Electing Justice: Fixing the Supreme Court Nomination Process by Richard Davis.

Tim Taylor

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Professor Richard Davis’s book *Electing Justice: Fixing the Supreme Court Nomination Process* leaves its readers informed, frustrated, and overwhelmingly surprised by the all-too political process surrounding the nomination and confirmation of Supreme Court Justices. The book is great history, unfurling the progression of court appointments from staid congressional duty to media frenzy with a good, if not excellent, balance of narrative, analysis, and anecdote. While the crux of Davis’s response to the politicization of judicial nomination—that we should elect the Supreme Court Justices—may sound radical at first glance, his actual proposal is nuanced and (dare I say it?) practicable. Not all readers will be convinced that American citizens ought to elect justices, but the book’s argument is refreshing and admirably serious.

**Summary**

The book’s introduction, and best section, is a frustrating position paper. Here, Davis unapologetically makes his case:

Particularly in the last quarter century or so, we have transformed the judicial selection process into one with all of the trappings of an electoral campaign but without the key players—the electorate. This is an untenable situation—a reality that looks only vaguely familiar to the formal structure designed for it more than 200 years ago and a process that no longer reflects reality.1

I say this chapter is frustrating because we do not want to believe what he has to say, but the evidence he provides is convincing. He begins by dispelling the myth that judicial nominees are selected for their merit alone. While competence matters, a plethora of senators have expressed that candidates with philosophies far from the Senate’s philosophy will “be in for a rough ride.”2 Thus, it is important for presidents to “sell” their nominees; in response to the president’s salesmanship, forces both for and against the nominee mobilize in hopes of influencing the Senate. However, the power of these forces—the media, interest groups, and public opinion—has multiplied in the last fifty years. These external players, who are not constitutionally enumerated, are here to stay, and the judicial selection process must be restructured to adapt to this new reality, says Davis. The battles waged over the confirmations of Justices John Roberts and Samuel Alito prove Davis correct: the process is political, and external forces are not only refusing to disappear, but growing in strength. For idealists of the judicial branch these revelations are, indeed, frustrating.

The book’s first full chapter, “Traditional Versus New Players,” details the constitutional and extra-constitutional roles of each branch of government in the judicial process and also the rise of new players: interest groups, the news media, and public opinion. For a presidency, a Supreme Court nomination has far-reaching ramifications: nominees may shift the court right or left, boost a president’s image among moderates or his core constituency, and serve as a barometer of the relative strength of the presidency to the Senate. As for the Senate, its pendulum between quiescence and assertiveness currently swings towards assertion. Even so, senators must take pains to avoid appearing either belligerent or political. Finally, the judiciary affects the process through timed retirements and their activity on the bench. Beyond these constitutional forces, new actors are affecting the selection process, and they are doing so strongly and on every nomination, rather than just occasionally. Unlike in the past, nominees are now subjected to extensive scrutiny of both their professional and private lives. Interest groups lobby both
for and against nominees on strictly ideological grounds, and constituents are encouraged to pressure their senators one way or the other. Davis argues that the growing politicization of the selection process has less to do with ideological presidents or confrontational senators, and more to do with the excesses of these new players. To that end, the role of these new players, especially the public’s, ought to be recognized, legitimated, and regulated.

The book’s next chapter provides a history of judicial selection, demonstrating that it has always had a political element. Presidents choose meritorious candidates, but they also choose candidates who mirror their personal ideology, who are personal friends, and who represent certain ethnic, religious, or gender groups. Presidents’ decisions are further influenced by advisors, senators, and current court members. The Senate’s reaction to nominees is influenced by its partisanship, its relationship with the president, the timing of the nomination, and the nominee him/herself. What is most noteworthy, Davis demonstrates, is that the time required for confirmation of nominees has markedly increased in the last thirty years.

In chapter three, Davis argues that the conditions for a more public, protracted, and altogether broken court selection process were in place by the Reagan administration. Congress was resurgent, the Supreme Court was fresh off many policy-making decisions involving salient issues like abortion, school prayer, and racial integration, and the media’s resources and appetite had grown considerably. While Robert H. Bork’s Senate conflagration is typically seen as a turning point, Davis argues, it is viewed as such only because the conditions for it were set. Since Bork, the incentives for expanding the fight have remained and so will the broken process.

Davis shows in chapter four how the new players affect judicial selection. First, are the interest groups. They reinforce the concept of “litmus tests” for nominees and lobby senators; more powerfully, though, they have become institutionalized in the selection process, with group representatives testifying during hearings. The press scrutinizes candidates, often doggedly, and revs up public interest in nominees. Whether rightfully or not, the press fan plays up the drama of judicial selection. Finally, the public is playing a larger role in the process, even though the Constitution’s original intent specifically prohibited it. Public opinion polling and its consequent leverage has its influence on the Senate.

Given the influence of public opinion, the White House, Senate, and interest groups all labor to create a suitable image of each nominee. The presidency has the advantage of surprise in announcing a nominee, but opposition groups quickly marshal their opposition. Then, the battle for the identity of the candidate is waged through the media. Sometimes, the White House wins, for example, when it successfully sold Clarence Thomas as a rags-to-riches personification of the “American Dream.” Other times, opposition forces win, such as, when the public became convinced that Bork truly was out of the mainstream. In either case, the media can be relied upon to foment the conflict.

