influences its ideological leanings. Often the Federal Nominating Commission is bipartisan, consisting of members chosen by elected officials of both political parties. For instance, under the current Charter, when, as in 2003, the President is of a different political party than both Senators, each Senator appoints two members of the Commission, the Wisconsin State Bar appoints two, and the most senior elected member of the President's party appoints four.\textsuperscript{38} If only one Senator belongs to the same party as the President, that Senator will appoint five members, the other Senator will appoint three, and the
State Bar of Wisconsin will appoint two.  

The Federal Nominating Commission is not always bipartisan, however. If both Senators and the President are from the same political party, each Senator appoints four members, while the State Bar of Wisconsin appoints two. The Federal Nominating Commission has consisted of members selected solely by elected officials of the same party in its consideration of five nominees: Barbara Crabb, Terence Evans (twice), Charles Clevert, and Lynn Adelman were all recommended by a Commission chosen without Republican participation.

Regardless of the party identification of the elected officials making the appointments, the officials are responsible for appointing Commission members who “shall each be residents of the State of Wisconsin, reflecting the diversity of the population and the respective judicial districts of the state.” Members serve for two-year terms.

The purposes outlined in the Federal Nominating Commission’s Charter are similar to the goals that the Carter Administration articulated when it first established merit-based commissions to ensure that merit and integrity—and not political spoils—would be the main considerations in the federal judicial selection process. According to the Federal Nominating Commission Charter, the official purposes of the Commission are to:

(a) assist the United States Senators from Wisconsin in faithfully fulfilling their constitutional and statutory obligation to provide advice and consent to the President in appointing federal judges and U.S. Attorneys;

40. Id. § IV(b).
42. In the years 1979, 1996, and 1997, a Democrat occupied the White House and Wisconsin had two Democratic Senators. See generally Federal Judicial Center, at www.fjc.gov.
44. Id.
45. Bell, supra note 19, at 27.
(b) help insure that qualified, conscientious and dedicated individuals be appointed to serve the public as judicial officers; and

(c) protect and preserve the independence and integrity of the judicial branch of government and help insure the fair and equal administration and enforcement of justice under the laws of the United States.\footnote{46}{Wisconsin Federal Nominating Commission Charter, \textit{supra} note 27, § I.}

The current Charter also addresses the initial Carter Administration concerns with enhancing diversity on the federal bench and reducing the instances of political patronage in the selection process.\footnote{47}{Id. § III(a).} In addition to working to fulfill the basic purposes outlined above, the Commission is charged with the following responsibilities:

(a) [to] affirmatively seek out qualified candidates, including women and minority candidates, for appointment to each such vacancy;

(b) [to] consider all applications from individuals interested in appointment to each such vacancy; and

(c) [to] recommend the nomination of not less than four nor more than six individuals who are the most qualified of those considered to serve.\footnote{48}{Id. § III.}

Finally, in addition to citing these goals codified in the Charter, Wisconsin Senators often tout the unwritten goal of “depoliticizing” the federal judicial process as an additional benefit of the Commission process.\footnote{49}{See, e.g., \textit{Nomination of Diane S. Sykes of Wisconsin, Nominee to Be Circuit Judge for the Seventh Circuit; James L. Robert of Washington, Nominee to Be District Judge for the Western District of Washington; and Juan R. Sanchez of Pennsylvania, Nominee to Be District Judge for the Eastern District of Pennsylvania: Hearing Before the Senate Comm. on the Judiciary}, 108th Cong. 581-84 (2004) [hereinafter \textit{Sykes Hearing}] (statements of Sens. Kohl and Feingold).} A return to the senatorial “cooling saucer” ideal, the Commission in theory serves to defuse national political struggles over the judiciary at the local level through a deliberative, merit-based process before Wisconsin federal nominees reach the Senate for consideration.\footnote{50}{See generally id.} Although the idea of a merit-based selection panel has inspired much rhetoric about removing politics from the process, the
Commission has not always performed in an apolitical manner; indeed, the Commission process on more than one occasion has had the unintended consequence of obscuring the actual politics of judicial selection from the public eye.51

While the Commission’s attention to merit, independence, and diversity is indeed commendable, especially in light of the rancor and politicization that have marked the judicial national selection process of late, the Commission’s record of implementing these ideals in the selection process has been mixed. Specifically, the Commission process has not always been able to remove political considerations from federal judicial selection, although it arguably has engendered greater civility and legitimacy in the process of selecting federal judges from Wisconsin.

