

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS

SECTION OF LITIGATION

SECTION OF ANTITRUST

NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES

NATIONAL CONFERENCE OF STATE TRIAL JUDGES

STANDING COMMITTEE ON JUDICIAL INDEPENDENCE

SECTION OF STATE AND LOCAL GOVERNMENT LAW

NATIONAL LESBIAN AND GAY LAW ASSOCIATION

COALITION FOR JUSTICE

AMERICAN JUDICATURE SOCIETY

COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY

NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS

SECTION OF LABOR AND EMPLOYMENT LAW

CENTER FOR RACIAL AND ETHNIC DIVERSITY

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association supports the selection as federal judges
 2 of men and women of diverse backgrounds and experiences, whose professional
 3 competence, integrity, and judicial temperament, including commitment to equal justice
 4 under law, fully qualify them to serve in the federal judiciary;
 5
- 6 FURTHER RESOLVED, That the American Bar Association supports the practice of
 7 federal judges providing advance notice of their intention to leave active federal judicial
 8 service in order to facilitate the timely nomination of individuals to vacant judgeships;
 9
- 10 FURTHER RESOLVED, That the American Bar Association encourages the senators in
 11 each state jointly to appoint (in cooperation with others not of their party when
 12 appropriate) bipartisan commissions of lawyers and other leaders, reflecting the diversity
 13 of the profession and the community, to evaluate the qualifications of prospective district
 14 judges and to recommend possible nominees whom their senators might suggest for the
 15 President's consideration;
 16
- 17 FURTHER RESOLVED, That the American Bar Association endorses the use of
 18 bipartisan commissions to consider and recommend prospective nominees for the United
 19 States Courts of Appeals;

20 FURTHER RESOLVED, That the American Bar Association recommends that the
21 President consult with Senate leaders of both parties and the home state senators in
22 advance of submitting nominations;

23

24 FURTHER RESOLVED, That the American Bar Association urges the President and
25 Senate to promptly fill judicial vacancies and act expeditiously, especially with respect
26 to nominees recommended by bipartisan commissions; and

27

28 FURTHER RESOLVED, That this resolution supersedes the August 1977 resolution
29 (appended) concerning the judicial nomination and confirmation process.

REPORT

Impartial and competent judges are essential to the rule of law. A key to assuring such judges is the process that puts them in office. Although the selection of Supreme Court justices catches the public eye, nominating and confirming men and women to serve on the federal district courts (665 currently authorized judgeships) and court of appeals (178 currently authorized judgeships) is no less important. The great majority of people who encounter the federal judiciary do so in those courts, and the overwhelming majority of legal issues that federal courts resolve get resolved there.

A. Changes in the Nomination and Confirmation Process for Federal District and Circuit Judges

The constitutionally stated requirements for selecting district and circuit judges are presidential nomination and Senate confirmation. A constellation of less formal procedures has evolved over the last century. Presidents, while hardly ignoring partisan and patronage considerations, have generally sought competent nominees whose service could be a legacy of their presidencies and who are acceptable to the Senate—particularly senators from the states where the nominees would serve. The Senate has generally confirmed nominees without extended conflict and relatively quickly.

Today, however, the nomination and confirmation processes for district and more so for circuit judges have become problematic. How problematic, and why they have become so, have been the subject of disputed analyses from members of both parties and in the press and academic literature. Suffice it to say that for the last several presidential administrations, the time to get nominations to the Senate has lengthened and the time from nomination to confirmation has grown considerably. Moreover, the level of vitriol in the process appears to have increased.

B. The Value of Contentiousness and the Danger of Its Excesses

Reasonable people in and out of government will disagree on what makes a good judge. Understandably and rightly, some degree of contentiousness inheres in the process of selecting judges, especially given the expansion of federal jurisdiction over the last century and a half. Deliberation at each stage is essential, given the responsibilities vested in federal judges.

At some point, though, healthy expression of different perspectives, and cautious weighing of candidates' merits, cross the line into polarized combat that fosters the view that judges are in office simply to carry out ideological agendas of those involved in putting them there, and makes some who could be excellent judges unwilling to subject themselves and their families to acrimony and their professional lives to a state of extended suspension. Although the vacancy rate in recent decades has not necessarily reflected historic highs, the process's time and what some have called its nastiness are greater than they were a half century ago.

Principled disagreement about judicial selection is not inconsistent with seeking candidates with legal competence and judicial temperament. Nor is it inconsistent with decent treatment of nominees for the bench. This recommendation can enhance those procedural values even while recognizing that the Constitution vests the nomination authority in the President and the confirmation authority in the Senate, and recognizing as well that political and partisan tensions are to a degree endemic to the selection process.

