

# COUP IN THE COURT

## IT'S TIME TO FIX WISCONSIN'S FEDERAL JUDICIAL-SELECTION PROCESS

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As part of their Constitutional “advice-and-consent” role, any single one of the 100 members of the United States Senate — including Wisconsin’s two current members, Democrats Herb Kohl and Russ Feingold — can vote either for or against anyone nominated to be a federal judge by any president, including the current one, Republican George W. Bush. Any of the nineteen members of the U.S. Senate’s Committee on the Judiciary, moreover — again including Senators Kohl and Feingold — can easily investigate, interview, derail, defend, and/or vote either for or against any federal judicial nominees at that level, before a nomination would even reach the Senate floor.

All of this is part of the normal, accepted, institutional process of filling federal judgeships.

As well, any senator has the right to “blue-slip” nominations to federal judgeships in his or her own home state that are made by any president. That’s “blue-slip” as a verb, and it’s used as such by the Senators and Senate-watchers. “Blue slips” as nouns are the forms that Senators submit to the Judiciary



Committee if they approve of a nomination in their home state being advanced to the hearing stage. One withheld blue slip from a nominee’s home-state senator seriously impedes a nomination; two effectively kill it.

While not contemplated in the Constitution, “blue slips” and “blue-slipping” have become a well-practiced —albeit oft

overly and sometimes overtly political — part of the same selection process.

Now, however, Wisconsin’s two senators have added a new wrinkle to the process, managing to amass more power to themselves, limiting the president’s options, and short-circuiting a process they themselves created.

In June 1995, Kohl and Feingold signed an amended charter pledging to continue to use a nonpartisan commission to give them merit-based advice about candidates for vacancies in the state’s federal courts and its two U.S. Attorney positions, along with certain vacancies on the Seventh Circuit U.S. Court of Appeals. This Wisconsin Federal Nominating

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Commission was first used by Wisconsin's senators in 1979. Its responsibility is to consider all applications for these jobs and to recommend between four and six individuals for each vacancy. These names are then forwarded by the senators to the White House as acceptable to them. According to initial research by the American Judicature Society in Chicago, only seven other states have even roughly similar commission mechanisms — California, Colorado, Massachusetts, Oklahoma, Pennsylvania, Texas, and Washington.

The senators' implicit promises are always that, if appointed by the President, none of the names on their commission's list will be "blue-slipped."

Given the Wisconsin commission's actual makeup, its effect has become to provide Kohl and Feingold with yet another, low-profile opportunity to deny the nomination of those either politically or ideologically undesirable to them. Since presumably prepared and printed on nice white bond paper, let's just call their charter and the commission it created — if used this way — a de facto "white slip."

Again, this is only part of the process in eight states.

In 2001, for the first time since the commission's creation, neither of Wisconsin's senators belonged to the same political party as the President. Of the other seven states with judicial screening commissions, only California, Massachusetts, and Washington have two Democratic senators.

Further complicating the nomination process is the one-vote margin Democratic control of the U.S. Senate. Each nomination thus becomes a delicate balancing of the power of President Bush and the Democratic Senate majority.

Last fall saw the first test of the new alignment. After the Wisconsin Federal Nominating Commission recommended five names to them for a new Green Bay-based federal judgeship created by Congress, Kohl and Feingold decided each to interview separately the recommendees by themselves, a part of the process

not mentioned or even contemplated in the charter they signed in 1995.

After the interviews, without any public explanation whatsoever (at this writing), Kohl and Feingold struck two people from the list. Although they claim to be advocates of openness in government, they privately eliminated the person generally considered the most-qualified candidate, Wisconsin Supreme Court Justice N. Patrick Crooks, and Milwaukee County Circuit Judge Elsa Lamelas, the only woman and the only minority on the list. Feingold reportedly conducted his interviews at his office in the federal building in downtown Milwaukee, and Kohl reportedly conducted his in the coffee shop at the Pfister hotel. After the tony, crème-colored bills with which diners are presented when done there, we'll call Crooks and Lamelas — the two commission-recommended, senator-rejected candidates — "crème-slipped."

### **What Happened**

The Kohl/Feingold commission has a total of eleven members — six of them liberal and five of them conservative. Of the liberals, two are appointed by Kohl (attorneys Stephen Glynn and James Hall, Jr., of Milwaukee), two are appointed by Feingold (attorneys Charles Curtis of Madison and Greg Conway of Green Bay), and one is appointed by the State Bar of Wisconsin (Milwaukee attorney James Brennan).

Of the conservatives, four are appointed by U.S. Representative F. James Sensenbrenner of Menomonee Falls, the state's senior Republican in Congress who also happens to be chairman of the House of Representatives' Judiciary Committee, (former U.S. Representative Mark Neumann of Hartland, attorney William Curran of Mauston, and attorneys Rick Graber and John Savage of Milwaukee), and one is appointed by the State Bar (attorney John Knuteson of Racine).

The chairman of the commission, when it's making recommendations for positions in the Eastern District, is the dean of Marquette University's law school. (When making recom-

mendations for Western District jobs, it's the dean of the University of Wisconsin Law School.) Marquette's dean is the highly respected Howard Eisenberg. He's a liberal, making it a 6-5 liberal-majority commission.

The commission itself, which is staffed by the State Bar, had already pared down eighteen applicants to ten for interviews. Of the ten interviewees, five were recommended by the commission (with Conway not participating). In addition to Justice Crooks and Judge Lamelas, they were Brown County Circuit Judge William Griesbach, Green Bay attorney Thomas Schober, and Outagamie County Circuit Judge Joseph Troy.