III. LOCAL POLITICS AND FEDERAL JUDICIAL SELECTION: THE WISCONSIN FEDERAL NOMINATING COMMISSION’S FAILURE TO REMOVE POLITICAL CONSIDERATIONS FROM THE NOMINATING PROCESS

Removing the politics from federal judicial selection and thus attaining a truly independent, merit-based judiciary may be an aspiration that, despite the best efforts of reformers and public officials, will always remain an aspiration. Publicly, the Wisconsin Federal Nominating Commission, a seemingly appropriate development in the context of Wisconsin’s proud progressive tradition, has been lauded as upholding the senatorial “cooling saucer” ideal by serving as an apolitical, independent mechanism to aid in a bipartisan federal judicial selection process.52 For instance, Wisconsin’s senior Senator, Herb Kohl, has described the Commission as “fair and independent.”53 Russ Feingold, the state’s junior Senator, has stated that the Commission “help[s] to take the judicial selection process out of politics as much as possible.”54 And just recently, the Milwaukee Journal Sentinel praised the Commission’s “bipartisan approach” and the “civil manner” in which the Diane Sykes nomination to the Seventh Circuit Court of

51. See Part III, infra.
52. See, e.g., Cary Spivak & Dan Bice, White House Plays Favorites with Judge Job, MILW. J. SENTINEL, July 27, 2003, at 2A (describing “all the nice talk about the purity of the commission process and Wisconsin’s much-vaunted progressive tradition” regarding the Commission’s role in filling the 2003 Seventh Circuit vacancy).
54. Id.
Appeals in 2003 was conducted.\textsuperscript{55}

Ironically, instead of removing politics from the process, the nonpartisan façade of the Commission may actually help to overshadow, and at times intensify, some of the real political forces at work in Wisconsin federal judicial selection. The Commission itself is an institution, developed and implemented by political actors, designed to bestow legitimacy on a judicial nominating process that is often fiercely partisan and divisive, qualities that the public generally does not—and does not want to—associate with the judiciary.\textsuperscript{56} On more than one occasion, these political forces inherent in the advice and consent process have manifestly affected the nomination process at both the local and national levels, despite the Commission’s involvement. Moreover, in some of these cases, the use of the Commission itself may have exacerbated the contentiousness of an already contentious process.

In fact, from the very beginning, the Federal Nominating Commission faced criticism for its first recommendations to fill two district court seats in 1979.\textsuperscript{57} Because the Carter Administration had created two new federal judgeships in Wisconsin, one for the Eastern District and one for the Western District,\textsuperscript{58} the Senators established one nominating commission for each district to winnow down the list of applicants.\textsuperscript{59}

Consistent with President Carter’s goal of promoting diversity on the federal bench, the Western District Commission sent a list of names to the President that included eventual nominee Barbara Crabb, the first female federal judge in Wisconsin.\textsuperscript{60} By contrast, the Eastern District Commission faced criticism for providing the President with a list of names that included no women and only one African-American candidate.\textsuperscript{61} In further contravention of the Carter Administration’s

\begin{itemize}
  \item [55.] Stanford, \textit{supra} note 10.
  \item [56.] Editorial, \textit{Injudicious}, WASH. POST, June 13, 2003, at A28 (denouncing “several attitudes that should be anathema to any federal judge: contempt for judges with whom they disagree, a vision of the judiciary as essentially political in nature, and a desire to see matters of national controversy resolved in such a way as to highlight the political differences among jurists”).
  \item [57.] Editorial, \textit{Judicial Selection by Merit Gets So-So Trial}, MILW. J., May 18, 1979, pt. 1, at 1.
  \item [58.] \textit{Id.}
  \item [59.] \textit{Youth Emphasized in New Judges}, MILW. J., May 19, 1979, pt. 1, at 1.
\end{itemize}
goals, the Eastern District Commission included on its final recommendation list the former treasurer of the Wisconsin State Democratic Party, a candidate who appeared to make the cut for political reasons, rather than for merit. Although the eventual Eastern District nominee, Terence Evans, was widely regarded as an eminently qualified, capable judge, some observers still felt that the first attempt at merit-based judicial selection in Wisconsin had not lived up to the goals that it had been designed to accomplish, as “the list [of finalists was] not as uniformly excellent as it could have been.”