C. Steps to Alleviate Excesses in the Nomination and Confirmation Process

This recommendation's implementation is not a panacea, given that many conflicts in the nomination and confirmation process are rooted in the underlying polarization of American society. But good faith implementation will help to mitigate some of the excesses.

1. Advance notice of vacancies—This recommendation encourages expedition in all phases of the selection process. The first phase is the creation of a vacancy, sometimes by a new judgeship statute or an incumbent's death, but much more commonly by judges' taking senior status under 28 U.S.C. §371 (or, less frequently, resigning from the bench). This resolution encourages federal judges to provide advance notice of the date on which they intend to leave active federal judicial service. Many already provide such notice, pursuant to the United States Judicial Conference's suggestion they do so 12 months before the date of the anticipated vacancy.

2. Bipartisan commissions Senators have a well-established role of recommending to the President potential nominees for federal judicial vacancies in their states, particularly for district judgeships. This resolution proposes a means of providing bipartisan assistance to senators and to the President in identifying nominees.

State commissions to suggest potential judges to those responsible for judicial appointments have, by most accounts, improved the judicial selection process in the states. For federal judicial nominations, senators in eight states now use commissions of lawyers and others to screen potential district judge nominees. This recommendation urges that the two senators in every state jointly appoint truly bipartisan commissions of lawyers and non-lawyers to develop lists of potential district judge nominees for the consideration of the senators and the White House. When a state's senators are of the same political party, it may be appropriate to share the appointing authority with legislators and others in the state of the opposite party.

This recommendation does not propose particular steps or procedures that each commission and senator should follow—for example, whether and how to solicit judgeship applicants or how many applicants to forward as potential nominees. Such specifics are best fashioned in light of needs and conditions in the various jurisdictions.

The recommendation does propose, however, that the lawyers on the commissions reflect, as much as possible, the various elements and specializations within the bar and that overall commission membership reflect the diversity in the population of the state or part of the state served by the judicial district.

While the processes for nominating circuit judges vary from those for district judges, the resolution recommends appointment of bipartisan commissions, reflecting the aspirations and values described above, in respect to potential circuit judge nominees.

3. Advance presidential and senatorial consultation—This resolution recommends that the President consult, before deciding on nominees, with the Senate leadership and home state senators of both parties. Such consultation, far from compromising the President's authority to nominate judges, would serve that authority well, helping to avoid battles whose costs outweigh their benefits to the President, the Senate, the nominees, and the courts on which they may serve.

4. Expeditious Action by the President and Senate—The goal of fully staffed federal courts, as well as fairness to judicial nominees, requires as much expedition in all phases of the process as is possible, consistent with the deliberation appropriate in the selection of federal judges. In particular, because of the extra screening received by potential and actual nominees who have been recommended by bipartisan commissions, those nominees have an especially strong claim for expedited consideration for presidential nomination and senatorial consideration.

This recommendation makes no call for set timetables for the various stages, but it encourages senators to forward prospective nominees to the White House promptly. It calls for prompt nominations by the President, and prompt consideration of them by the Senate, especially persons recommended by bi-partisan commissions.

Respectfully submitted,

Harvey Saferstein
Vice-Chair, Standing Committee on Federal Judicial Improvements
August 2008

APPENDIX

August 1977 (Report 109)

Special Committee on Coordination of Federal Judicial Improvements

Be It Resolved, That the American Bar Association supports the principle of non-partisan merit selection of Federal judges; and

Be It Further Resolved, That the American Bar Association recommends that the President of the United States establish a non-partisan United States Circuit Judge Nominating Commission to recommend for nomination as circuit judges persons whose character, experience, ability and commitment to equal justice under law fully qualify them to serve in the federal judiciary; and

Be It Further Resolved, That the American Bar Association commends the President of the United States for Establishing by his Executive Order of 05/24/77, a “Committee on Selection of Federal Judicial Officers” to recommend persons similarly qualified for service as federal judicial officers other than circuit judges and district judges; and

Be It Further Resolved, That the United States Senators who have committed themselves to merit selection of federal judges are likewise commended for their recognition of the fact that politics has no place in the administration of justice; and

Be It Further Resolved, That it is the policy of the American Bar Association to assist to the fullest extent possible the Attorney General and the United States Senate in evaluating the judicial qualifications of candidates and nominees for federal judgeships; and

Be It Further Resolved, That the American Bar Association reaffirms its resolution of August 26, 1958, and which in pertinent part reads as follows:

Resolved, That judicial appointments should be completely removed from the area of political patronage and made only from those lawyers and judges, irrespective of party affiliation and political consideration, who possess the highest qualifications.

