

William & Mary Bill of Rights Journal

Volume 10 (2001-2002)
Issue 1 *Symposium: The Judicial Process*

Article 2

December 2001

Introduction to the Symposium: The Judicial Process Appointments Process

Carly Van Orman

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), and the [Judges Commons](#)

Repository Citation

Carly Van Orman, *Introduction to the Symposium: The Judicial Process Appointments Process*, 10 Wm. & Mary Bill Rts. J. 1 (2001), <https://scholarship.law.wm.edu/wmborj/vol10/iss1/2>

Copyright c 2001 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

THE JUDICIAL APPOINTMENTS PROCESS¹

INTRODUCTION

Each year, the *William & Mary Bill of Rights Journal* fosters the creation of a symposium on an issue of contemporary constitutional significance. This year's topic, *The Judicial Appointments Process*, explores the manner in which federal judges are selected, from the framers' intended achievement of a balance of powers via the Appointments Clause of the Constitution, to the current presidential administration's selection of nominees. The five articles developed for this symposium provide detailed examination of various aspects of the judicial appointments process and suggest ways in which it may be maintained or adjusted to best serve the interests of democracy and the Constitution.

Judicial appointments are important because judges matter, not just to academics, politicians, and practitioners, but to all Americans.² Judges play an increasingly significant role in everyday life decisions.³ It follows that the process by which they are selected matters.⁴ It likewise follows that because of the perceived importance of appointing judges, the appointments process breeds contention.

Disagreement over the appointments process is not a recent phenomenon.⁵ The

¹ This symposium was conceived and coordinated by Bryce Hunter, the *Bill of Rights Journal's* 2000-2001 Symposium Editor and a 2001 graduate of the William & Mary School of Law.

² See generally Edwin Meese III, *Foreword* to JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS, ix (National Legal Center for the Public Interest ed., 1990); Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM & MARY BILL RTS J. 103 (2001).

³ See Meese, *supra* note 2, at ix:

[O]ver the past thirty years or so the federal courts have come to exercise increasing power over the daily affairs of the American people. On issues from abortion to court-ordered busing, from affirmative action plans to the rights of those accused of crime, the federal courts, from the Supreme Court down to the District Courts, have become ever more deeply immersed in the policy battles of the day.

See also Tobias, *supra* note 2.

⁴ Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM & MARY BILL RTS J. 7, n.9 (2001) ("It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection.") (quoting Philip Dubois).

⁵ See generally *id.*; Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS, 3-11 (1990) (describing specific instances of controversy from the Constitutional Convention to the confirmation hearings of Judge Robert Bork).

Founding Fathers' sometimes "heated" debates over how best to divide the responsibilities for finding and approving public officials occupied the Constitutional Convention for many months.⁶ The product of this deliberation was the Appointments Clause.⁷ This brief section of the Constitution states that the president nominates and appoints judges with the advice and consent of the Senate.⁸ Although easily stated, the history of the Appointments Clause is one of great conflict.⁹

In later years, the focus of criticism shifted from the process of appointment to the character, abilities, and politics of the nominees themselves.¹⁰ Despite the attention paid to the *process* of appointing judges, there are no actual qualifications or standards for judicial nominees.¹¹ The *de facto* imposition of standards was thus left to be determined by the acts of the president and the Senate.

The grueling senate confirmation hearings of the past few decades indicate that appointments are as contentious now as they have ever been.¹² The divisive process is exacerbated by a perceived "crisis" in the federal judiciary cause by a high number of vacancies on the bench.¹³ The actions of the new presidential

⁶ See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 17-28 (2000).

⁷ U.S. CONST. art. II, § 2, cl. 2.

⁸ *Id.* The Appointments Clause states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." *Id.*

⁹ GERHARDT, *supra* note 6 at 15-38, 135-79 (discussing the Senate's role in all appointments, including judicial appointments).

¹⁰ See *generally id.* at 45-80.

¹¹ Compare this with detailed threshold qualifications (age, citizenship, and residency requirements) for the president and members of Congress. U.S. CONST. art. I, § 2, cl. 2 (qualifications for representatives), U.S. CONST. art. I, § 3, cl. 3 (senators), U.S. CONST. art. II, § 1, cl. 5 (qualifications for the president).

¹² The confirmation hearings of Judge Robert Bork are generally viewed as the watershed event that heralded a new era of scrutiny. See Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM & MARY BILL RTS J. 103 (2001) ("[T]he controversial battle which ensued over Bork's confirmation substantially changed modern judicial selection and the event's repercussion's continue."). *Id.* at 105. Bork, a 1987 Reagan nominee to the Supreme Court, was ultimately rejected by the Senate after a probing inquiry into Bork's ideological composition. See GERHARDT, *supra* note 6, at 2.