Despite its rocky start, the Wisconsin Federal Nominating Commission has endured; however, the allegations of undue political influence in the Commission process have endured as well. The 1981 nomination of John Shabaz to the Western District of Wisconsin, which ended in a public dispute among members of the Commission who were divided along party lines, is probably the most dramatic example of the Commission’s failure to remove politics from the judicial selection process. Moreover, two more recent instances—the nomination of State Senator Lynn Adelman to the United States District Court for the Eastern District of Wisconsin and the nomination of Wisconsin Supreme Court Justice Diane Sykes to the Seventh Circuit Court of Appeals—demonstrate the power of both federal and state politics in federal judicial selection, despite the use of the Commission in both cases.

A. John Shabaz: Politics Divides the Commission Along Partisan Lines

The nomination of John Shabaz in 1981 was a product of the kind of partisan political infighting that the Federal Nominating Commission was developed to counteract. Less than a year into his first term, President Ronald Reagan, with the urging of Wisconsin Republican Senator Robert Kasten and over the objections of senior Democratic Senator William Proxmire, nominated John Shabaz, a Republican state senator with no prior judicial experience, to the United States District Court for the Western District of Wisconsin. Despite Reagan’s official

63. Id.
64. Judicial Selection by Merit Gets So-So Trial, supra note 57.
66. Id. at 138 (statement of Sen. Proxmire).
abolition of the Carter-era federal nominating commissions upon taking office, Wisconsin Senators Proxmire and Kasten continued to use the bipartisan Nominating Commission to fill this vacancy; however, according to Senator Kasten, "the merit selection panel in this case did not work very well." The first signs of discord began during the Commission's secret voting in April of that year when the Commission—composed of seven Kasten appointees, three Proxmire appointees, four State Bar of Wisconsin appointees, and the Dean of the University of Wisconsin Law School—split along party lines in their consideration of Shabaz, leading some to suggest that "the Kasten appointees had a prearranged agreement to vote for Shabaz." The Commission forwarded Shabaz' name to the Senators and, despite Shabaz' failure to garner a majority vote of Commission members, Senator Kasten recommended Shabaz to the President. According to the Milwaukee Sentinel, "some of the non-Kasten appointees were upset with the apparent bloc voting by the Kasten members" and "believed it violated the spirit of merit selection."

These non-Kasten Commission members lodged their objections in a minority report, prepared by the nonpartisan Wisconsin State Bar appointees and cosigned by the Proxmire appointees, which was subsequently leaked and reproduced in the Wisconsin press. This report described in stark terms the political infighting that took place behind the scenes of the Shabaz consideration, shielded from public view by the Commission's own secrecy policy:

The position of this Report is that the integrity of the selection process was, in this situation, subverted by the concerted action of seven Commission members, the Kasten appointees, who succeeded in turning the result of the Commission's designation into a political spoils system benefiting their pre-selected candidate, John Shabaz.

70. Shabaz Hearing, supra note 65, at 137 (statement of Sen. Kasten). According to Senator Kasten, "panel members could not get a majority vote on more than two candidates. Therefore, by majority vote they passed a motion forwarding five names with a notation that three of the candidates received less than a majority vote. Mr. Shabaz was one of the three." Id.
In that the tactics and preference of the Shabaz bloc were determined before the facts ascertained by the Commission’s investigation and interview process were even available, these members made a farce out of the function of the Commission, and certainly impugned the integrity of its results. It is the position of this Report that such actions border on scandal as being a fraud on the selection process. Objectively, such actions should negate the nomination of Mr. Shabaz, as the tactics used to obtain his designation make such designation a sham. Being apprised of these facts, it should be clear that neither Senator can in good conscience rely upon the Commission’s designation of Mr. Shabaz.

Despite the minority report’s harsh words regarding the integrity of the Commission process and over Senator Proxmire’s vehement objections, John Shabaz was nominated and confirmed to the United States District Court for the Western District of Wisconsin. Ironically, but for the leak of the minority report to the media, the formal Federal Nominating Commission process would have shrouded with a cloak of legitimacy what many Commission members perceived as a blatantly partisan appointment. The lack of transparency and the closed-door nature of the process may have contributed in this instance to the majority party’s ability to use the Commission as a means to a political end.

