

5-1-2010

Improving Federal Judicial Selection

Carl Tobias

University of Richmond School of Law

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Recommended Citation

Carl Tobias, *Improving Federal Judicial Selection*, 44 U. Rich. L. Rev. 1173 (2010).

Available at: <https://scholarship.richmond.edu/lawreview/vol44/iss4/2>

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BOOK REVIEW

IMPROVING FEDERAL JUDICIAL SELECTION

CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES. By Benjamin Wittes, NEW YORK, N.Y.: ROWMAN & LITTLEFIELD. 2006. 168 pp. \$14.95.

*Reviewed by Carl Tobias **

Federal judicial selection is an essential, but highly controversial, area of modern governance that is virtually impervious to constructive reform. Divisive accusations and recriminations between Democrats and Republicans, incessant conflicts, and non-stop paybacks have troubled judicial appointments for decades.¹ Both parties in the 111th Senate have already repeated those corrosive dynamics, even as most senators are pledging cooperation.² Thus, astute students of the judiciary, the presidency, the Senate, constitutional law, and political science find alarming and intractable the selection conundrum while they assiduously pursue efficacious remedies. Benjamin Wittes's volume, *Confirmation Wars: Preserving Independent Courts in Angry Times*, is a balanced, concerted effort to solve this dilemma.³ The monograph's timing

* Williams Professor, University of Richmond School of Law. I wish to thank Paul Catanese and Peggy Sanner for valuable suggestions; Tammy Longest for processing this piece; and Russell Williams for generous, continuing support. Errors that remain are mine.

1. See, e.g., David S. Law & Sanford Levinson, *Why Nuclear Disarmament May Be Easier to Achieve Than an End to Partisan Conflict over Judicial Appointments*, 39 U. RICH. L. REV. 923, 923–24 (2005).

2. See, e.g., Letter from Senate Republicans to President Barack H. Obama (Mar. 2, 2009), http://republican.senate.gov/public/index.cfm?FuseAction=Blogs.view&Blog_id=3c522434-76e5-448e-9ead-1ec214b881ac (pledging to make the nomination process less “acrimonious,” yet threatening to withhold support of any nominee unless first consulted).

3. BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN

was impeccable, as publication anticipated the shift in party control of the White House and the Senate.⁴ Rarely have the parties been so divided over critical issues, especially whether federal judges ought to resolve societal disputes regarding life and death questions, as well as the responsibilities that the President and Senate discharge when appointing judges.⁵

These propositions make timely the scrutiny of *Confirmation Wars*, which this review undertakes. Part I descriptively analyzes the volume. Part II evaluates the many insights Wittes contributes to readers' appreciation of contemporary federal judicial selection. Part III details numerous recommendations.

I. DESCRIPTIVE ANALYSIS

The Introduction wonders if judicial appointments might be different, a question that Chief Justice John Roberts posed rhetorically and speculated on affirmatively.⁶ Wittes traces how the process of selection has grown increasingly partisan and crafts a few queries about confirmation.⁷ He explores how appointments became "political battlegrounds," whether this change is for the worse or has improved the appointment process because it appears more democratic, whether the nastiness is only politics as usual, and why "Americans fight so tenaciously over" selection.⁸ The writer concludes that modern political and academic dis-

ANGRY TIMES (2006).

4. In 2009, with this shift in power complete, Wittes published an updated version of *Confirmation Wars*, which included a new Foreword. See BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* ix–xiii (updated ed. 2009).

5. Cf. United States Senate, Nominations, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited Apr. 1, 2010) (discussing the Senate's tendency to "jealously guard[] its power to review and approve or reject presidential appointees to executive and judicial branch posts," as well as senators' routine consideration of "a nominee's philosophy or ideology" in their evaluation of a nominee's "ability and character").

6. WITTES, *supra* note 3, at 1. Specifically, Chief Justice Roberts opined:

Can it be different? Of course it can be different. If there are serious questions about qualifications, senators should explore those. If there are serious questions about ethics, senators should explore those. If there are disputes about appropriate judicial philosophy and approach, talk about those. But barring that . . . everybody doesn't have to think that this is an opportunity for them to be the reincarnation of Clarence Darrow.

Id. (ellipsis in original).

7. *Id.* at 5–7.