That suggestions for nominations should originate in an independent commission established as an agency of the President, to advise with the President on appointments, and to receive from outside sources and from all segments of the organized Bar, suggestions of names of persons deemed highly qualified for appointment as judges in their respective jurisdictions.

That the “nominations” of all persons to serve as members of the federal judiciary should rest solely in the President of the United States; and the United States Senators in a spirit of unselfish public service should restrict themselves to the constitutional duty of conducting thorough investigations, and expressing their considered judgment, on the qualifications of the nominees.

That to avoid any suggestion of partisanship to make the courts truly non-partisan or bi-partisan, it is desirable that there should be some recognition of a general principle that a substantial percentage of the membership of any federal court should be from the ranks of a party other than that of the president who is to make the appointment.

Further Resolved, That the American Bar Association expresses its gratitude for the confidence reposed by the President of the United States in the Standing Committee on the Federal Judiciary of this Association in enlisting its advice and recommendations of those being considered for appointment and confirmation.

GENERAL INFORMATION FORM

Submitting Entity: ABA Standing Committee on Federal Judicial Improvements

Submitted By: Harvey Saferstein, Vice Chairperson

1. Summary of Recommendation.

This proposed resolution relates to improving the process for the nomination and confirmation of federal judges at both the district court and appellate levels.

The proposed resolution encourages senators in each state to jointly establish bipartisan commissions to evaluate the qualifications of prospective candidates for nomination to the U.S. district and courts of appeals and to recommend possible nominees whom their senators might suggest for the President's consideration. The bipartisan commissions should be made up of lawyers and others whose makeup reflects the diversity of the profession and community. The proposed resolution also recommends expeditious nomination by the president and consideration by the Senate, especially with regard to nominees who have been recommended by bipartisan commissions.

2. Approval by Submitting Entity.

The Standing Committee on Federal Judicial Improvements voted unanimously to approve this proposed resolution at their Spring Planning Meeting in New York City on April 26, 2008. Judge Margaret McKeown, SCFJI Chair, recused herself.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

Report 109 was approved in August 1977 by the HOD. It was approved and submitted by the ABA *Special Committee on Coordination of Federal Judicial Improvements*. The present recommendation supersedes the American Bar Association resolution of August 1977 concerning the selection of federal judges. In brief, Report 109 supports the principle of non-partisan merit selection of federal judges; and recommends that the President of the United States establish a non-partisan United States Circuit Judge Nominating Commission to recommend for nomination as circuit judges persons whose character, experience, ability and commitment to equal justice under law fully qualify them to serve in the federal judiciary.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

As noted above in more detail, the present recommendation supersedes the American Bar Association resolution of August 1977 concerning the selection of federal judges. The 1977 Association policy of support is now outdated. The more general policy of the proposed resolution will supersede the 1977 policy with a more generalized policy of support that carries forward the Association's long tradition of supporting bipartisan commissions while also recognizing that successful nominating commissions may be constituted in many different ways.

5. What urgency exists which requires action at this meeting of the House?

In light of the upcoming presidential elections, time is of the essence. The 2008 Annual Meeting presents an ideal opportunity for the House of Delegates to adopt this proposed ABA policy. In August, nobody will know which party will control the White House or the Senate, thereby insulating the ABA from accusations of partisanship.

6. Status of Legislation. (If applicable.)

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Judge Margaret McKeown, SCFJI Chair, abstained in this matter.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

On May 6, 2008, SCFJI referred said recommendation to all ABA Sections/Divisions/Forums; Standing Committees/Commissions; and ABA-Affiliated Organizations.

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

This proposed resolution, which relates to both the district and appellate levels, encourages senators in each state to jointly establish bipartisan commissions to evaluate the qualifications of prospective candidates for nomination to the U.S. district courts and courts of appeals and to recommend possible nominees whom their senators might suggest for the President's consideration. The bipartisan commissions should be made up of lawyers and others who reflect the diversity of the profession and community. The proposed resolution also recommends expeditious nomination by the president and consideration by the Senate, especially with regard to nominees who have been recommended by bipartisan commissions.

2. Summary of the Issue Which the Recommendation Addresses

Undue divisiveness for many years has compromised the federal judicial selection process in all its phases, limiting the ability of the President and the Senate to exercise their constitutional roles and serving to discourage some able lawyers and judges from being willing to be considered for service as federal judges.

3. How the Proposed Policy Will Address this Issue

Even though the judicial nomination and confirmation process is political by design, it ceases to function well when it is dominated by polarized contentiousness. Pre-nomination consultation between the President and home state senators and the use of bipartisan nominating commissions can encourage bipartisan and interbranch cooperation in the filling of federal judicial vacancies while preserving the constitutional roles of the President and Senate.

4. Summary of Minority Views or Opposition

None known at this time.