The Commission was not involved in filling the next Wisconsin vacancy on the federal bench, as President Reagan quickly appointed then-Wisconsin Supreme Court Justice John L. Coffey to the Seventh Circuit Court of Appeals in 1981, per Senator Kasten’s sole recommendation, while the Shabaz nomination was still pending. At the time, observers saw this move both as consistent with the Reagan Administration’s abandonment of the Carter-era merit selection panels, and as a shrewd political calculation on Senator Kasten’s part to ensure an expedited appointment while the Shabaz nomination remained pending.

73. Id. at 164–65 (statement of Sen. Proxmire) (quoting the Federal Judicial Nominating Commission minority report).
bogged down in controversy. The Commission process was reinstated in 1983 with the nomination of Thomas Curran to the Eastern District of Wisconsin, and has been used to fill every subsequent Wisconsin vacancy on the federal courts.

B. Lynn Adelman: State Politicians Use a Federal Judicial Appointment for Political Gain

In 1997, although the Commission process itself was devoid of any major power struggles similar to those that plagued the Shabaz nomination, political maneuvering on both the federal and local levels impacted the nomination of State Senator Lynn S. Adelman to the United States District Court for the Eastern District of Wisconsin. In addition to maintaining a private legal practice, Lynn Adelman was a staunch Democrat, long-time state senator, and personal friend of United States Senator Russ Feingold, with whom he had served in the state senate. A finalist for a 1995 vacancy on the Seventh Circuit Court of Appeals, Adelman in 1997 once again found his name on the short list of candidates that the Federal Nominating Commission presented to the Senators.

Adelman, despite his reputation as “one of the true liberals of the Wisconsin Senate,” was nominated and easily confirmed with wide bipartisan support in the midst of an otherwise contentious, partisan struggle over federal appointments between Senate Republicans and the Clinton White House. Although it may be tempting to credit the Federal Nominating Commission for the bipartisan cooperation that seemed to characterize the Adelman nomination, this ostensible bipartisanship was instead the result of maneuvering on both sides of the aisle to use the vacancy to their political advantage after the Commission’s initial screening of the candidates was complete.

For President Bill Clinton, the Adelman nomination was an attempt

76. Id.
78. Steven Walters & Sam Martino, Both Parties Want Adelman Confirmed, MILW. J. SENTINEL, Sept. 10, 1997, at 1B.
80. Id.
82. Id.
to ingratiate himself with the Wisconsin Democrats, particularly Senator Feingold, who had "made his former colleague's appointment a personal priority." President Clinton, facing a Republican congressional majority and increasing scrutiny of his public and personal life, likely saw his support of this nomination as an opportunity to gain much-needed Democratic allies in the Senate.

State Republicans, following the lead of then-Governor Tommy Thompson and aided by the clout of Senate Majority Leader Trent Lott, also threw their support behind Adelman, viewing his appointment to the federal judiciary as an opportunity to win Adelman's state senate seat in a Republican-leaning district. Gaining control of this seat would allow the Republicans to claim a one-seat majority in the Wisconsin Senate. This dynamic led to an anomalous situation in which state senate Democrats attempted to stall the nomination of one of their own in order to preserve their tenuous majority.

The Republicans' strategy ultimately backfired, however. Shortly after Judge Adelman's confirmation, the Democrats reclaimed the majority in the state senate, leaving Wisconsin Republicans to wonder whether their strategy of endorsing Adelman had been worth giving a liberal judge life tenure on the federal bench. One state senate Republican characterized the Adelman strategy as "a huge error, a tragedy. . . . People can be upset that we saw it as a political opportunity. We did." Thus, as the Adelman nomination demonstrates, federal judicial selection is often fraught with politics, even when the ostensibly nonpartisan Federal Nominating Commission is involved in the vetting process.