8. *Id.* at 9–10.

course enunciates four responses.⁹ One school denies that fundamental change has occurred or has any grave consequences.¹⁰ According to this line of reasoning, the nomination system always has been, and remains, political, as politics is intrinsic to the judicial function.¹¹ Another view, which is effectively orthodoxy for ideological conservatives, holds that liberals and Democrats have revamped appointments by seeking certain desirable policy results, not adjudication, from courts.¹² A third perspective, which the author characterizes as liberal dogma, ascribes selection's modification to Grand Old Party ("GOP") "right-wing court-packing."¹³ A fourth theory laments the downward spiral and attributes responsibility to both Democrats and Republicans, viewing the change as one feature of civility's broader decline in "American political culture."¹⁴

Wittes aspires to proffer more comprehensive reasons why the appointment process has changed, especially for the worse.¹⁵ He distinguishes Senate assessment of Supreme Court nominees from lower-court nominees, finding that the less public character of lower-court nominations has allowed the system to "[break] down more completely."¹⁶ However, each assessment nonetheless reflects the identical degenerative phenomenon: senators' fascination with controlling essential access to the judiciary.¹⁷ Unlike ideological observers who examine change vis-à-vis partisanship, the writer analyzes selection institutionally.¹⁸ He conceptualizes the deterioration of judicial selection as a Senate response to growing judicial power following the Supreme Court's decision in *Brown v. Board of Education*.¹⁹ Judicial authority expanded while confirmation politics became increasingly democratized over a longer term.²⁰ However, the escalating assertiveness of the Senate's conception of its role has threatened judicial indepen-

9. *Id.* at 10.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 10–11.

17. *Id.* at 11.

18. *See id.*

19. *See id.* *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

20. WITTES, *supra* note 3, at 11.

dence.²¹ The author disagrees with Chief Justice Roberts's optimistic appraisal that modifications could enhance selection.²² Instead, Wittes asserts, the nuanced question is how to manage the political conflict generated by appointments in ways that safeguard court independence and the executive's nomination prerogative while maximizing the value to democracy of the rather aggressive, ideologically charged Senate approval process.²³

The second chapter, "An Unsatisfying Debate," thoroughly assesses the leading explanations canvassed above for the contemporary selection process as well as their strengths and weaknesses, but ultimately finds all the proposed rationales insufficient.²⁴ Chapter Three, "The Transformation of Judicial Confirmations," offers Wittes's explication of why the process has deteriorated.²⁵ Following *Brown*, the Senate broke with longstanding tradition and began requiring nominees to testify before the Senate regarding their "view of specific cases" and their "judicial philosophy."²⁶ This change, according to Wittes, is one "from which the process has never quite recovered."²⁷ The fourth chapter, "The Threat to Independent Courts," evaluates selection's problems for an independent judiciary.²⁸ Wittes ascertains that the potential downside to the current nomination process is that it inherently imprints "partisan identifications onto nominees whom we then expect to act as disinterested interpreters of the law."²⁹ He admits the broader deleterious consequences of the modern process are currently speculative but still pose both immediate and long-term concerns.³⁰ These views prompt strategies to resolve the difficulties in Chapter Five, "A Confirmation Process for Angry Times": eliminating nominee testimony and premising Senate votes on nominees' records and others' testimony.³¹ This idea would deter senators from extracting televised promises that involve future votes and would encourage members

21. *Id.* at 12.

22. *See id.* at 13.

23. *See id.*

24. *See id.* at 15-36.

25. *See id.* at 37-85.

26. *Id.* at 60-61.

27. *Id.* at 60.

28. *See id.* at 87-110.

29. *Id.* at 89.

30. *See id.* at 91.

31. *See id.* at 119-29.

to apply pressure on the chief executive in advancing lawyers whom they favor.³²

II. CONTRIBUTIONS

Wittes affords a number of incisive observations. He descriptively surveys four major reasons that contemporary academic and political commentators articulate for selection's troubled—even dysfunctional—condition, illuminating why each is not satisfactory before suggesting that his institutional approach provides a more accurate assessment.³³ Much prior research has examined specific confirmation disputes, alterations in the process, and emerging trends;³⁴ however, Wittes's book is among the finest new renditions. He meticulously documents relevant historical considerations, assesses and imposes a salutary conceptual framework on essential phenomena, identifies applicable political and constitutional linkages, and effectively analyzes how the whole can often be greater than the sum of its parts. Instructive are the detail and clarity the author brings to the four explanations. Wittes canvasses the schools' backgrounds, philosophical foundations, and present relevance as well as their advantages, detriments, and lack of comprehensiveness and persuasiveness. In the end, the writer advocates an institutional view, urging that it best explains changes over the last five decades as a Senate response to judicial power's ascendance.³⁵

Telling are his criticisms of this growth, which he indicates might eviscerate democracy and the rights and liberties that individuals now enjoy by undermining legislative branch authority.³⁶ Wittes shows how the development may foster consolidation of power in the judiciary—authority that the elected branches formerly held—and constrict legislation designed to safeguard American freedoms.³⁷ Illustrative are judicial opinions that nar-

32. *See id.* at 128–30.

