

The ABA Plots a Judicial Coup

THE WALL STREET JOURNAL.

August 14, 2008; Page A12

Some bad ideas never seem to die, especially in the hands of a crafty attorney. That's the story now playing out at the American Bar Association, which voted at its annual meeting this week to endorse a version of "merit selection" for federal judges. What we have here is the latest lawyer-led attempt to strip judicial selection from future Presidents.

According to the proposal, future federal judges would be selected not by an elected President, but with the aid of home-state Senators and a bipartisan commission that would provide a list of recommended nominees for judicial vacancies. The White House would then select a candidate from the preapproved list. The commission would be created by the two Senators from each state to offer up consensus choices for federal nominees.

The point of all this, says the ABA's incoming President Thomas Wells, is to avoid "really rancorous debates" in the confirmation process and make sure vacancies aren't left to languish indefinitely. The bar association has also enlisted former Supreme Court Justice Sandra Day O'Connor to push for an expansion of merit selection at the state level as an alternative to judicial elections -- which the bar loathes because voters can be so darn unpredictable.

We admire Mr. Wells's high-mindedness. But surely he must have heard that merit selection merely takes the partisan politics out of the public eye and into backrooms stocked with political insiders. In states that have adopted the ostensibly nonpartisan system, it has given disproportionate influence to the state trial bars that control selection commissions and have steadily marched state courts to the left.

That may not be Mr. Wells's intention, but it's no accident that outfits like the George Soros-bankrolled Justice at Stake have lobbied for precisely this kind of "merit" selection. The group cheered the ABA proposal this week, and pledged its support. "Judges are not politicians in robes, nor are they prizes to be won by aggressive special interests," executive director Bert Brandenburg remarked. Unless, of course, the "special interest" is the lawyers' guild. Then it's all just one happy meritocracy.

And the chief arbiter of what qualifies as "merit" soon becomes the lawyers' club, especially the trial bar. The ABA resolution is explicit on the point that the commissions should be composed of "lawyers and other leaders." Lawyers might even deserve such pride of place if the judges they chose stuck to judging. But with so many modern judges bent on writing law by fiat, doctors, firemen and used car salesmen are just as qualified to opine on judicial philosophy. In fact, we'd prefer the used car salesmen.

All of which explains why states that use some version of merit selection are trying either to reform the system or ditch it altogether. This spring, Tennessee allowed its merit selection plan to expire after abuses that drew the ire of even Democratic Governor Phil Bredesen. In 2006, he said the nominating commission was "trying to force people down my throat."

In Missouri, Governor Matt Blunt last year considered rejecting a slate of nominees to protest a commission that had habitually done the trial bar's bidding. In Kansas, legislation to dump its version of the so-called Missouri Plan also got momentum in the last legislative session, and voters in Johnson County will consider whether to retain the Missouri Plan or move to direct elections in November.

Taking all this to the federal level has the same problems and then some. The ABA proposal would institutionalize the role of home-state Senators as Presidential equals in nominating federal judges. One source of judicial gridlock has been the Senate's habit of "blue-slipping," a practice by which a nominee's two home-state Senators must both bless a nomination for it to proceed. That gives Arlen Specter or Barbara Boxer individual veto power, which is well beyond what the Constitution intended for Senate advice and consent.

The ABA's own judicial review panel, which rates Presidential nominees, has already proven it can't be trusted. Loaded with liberals who hid behind the bar's professional sheen, four members of the panel gave Judge Robert Bork a rating of "not qualified," though he was as well qualified as any nominee in American history. A couple of panel members also tried to torpedo Clarence Thomas by saying he was "unqualified" while the rest went with a lukewarm "qualified." Those episodes caused Senate Republicans to downgrade the ABA panel's status as an official vetting body.

The recent trend toward nominees from "compromise" lists has already thwarted the confirmation of other excellent judges whose only faults are belonging to the Federalist Society or believing in original Constitutional principles. You can be certain that the next Antonin Scalia would be deemed too controversial, while David Souter would qualify as the ultimate "consensus" choice.

A better option is to keep the judicial nominating process democratically accountable and transparent. Those who don't like the judges a President appoints can take their preferences out at the ballot box.