C. Diane Sykes: Senate Democrats Win the Battle, but Lose the War

Most recently, in 2003, Wisconsin's Senators activated the Federal Nominating Commission to fill a Wisconsin vacancy on the United

84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
90. Id. (quoting state Sen. Alberta Darling, R-River Hills). However, Governor Thompson's spokesman attempted to play down the consequences of the Adelman strategy, asserting that Clinton "was going to appoint a big liberal anyway." Id.
States Court of Appeals for the Seventh Circuit. Although the Commission process ran smoothly and without any overt signs of undue political influence, the initial fight between Wisconsin’s Democratic Senators and the Republican White House over the use of the Commission had important consequences: The Senators’ successful fight to employ the Commission process resulted in their consequent political inability to oppose any nominee that the Commission produced. Thus, once the Senators’ own Nominating Commission produced a list of names, the Senators found that they lacked the political capital necessary to strike the names of candidates whom they might have otherwise opposed, including the eventual nominee, Wisconsin Supreme Court Justice Diane Sykes.

When Judge John Coffey announced his intention to assume senior status, the George W. Bush White House initially resisted the use of the Wisconsin Federal Nominating Commission to fill the resulting vacancy on the Seventh Circuit Court of Appeals. Because federal courts of appeals seats are particularly influential, the Bush Administration did not want its selection to be constrained in any way by Wisconsin’s two Democratic Senators: According to a White House spokesman, “The President makes the decision about who [sic] to select.”

Recognizing the high-stakes nature of this appointment, Wisconsin Senators Kohl and Feingold, both members of the influential Senate Judiciary Committee, fought to preserve the Nominating Commission. According to Senator Kohl, “particularly during this time of extreme contentiousness in the Senate, one could easily argue that the best way to avoid that here in Wisconsin is to use a commission approach, which is most likely to produce a nominee both sides can live with.” Senator Feingold agreed, stating, “There is no reason to abandon this process, which is good for the judiciary and for Wisconsin.”

Finally, “[a]fter some contentious discussion,” the White House agreed to the use of the Federal Nominating Commission, even though

93. Gilbert, supra note 91.
94. Id. (quoting White House spokesman Scott Stanzel).
95. Id.
96. Id.
97. Gina Barton, 12 Apply to Fill Vacancy on U.S. Appeals Court, MILW. J. SENTINEL, July 17, 2003, at 7B.
the President had reportedly prescreened and interviewed six candidates for the seat before the Commission had even begun accepting applications. The Commission ultimately returned four names to the Senators after a deliberative, noncontentious process. The Senators, after initially expending a great deal of political capital fighting for the use of the Commission, agreed to back any of the four candidates on the list, including conservative Wisconsin Supreme Court Justice Diane Sykes, the eventual nominee.

At the state level, local politicians saw a potential Sykes appointment as an opportunity for political gain, as Democratic Governor Jim Doyle would appoint Justice Sykes's successor to the Wisconsin Supreme Court, presumably affecting the court's ideological balance. While many state Democrats hoped that Justice Sykes would receive the Seventh Circuit appointment for this reason, many state Republicans did not want to lose a prominent conservative voice on the Wisconsin Supreme Court. Moreover, former Wisconsin Governor Tommy Thompson, a longtime political adversary of Jim Doyle who had appointed Sykes to the Wisconsin Supreme Court in 1992, reportedly was not happy that Governor Doyle would name Justice Sykes's replacement.

Although Diane Sykes's record both as a Wisconsin Supreme Court justice and as a judge on the Milwaukee County Circuit Court established her as a results-oriented conservative similar to many previous Bush judicial nominees that the Senate Democrats had filibustered that term, neither Senator Kohl nor Senator Feingold

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98. Spivak & Bice, supra note 52.
100. David Callender, Kohl, Feingold Back All Four Judge Finalists; Appeals Court Pick is Up to Bush, CAPITAL TIMES (Madison, Wis.), Sept. 18, 2003, at A8.
102. Id.
103. Craig Gilbert, Kohl, Feingold Back Panel's Recommendations for U.S. Appeals Court, MILW. J. SENTINEL, Sep. 19, 2003, at 1B. At the time of the Sykes nomination, Thompson was serving in the Bush Administration as the Secretary of Health and Human Services. Governor Doyle served as Wisconsin Attorney General while Thompson was governor. Callender, supra note 12.
104. Katherine M. Skiba, U.S. Senate Approves Sykes for Federal Seat, MILW. J. SENTINEL, June 25, 2004, at 1B. During Justice Sykes's confirmation hearing before the Senate Judiciary Committee, Senators Kohl and Feingold declined to express concern over a number of instances in Justice Sykes's record that, absent their vigorous support of the Nominating Commission, they otherwise might have scrutinized more closely. Id. Although other Democrats on the Committee probed deeper into these problematic areas and were not
opposed the Sykes nomination, making good on their promise to support any name on the Commission's final list.\textsuperscript{105} With the Senators' support, the Sykes nomination was headed for a much smoother and less controversial confirmation than many previous conservative Bush nominees.