With the best judicial credentials, Crooks was considered the heavy favorite for the \$145,100-per-year position and his removal shocked even some Democrats. A former Brown County Circuit Court judge, he is known as smart and savvy, and he is politically well-connected — including to Republican U.S. Health and Human Services Secretary and former Governor Tommy Thompson and Green Bay's U.S. Representative Mark Green, who fought with Kohl for the new judgeship's very creation.

The front-running Crooks was a finalist for federal judgeships in Milwaukee in both 1986 and 1991. He ran unsuccessfully for the Wisconsin Supreme Court in 1995, losing to Justice Ann Walsh Bradley, but then won the seat he now holds the next year, beating state appellate-court Judge Ralph Adam Fine. For this seat, of course, Crooks was chosen by the same statewide electorate that gave Kohl and Feingold their jobs. The only real potential drawback to a Crooks' appointment had been considered his age, 62.

Lamelas was also "crème-slipped." A judge since 1993 and a federal prosecutor for ten years before that, Lamelas is smart and personable. As a Hispanic female (she is of Cuban descent), Lamelas would have been an especially appealing candidate for a Bush White House anxious to build ties with the nation's growing Hispanic electorate. But perhaps Lamelas' attraction as a "diversity" candidate made her objectionable to the Democratic senators. Other Hispanic nominees of a conservative hue have similarly languished in the Senate. Voting against or "blue-slipping" a minority woman, however, had obvious political downsides for Kohl and Feingold, who chose instead to veto her quietly,

without awkward public debate, publicity, or explanations. (Another person's name was also removed from the list of recommended candidates to be U.S. Attorney for the Eastern District.)

After Crooks and Lamelas were crossed off the commission's list, the remaining three names were submitted on November 16 to the White House. Sensenbrenner publicly co-submitted the smaller list along with the

Senators, though protested its paring.

According to a statement released that day by Sensenbrenner,

Although I believe everyone on the list sent to President Bush to be good candidates who are qualified for their respective positions, the Senators' actions have resulted in a pared down list. This has the effect of reducing the President's options for filling these positions — even though these appointments are to be filled by President Bush and not by Senators Kohl, Feingold, or myself.

"I am pleased with the results of the Commission," he then pointedly noted, "and I

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support and commend the members of the Commission for their hard work and commitment to our state.”

Seemingly slightly more steamed that Crooks and Lamelas were “crème-slipped,” Wisconsin’s three other Republican House members — Representatives Green, Tom Petri, and Paul Ryan — wrote a strong letter of protest to the President two days later urging him still to consider all five names.

We were very disappointed that only a partial list of the commission’s finalists was forwarded to you for consideration for the vacant positions.

We believe this is a mistake and unfairly denies you the opportunity to consider three very qualified individuals who won the approval of the commission but were eliminated from your consideration for undisclosed reasons. These public servants were deemed worthy of presidential consideration by the bipartisan commission. Fairness dictates that you have the chance to consider them for these posts.

Whether this was done or not, Judge Griesbach, a judge for only a couple of years, got the nomination in late January 2002.

Perhaps even less is known about Schober and Judge Troy than Griesbach. An experienced practitioner, Schober was the only one among the last three with federal trial-court experience.

### **What Should Happen Now**

It is widely expected that sometime soon, respected Judge John Coffey of the Seventh Circuit U.S. Court of Appeals will announce a decision to take “senior status” and need to be replaced by an active judge. Of the eleven full-time judgeships on that court — which can, through its consideration of the cases brought before it, pass on virtually all federal-law issues from Wisconsin, Illinois, and Indiana — two of them are putative “Wisconsin seats,” those of Judge Coffey and Judge Terence Evans.

Given that which has occurred, Sensenbrenner should just plain old refuse to participate any further in the Kohl/Feingold commission’s process to select acceptable federal judicial nominees, including to replace Coffey. Whether this is done or not, the White House should ignore any further recommendations arising out of the commission process, especially if it’s like this last one. Alternatively, either Sensenbrenner and/or the White House could request or demand up front that the process somehow be normalized to prevent the placement, perhaps purposeful, of any more very privately used political “slips” in the hands of Kohl and Feingold by the now only supposedly nonpartisan, merit-based process.

This may be done. Last December, White House counsel Alberto Gonzales wrote to Washington’s Democratic Senators Patty Murray and Maria Cantwell (who replaced Senator Slade Gorton in January 2001) and informed them that the White House would not consider candidates recommended by their panel to replace an outgoing federal judge in Tacoma. According to Gonzales’s letter — which said he was “willing to consider” a commission, but with conditions — commissions “do not uniformly produce the most highly qualified candidates for the federal judiciary.” Gonzales’s conditions are that the President could ignore the commission’s candidates and that it would play no role in nominations to the Ninth Circuit Court of Appeals.

In its current form, the Wisconsin commission unfairly allows more judicial-selection “say” by two senators of the opposite party from the President’s than is considered warranted almost everywhere else in the country — and arguably more importantly, much more than is Constitutionally accorded them.

Although according to the charter’s Section XI, “Nothing contained herein is intended to in any way impair or delegate the Constitutional and statutory powers, duties or prerogatives of the President of the United

States,” the now-“three-slip” Wisconsin process does, in fact, very arguably have the effect of making for a troubling imbalance of the judicial-selection powers given the President and the Senate.

It is time to “pink-slip” this unique process of de-selecting federal judges.