33. *See id.* at 15–36.

34. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (1999); MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES (2004); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENT (2005).

35. *See, e.g.*, WITTES, *supra* note 3, at 59.

36. *See id.* at 60.

37. *See id.*

row congressional “power to enforce, by appropriate legislation,”³⁸ the Constitution’s Fourteenth Amendment,³⁹ which treat Supreme Court Justices, rather than lawmakers, as the judges of propriety. Equally troubling are the Justices’ analogous limitation of congressional authority to pass statutes under the Commerce Clause and the idea that they, not Congress, should be the arbiters of “effects” on commerce.⁴⁰ This view is apparently a fiction based on a misunderstanding of Section Five of the Fourteenth Amendment, which undermines legislative power, especially the power to safeguard the public, and increases judges’ authority.⁴¹ However, Wittes finds Senate treatment of enhanced court power an overreaction because it threatens judicial independence.⁴²

The author’s central solution—ending nominee testimony and premising Senate ballots on candidate records and additional witnesses’ testimony—might yield improvements. First, it would deny senators televised opportunities for self-promotion and for eliciting nominee pledges related to future votes. The concept may also help train the Senate’s attention on the nomination stage and on importuning the chief executive to forward prospects whom legislators deem acceptable. A more specific illustration is consultation, whereby the president broaches potential nominees with lawmakers *prior to* nomination, a mechanism that has facilitated confirmation.

The writer’s clarification of the divisive rhetoric that infects discourse respecting judicial selection is also effective. For example, the author finds woefully deficient the characterization of appointment battles as fights over liberal and conservative ideology, even while he blames partisan rancor for much difficulty.⁴³ The writer also clearly demonstrates the flaws in using notions, such

38. U.S. CONST. amend. XIV, § 5.

39. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (holding that the patent laws that “abrogated the States’ sovereign immunity from infringement” suits could not “be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment’s Due Process Clause”); City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (holding that Congress exceeded its power when it enacted the Religious Freedom Restoration Act of 1993).

40. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 239–41 (2005).

41. *See id.* at 240–41.

42. *See* WITTES, *supra* note 3, at 12.

43. *See, e.g., id.* ch. 3.

as “judicial activism,” by maintaining that the practice of “activism” is frequently witnessed on both the spectrum’s conservative and liberal ends.⁴⁴

His astute observations should correspondingly reach a broad audience. Despite the inherent complexity of the political, legal, theoretical, and policy-based questions addressed and the essentially obscure character of the nomination and appointment regimes investigated, Wittes’s lucid, thorough explication and informal—even colloquial—style will foster his monograph’s wide distribution. Practitioners and law students will understand the volume, but readers without legal training should also find it accessible and informative.

Wittes’s cogent views have special force because his affiliation with *The New Republic*, the *Washington Post*, and the Brookings Institution might lead certain observers to assume that he would champion liberalism. Yet the author trenchantly disavows both this perspective and conservatism, as well as both Republicans and Democrats, basically for analogous reasons—each sacrifices pragmatism to ideological absolutism and deserves equal responsibility for selection’s dismal condition. The writer advocates moderation and depoliticization to better protect judicial independence.

III. SUGGESTIONS

Notwithstanding the author’s myriad insights, I can afford a few constructive thoughts. Adumbration of some notions would enhance comprehension of recent appointment disputes and the courts. For instance, it is helpful to appreciate that the existing process, which reflects how the Senate treats burgeoning court authority, may erode judicial independence. Equally valuable would be additional scrutiny of confirmation’s effects on power distribution among the coordinate branches, given the inclinations that all presidents and numerous judges have to claim more authority, namely vis-à-vis lawmakers. Specifying the horizontal ramifications should concomitantly elucidate modern debates, including the preferable governmental branch and level, to address complex societal questions encompassing race, natural disasters,

44. See *id.* at 25.

poverty, crime, and the multiple tensions between national security and civil liberty. This material would assist policymakers and citizens in ascertaining whether the growth in the judiciary's power at the expense of the other branches helps the nation as a matter of structure and authority; if not, the material could help to discern ways for changing those trends.