During the Sykes confirmation hearing, both Democratic Senators expressed their support for Justice Sykes, but almost more prominently, expressed their satisfaction with the performance of the bipartisan Nominating Commission.\textsuperscript{106} Senator Kohl stated on the record, "Wisconsin's process should be a model... because it finds qualified applicants and takes much of the politics out of judicial selection." Senator Feingold concurred in Senator Kohl's praise for the Commission process:

Senator Kohl and I have worked very hard to maintain and strengthen the commission throughout our time in the Senate. The composition of the commission assures that selections for these important positions will be made based on merit, not politics. Over the past 25 years, the commission process has yielded very high quality nominees and has served to depoliticize the nomination process in our State. Despite some initial satisfied with Justice Sykes's explanations, her nomination sailed through the Committee with the support of both Wisconsin Senators:

The vote Thursday came after harsh criticism on the Senate floor from Democrats Richard Durbin of Illinois and Pat Leahy of Vermont. Durbin condemned Sykes on three grounds. First, he said she has taken pride in being known as a "hanging judge," and he noted that she once told a reporter that a wing of a Wisconsin maximum-security prison was informally named after her. "Do these sound like temperate statements by a person who will be asked to honor the presumption of innocence?" Durbin asked. Second, he charged that Sykes was not "open and honest" about sentencing two abortion protesters with long arrest records. "You obviously possess fine characters... Your motivations are pure," she had said at sentencing. Third, Durbin charged that Sykes had committed "major-league evasion" by ducking his questions to her on two landmark Supreme Court cases. One was the decision to give Miranda rights to suspects; the other ruling legalized abortion. He said she cited the Wisconsin Code of Judicial Conduct as the reason she could not answer his questions, but that if all judicial nominees could "hide" behind such ethics codes, "then the Senate Judiciary Committee should turn out its lights and the Senate should walk away from any role advising and consenting on judicial nominees."

\textit{Id.}

105. Gilbert, \textit{supra} note 103.
106. \textit{Sykes Hearing}, \textit{supra} note 49.
resistance, the Bush administration ultimately agreed to have candidates for the Seventh Circuit vacancy go through the commission process. ¹⁰⁸

Judging from these statements, combined with the Senators' failure to ask probing questions during the confirmation hearing, it appears that winning their initial fight for the Commission tied the Senators' hands politically, resulting in their acquiescence in the nomination of a candidate who might not have been acceptable otherwise. ¹⁰⁹ Thus, in this instance, the use of the Commission led the Senators to consider the nominee not based on scrutiny of her past record, but instead based on political considerations, a situation anathema to the very purpose of the Commission itself.

IV. CONCLUSION: A CAUTIOUS CASE FOR MERIT SELECTION

Because the Constitution delegates the "advice and consent" power to the United States Senate, the judicial confirmation process has always been, to some extent, unavoidably political. ¹¹⁰ According to Professor Stephen Carter:

The nation moves, and [nominees] very far ahead of it are as likely to be swept into irrelevance as those very far behind. Because the politically sensitive President nominates the [judges] and the politically sensitive Senate must consent to the nominations, it is no easy matter to argue that the selection process was designed to be, or can practically be made to be, entirely distinct from politics. ¹¹¹

Thus, Senators, as members of a political body chosen by constituents whose votes reflect the political norms of the day, will inevitably favor judges whose jurisprudence reflects those same norms, sometimes over those nominees with the most impressive résumés. ¹¹²