¹³ As of October 17, 2001, out of 862 authorized federal judgeships, 110 vacancies existed with 52 nominees awaiting confirmation. See Vacancy Summary, at <http://www.uscourts.gov/vacancies/summary.html> (last visited Dec. 15, 2001). See also Judicial Emergencies, at <http://www.uscourts.gov/vacancies/emergencies.htm> (last visited Dec. 15, 2001) (listing critical bench positions vacant since as early as 1994).

administration reflect an awareness of these challenges.¹⁴ It remains critical that all interested parties understand the mechanisms and motivations of the judicial appointments process. The five articles comprising this symposium examine various aspects of the judicial appointments process and several different stages of proceedings.

In *The ABA's Role in Prescreening Federal Judicial Candidates*,¹⁵ Professor Laura Little weighs the merits of the George W. Bush Administration's controversial decision to end the half-century practice of soliciting the pre-nomination opinion of the American Bar Association (ABA) with respect to potential judicial candidates.¹⁶ Little asks "whether ABA participation early in the process is best for the nation."¹⁷ Her analysis focuses on the history of the ABA's involvement in the appointments process, the organization's purpose and activities, and whether the ABA's involvement in a screening capacity is consistent with the Constitution and the Founding Fathers' conception of the appointments process. Little's conclusion is a "qualified yes"¹⁸ in favor of ABA participation that suggests a modified role for the organization's contributions.¹⁹

Professor Carl Tobias focuses on the current administration's selection of candidates for the United States Courts of Appeals.²⁰ Tobias first examines the recent history of appointments under a quarter-century of presidents, including the watershed confirmation battle over Judge Robert Bork.²¹ Tobias explains how nominees are proposed and evaluated in the absence of ABA participation.²² He then suggests lessons that may be derived from George W. Bush's first eleven appellate court nominations.²³ Finally, Tobias presents suggestions for the selection

¹⁴ These changes include the removal of the American Bar Association from the pre-nomination screening process. See Letter from Alberto R. Gonzales, Counsel to the President, to Martha W. Barnett, President, American Bar Association (Mar. 22, 2001), available at <http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html>; Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM & MARY BILL RTS J. 103 (2001) (citing the removal of the presentation of appellate court nominees in a manner traditionally reserved for Supreme Court nominees).

¹⁵ Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM & MARY BILL RTS J. 37 (2001).

¹⁶ See *id.*

¹⁷ *Id.* at 38.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM & MARY BILL RTS J. 103 (2001).

²¹ See *id.*

²² See *id.*

²³ See *id.*

of future nominees, including limiting the emphasis placed on a candidate's ideology.²⁴

Professor William Ross presents a detailed examination, rich in anecdotal accounts, of a nominee's treatment before the Senate.²⁵ Ross describes the confirmation process as both a challenge and an opportunity to a judicial candidate.²⁶ He describes the Senate's concern with various factors such as a nominee's professional qualifications²⁷ and integrity.²⁸ Ross pays particular attention to the Senate's consideration of political philosophies.²⁹ He questions the effectiveness of congressional inquiry on issues of "judicial activism"³⁰ and a "living Constitution."³¹ Ross then provides suggestions for ways in which increased genuine dialogue between nominees and the Senate may occur.

In *The 'Blue Slip': Enforcing the Norms of the Judicial Confirmation Process*,³² Professor Brannon Denning sheds light on an "obscure Senate custom" known as the blue slip.³³ This device allows a single senator from a nominee's home state to blackball the nominee.³⁴ Denning discusses the history of the practice and the effect of the blue slip on Senate operations. He questions the constitutionality of the blue slip,³⁵ and suggests possible reform.³⁶

Finally, Professors Lee Epstein, Jack Knight, and Olga Shvetsova compare the American method of selecting and retaining judges to those of several European countries.³⁷ Epstein, Knight, and Shvetsova begin with the premise that "a legally distinguished and independent bench" is a desirable goal.³⁸ They then empirically examine the effect of factors such as threshold qualifications (e.g., a minimum age,

²⁴ *See id.*

²⁵ William G. Ross, *The Questioning of Lower Federal Court Nominees at Senate Confirmation Hearings*, 10 WM & MARY BILL RTS J. 119 (2001).

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.* at 138, *passim*.

³¹ *See id.*

³² Brannon Denning, *The 'Blue Slip': Enforcing the Norms of the Judicial Confirmation Process*, 10 WM & MARY BILL RTS J. 75 (2001).

³³ *Id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM & MARY BILL RTS J. 7 (2001).

³⁸ *Id.* at 8.

nationality, or legal education requirement)³⁹ compulsory retirement,⁴⁰ and fixed-terms versus life tenure⁴¹ of American judges. Epstein, Knight, and Shvestova's analysis provides insight into factors critics should consider when contemplating reform.

These articles form a chain of detailed analyses within the broad spectrum of appointments process scholarship. They are valuable for their historical and contextual information, and more importantly for their practical recommendations. The new presidential administration has already altered their treatment of judicial appointments. The process will almost certainly undergo additional change in the near future. Those responsible for reform would be well advised to consider the articles that follow.

Carly Van Orman

³⁹ *See id.* at 8.

⁴⁰ *See id.*

⁴¹ *See id.*