Another question is how responsive Wittes's prescriptions are to modern confirmation dilemmas. One example is his leading alternative that nominee testimony be proscribed.⁴⁵ Insofar as this measure would concentrate greater Senate attention on the nomination process, that seems efficacious because mechanisms like consultation will likely improve appointments. His concept of eliminating hearings for uncontroversial nominees might facilitate approval because their review is perfunctory. However, disallowing Supreme Court nominee testimony would forfeit an integral approach that can heighten legitimacy, and it would ostensibly undermine Americans' confidence that the confirmed Justices are qualified because senators would lack adequate data to cast fully informed votes. Preclusion of appellate nominee testimony would correspondingly have minimal effect on the factors that have vexed this aspect of selection. These factors include engaging in partisan gamesmanship; relying on contentious ideas, especially filibusters and "blue slips," whereby legislators from nominees' home states may withdraw their support; paybacks; and slowing designee analysis in hearings, in committee, and during floor votes. Wittes's basic remedy thus may be somewhat incomplete.

These concerns do not undercut his astute contributions. Yet, it would be valuable to have additional views from an expert observer who has meticulously scrutinized politics, the federal bench, confirmation, and separated powers. For instance, Wittes ought to have evaluated the ramifications of the Senate's increasingly partisan—and decreasingly collegial—nature for the appointment parameters that *Confirmation Wars* reviews. Wittes should also have examined how the unelected judiciary—the least democratic branch—is the greatest moderating force among the three, an irony which erodes the quintessential concern that animated the Senate's response.

45. See *id.* at 119–31.

The author could have proffered and analyzed more concrete solutions to the difficulties—namely partisanship—that have troubled appointments. Many elected officials and scholars have formulated or applied a plethora of innovative concepts. Some focus on nominations. One effective avenue discussed briefly by Wittes is consultation, an idea that respects White House prerogatives and those of the Senate, such as early input.⁴⁶ Moreover, this alternative fosters consensus on designees before nomination as well as minimizes surprises and embarrassing revelations. Another device is “home state” lawmakers’ bipartisan proposal of candidates, which a few jurisdictions used when Republican and Democratic legislators tendered alternating nominee suggestions.⁴⁷ The parties might concomitantly assess a bipartisan national judiciary, which would have each party submit candidates, thus reducing divisiveness. This approach may include a thorough judgeships bill, which Congress has not adopted for two decades,⁴⁸ and could even allow members of the party lacking White House control to suggest a few jurists. A related concept is the Senate’s assertion of its prerogatives, which implicate appellate court nominations and their corresponding decentralization from the White House, and which has essentially assumed control over appellate selection.⁴⁹ The President might concomitantly grant increased respect to longstanding Senate traditions, such as patronage; eschew divisive vehicles, such as recess appointments; or forward less ideological designees, all of which could help to galvanize consensus. These prospects, however, appear remote.

Reform measures should also target the judicial confirmation process. For example, the proposed idea to eliminate hearings for uncontroversial nominees may be successful. President George W. Bush and others have urged imposing temporal limits on commit-

46. See *id.* at 115.

47. See, e.g., Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 754 (2008) (discussing practices of “senatorial courtesy”); Lawrence E. Walsh, *The Federal Judiciary—Progress and the Road Ahead*, 43 J. AM. JUDICATURE SOC. 155, 156 (1960) (discussing the President’s involvement in the nomination process with senators and senators’ home states).

48. See Pub. L. No. 101-650, 104 Stat. 5089. The last comprehensive judgeships bill enacted by Congress is the Judicial Improvements Act of 1990.

49. See WITTES, *supra* note 3, at 38–41. “In both the Clinton and Bush administrations, many nominees have had to be resubmitted to the Senate following non-action over the course of an entire Congress—sometimes more than once.” *Id.* at 40.

tee analyses, floor debates, and committee and Senate votes.⁵⁰ The Bush administration even cabined American Bar Association (“ABA”) involvement in the process.⁵¹ However, a Federal Judicial Center evaluation was not sanguine about the initiatives’ worth or about expediting confirmation, as the many participants and assessments suggest delay is critical.⁵² Yet techniques like consultation will likely facilitate appointments, and certain elements of the confirmation process are amenable to streamlining. For instance, President Barack Obama should steadily tender large numbers of well-qualified counsel because his administration has vigorously championed bipartisanship, a phenomenon witnessed in his appointments to the Cabinet.⁵³ Public officials and scholars must fashion entities and institute approaches that rectify or temper the worst partisan excesses in specific contexts. One valuable—albeit controversial—notation was the “Gang of 14,” an ad hoc bipartisan coalition of senators that formed in response to a Senate proposal to bar filibuster use with judicial candidates.⁵⁴ The entity preserved filibusters⁵⁵—whose recommended termination would have jeopardized the Senate institutionally—while the group thwarted appointment of a few nominees deemed radical, even as others who seemed controversial won approval.⁵⁶ The Senate might abolish, or sharply confine application of, ideas found overly divisive. For example, it could eliminate “blue slips” or require that two legislators from nominees’ jurisdictions object when discontinuing analysis. The Senate may correspondingly abrogate filibusters or reserve the notion for highly controversial designees.