¹⁰⁸ Id. at 582–83 (statement of Sen. Feingold).
¹⁰⁹ Spivak & Bice, supra note 92 (describing Senators Kohl and Feingold as "the ones who went to the wall demanding that the commission be used. 'You're left with, "We'll give you your conservative, but it's going to cost you,"' said one federal honcho, speculating on the thought process of the two senators.").
¹¹¹ Id. at 1190.
¹¹² Id.
Likewise, a commission consisting of members chosen by those same elected officials will not be completely insulated from political pressures either. While the Wisconsin Federal Nominating Commission has assuaged some of these problems by emphasizing merit, political pressures still sometimes overshadow the merit-based aspect of the process, as demonstrated in Part III of this Comment. Nonetheless, merit-based selection might be an improvement over the current national rancor surrounding the selection process, as the majority of the nominations originating from the Nominating Commission—including those of Lynn Adelman and Diane Sykes—have engendered less animosity in the Senate than nominees from other states that did not engage in similar vetting at the local level. In an era where very real political pressures might tempt some Senators to rubberstamp judicial nominees instead of fulfilling their constitutionally mandated advice and consent duty, a return to the “cooling saucer” ideal led by local merit-selection commissions such as Wisconsin’s could be beneficial for both the Senate and the federal judiciary.

Moreover, less rancor and greater cooperation among political actors in the judicial nominating process may also protect the legitimacy of the federal judiciary. Because Article III judges are unelected, enjoy lifetime tenure, and often make policy-related decisions that impact people’s lives, the legitimacy of the federal judiciary has been precarious from the start. For this reason, the federal courts themselves have developed a jurisprudence surrounding the Constitution’s “case or controversy” requirement to limit their own power and ensure that the


114. In the 2004 election, a number of Senate Democrats lost reelection amid allegations of obstructionism, particularly pertaining to judicial nominations. Charles Babington, 109th Congress Convenes, WASH. POST, Jan. 5, 2005, at A3. Most prominently, John Thune unseated Senate Democratic minority leader Tom Daschle of South Dakota in this manner:

Thune, who turns 44 on Friday, said Democrats cannot ignore the successful Republican campaigns, especially his, in which he portrayed Daschle as the chief obstructionist of GOP goals.... Alluding to last year’s parliamentary tactics by Senate Democrats that blocked confirmation votes on 10 of President Bush’s judicial nominees, Thune said: “I have to believe that on.... judicial nominations, people who maybe felt in the past obligated to toe the line to sustain a filibuster are now going to look at it and say we’ve got to give these nominees an up-or-down vote.”

Id.


116. U.S. CONST. art. III, § 2, cl. 1. According to Justice Tom Clark:
The case or controversy presented must be a genuine dispute..., raising a substantial question. The Court does not deal in advisory opinions..., moot questions..., or political issues.... Traditionally it shies away from deciding constitutional questions; not rendering such a decision unless it is absolutely necessary to the disposition of the case.... An appeal from the highest state court is dismissed if that court’s judgment can be sustained on an independent state ground.... A statute is not construed unless the complaining party shows that he is substantially injured by its enforcement. An attack on an act of Congress on constitutional grounds is by-passed in the event a construction of the statute is fairly possible by which the constitutional question may be avoided.


117. In Federalist No. 78, Alexander Hamilton expressed this same concern that the vitality and legitimacy of the judiciary rests on the maintenance of a strict separation of powers:

[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean so long as the judiciary remains truly distinct from both the legislature and executive. For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”

THE FEDERALIST NO. 78 (Alexander Hamilton).

118. Wisconsin Federal Nominating Commission Charter, supra note 27, §§ I(b), III(a).

119. Friederich, supra note 60; Patrick Jasperse, Senate Confirms Clevert as Federal Judge, MILW. J. SENTINEL, July 18, 1996, at 1B. A 1998 report of the Twentieth Century Fund Task Force on Judicial Selection pointed out the role of racial and gender diversity on
Thus, although the Wisconsin Federal Nominating Commission does not remove all political considerations from federal judicial selection, it has been a beneficial local tool in restoring some modicum of civility and legitimacy to the selection process at the national level. If more Senators fashioned their consideration of federal judicial nominees from their home states after Wisconsin’s merit-selection model, perhaps the increasingly contentious process could be tamed, marking a return to the senatorial “cooling saucer” ideal and fortifying the legitimacy of the federal bench.

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the federal bench in enhancing the legitimacy of the judiciary:

The Task Force acknowledges that “representative” considerations have and will at various times come properly into play in judicial appointments. Geographical representation on the Supreme Court was important in establishing the legitimacy of the Court and the national government in the nineteenth century, an era when sectional loyalty was far greater than it is now. Today, as our population has become increasingly diverse and opportunities have widened, it has become equally important that the federal bench be broadly reflective of that diversity.