50. See, e.g., Remarks on the Judicial Confirmation Process, 2 PUB. PAPERS 1929 (Oct. 30, 2002) (proposing that the Senate hold an up-or-down vote on nominees within 180 days of the submission of the nomination).

51. Letter from Alberto Gonzales, Counsel to the President, to Martha Barnett, President, American Bar Association (Mar. 22, 2001), available at <http://www.presidency.ucsb.edu/ws/print.php?pid=7856>.

52. See FED. JUDICIAL CTR., PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 3, 25, 47, 69, 91 (1994).

53. President Obama nominated three Republicans to his Cabinet: Robert Gates as Defense Secretary, Ray LaHood as Transportation Secretary, and Judd Gregg as Commerce Secretary. See *Obama Nominates Gregg for Commerce Head*, MSNBC.COM, Feb. 3, 2009, <http://www.msnbc.msn.com/id/28974959/>. However, Senator Gregg later declined the nomination over conflicts with the President’s economic stimulus plan. Jeff Zeleny, *Gregg Ends Bid for Commerce Job*, N.Y. TIMES, Feb. 13, 2009, at A1.

54. Sheryl Gay Stolberg, *Swing Senators Meet on the Court Vacancy, but Their Course Remains Uncharted*, N.Y. TIMES, July 14, 2005, at A15.

55. *Id.*

56. See Editorial, *Judicial Review*, WALL ST. J., Mar. 27, 2006, at A16.

Some measures apply to both nomination and confirmation. Merit selection panels, which aggressively identified and fostered the nomination of talented women and minorities, were effective in President Jimmy Carter's administration.⁵⁷ Its emphasis on gender and racial diversity increased balance.⁵⁸ The judges helped their colleagues appreciate complex questions that federal courts address, such as issues involving abortion, gender, and racial discrimination, while limiting bias in the tribunals. Comparatively extreme theories also warrant attention. One unorthodox concept is altering judges' life tenure with, for instance, eighteen-year Supreme Court terms. This could defuse acrimony by lowering the stakes.

It is critical to be realistic about instituting effective change. A few appointment problems—namely the substantial incentives to delay, manipulate, or subvert the current regime for partisan benefit and engage in payback—appear endemic or insolvable. Others derive from the Constitution, especially the President's nomination responsibility and Senate authority for confirmation,⁵⁹ or might be venerated traditions or accepted norms, such as patronage and unanimous consent, whereby one senator delays floor action. Thus, progress may remain elusive, so long as the party not occupying the White House sees an advantage in maximizing vacant judgeships in the hope that its candidate wins the next election and fills the open seats. Partisanship also can have affirmative dimensions, reflecting a healthy system of checks and balances and legitimate policy differences. Moreover, the actuality that the thirteen circuit courts are essentially the courts of last resort in ninety-nine percent of filings and the view that the appellate judiciary addresses controversial societal disputes regarding issues, such as terrorism and homosexuality, make these nominations extremely divisive and apparently intractable.

Confirmation Wars might be profitably compared with recent efforts on judicial selection and the federal courts. They include *The Next Justice* by Professor Christopher Eisgruber,⁶⁰ *The Nine*

57. Robert J. Lipshutz & Douglas B. Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483, 484 (1979).

58. *Id.*

59. U.S. CONST. art. II, § 2, cl. 2.

60. CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2005).

by Jeffrey Toobin,⁶¹ and *Supreme Conflict* by CBS Supreme Court Correspondent Jan Crawford Greenburg.⁶² The above propositions are important when exceptionally controversial, strongly held views about the best ways to choose judges, allocate governmental power and concomitantly retain horizontal structural integrity, and efficaciously protect judicial independence now fuel dialogue.

IV. CONCLUSION

Confirmation Wars significantly enhances appreciation of contemporary appointments, mainly by recounting how the growth in judicial power and its Senate treatment undercut judicial independence. The book affords numerous provocative ideas that President Obama and the 111th Senate ought to consider and adopt. Wittes elucidates certain phenomena, their adverse consequences, and salutary relief in the form of a preferable approach, which would eliminate nominee testimony and potentially channel Senate attention to the nomination phase. This proposal might safeguard judicial independence by, for example, improving consultation. However, the device would have limited effect on appellate selection and could prove to be insufficiently comprehensive.

61. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

62. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007).