After tracing the history and current problems of the selection process, Davis offers bold recommendations to repair it. He scolds presidents for nominating justices according to certain political or ideological themes; he scolds the Senate for treating confirmation hearings as high theater rather than serious deliberation; and he scolds nominees for being less-than-forthright in their testimonies. However innocuous, his strongest reform is for the public: “Since . . . the public already is involved as a player, one possible reform is to formalize that involvement by allowing the public to participate in the selection of justices.” He suggests term limits and the regular election of new justices by a plebiscite of nominees already confirmed by the Senate, competitive election among potential nominees submitted by the president, or by other limited means. He submits the democratizing trend of American politics and the election of state justices as powerful precedent. Whether or not one agrees with his proposal, his argument in this chapter is careful and serious.

**Evaluation of Methodology**

Systematic study of the Supreme Court is difficult for one overwhelming reason: a small sample size. That is, with the court only rotating in a new justice every two years, on average, it is challenging to develop models that both explain and predict the behavior of presidents, Congress, nominees, and extra-constitutional players, simply because there are few real world observations to base those models upon. From the court’s inception, in 1789, to the present day, only 110 justices have occupied its bench (108 at the time Electing Justice was written). This contrasts starkly with the data available to congressional scholars, who have 535 members to observe, with many of them changing every two years. It is in even greater contrast with behavioral political scientists or pollsters who typically judge one thousand as the magic number of observations necessary for analysis.

As Davis’s observations are truncated in quantity, they are also elongated in time, further compounding difficulty. He argues that there has been a fundamental shift in the role of public opinion, media, and interest groups in the selection process over the last quarter-century. Yet, his argument must be based on only a few select instances, specifically, the nomination of William Rehnquist to chief justice and the subsequent confirmation battles from Antonin Scalia to Stephen Breyer. Thus, the number of relevant observations to Davis’s argument is exceptionally small.

To address this problem, Davis first expands the study by, in the words of Robert A. Dahl, “quantifying when he can and qualifying when he must.” Davis produces
convincing figures that something truly has broken in the Supreme Court nomination process: the nomination process takes significantly longer, nominations are featured more often in major print and television media, and opposition groups are featured more prominently in those media spots. *Election Justice* is a slim volume, and it could benefit from additional quantitative information. Specifically, he tracks the growing influence of the media, but few numbers are given to support the assertion that interest groups and the public are becoming increasingly involved. Have senators actually received more constituent calls regarding nominations since the 1970s? Have groups poured more money into the fight? Data on these and similar questions would be an improvement.

Justice by Consent?

Although Davis does not expand on quantitative information, he does assemble his qualitative evidence nicely. His particular gift for narrative shines as his volume seamlessly incorporates anecdotes, news reports, scholarly assessments, and expert opinion. Together, this forms a comprehensive account of the last thirty years of Supreme Court selections, and every relevant detail is included. In the book's acknowledgements, he includes his debt to several current justices, senators, and officials for their interviews and candor.

While Davis assembles his observations well, his explanation falls short. *Election Justice*'s theoretical underpinnings are underdeveloped, and the main causal mechanism he uses to explain the increasingly participatory nature of the Supreme Court selection process is inadequate. While reasonable, its explanatory power is limited. Given the incentives for increased participation, why was the fight not joined until roughly the 1970s? And if appeals to a larger group increase an interest's chance of success, why do politicians more often decrie the politicization of the process rather than embrace it? And given the theory's suggestion that the conflicts will inevitably increase in size, then why have some later confirmations, such as those of Ruth Ginsburg and Breyer, been relatively quiet?

This criticism of theory is a minor complaint. The organization of the book does clearly lay out what has happened to the selection process, and why it is of a lesser concern. Again and again, and impressively, Davis iterates that it *did* happen, and fixing the process is his point.

Justice by Consent?

*Election Justice*'s argument leaves the reader either sharply opposed or vigorously supportive. Its central premise—the current judicial selection system is essentially participatory for all but the electorate—cannot be denied prima facie. However, its central conclusion—the government ought to legitimate the electorate by including it in the selection system—can be.

Davis deserves credit for advancing a controversial idea. He deserves even more credit for suggesting proposals that are altogether serious. It would be far more incredulous than bold for Davis to call for open, presidential-style elections of Supreme Court Justices. Thus, his courage lies in the modest reforms he advances. They are compelling—perhaps, dangerous to some minds—because they are realistic.

Nonetheless, I remain unconvinced. Given the evidence the book brings forward, there is little reason to believe that more fully including citizens in judicial selection will alleviate its current politicization, nor is there assurance that electing the Supreme Court would not bring problems worse than those of the current system.

In the initial moment, it seems the election route is a bow to reality, a giving up. The book argues that, in regard to the unprecedented media and interest group attention given to judicial nominees since the 1970s, the "genie cannot be put back in the bottle." Maybe it cannot, but is the only option total acquiescence? Instead, I would suggest that much of the furor of recent confirmations is less because of the media's growing appetite—though it is substantial and has substantially affected all three branches of government—and is more a consequence of an overly ambitious late twentieth century Court, particularly during the Thomas Berger years.

It is difficult to study the Supreme Court in this sense because its members change at a glacial pace. Nonetheless, it is indisputable that the Court's sweeping reforms in the 1960s and 1970s, and incremental reverses from the 1980s through 2007, have raised the profile of the Court in the public consciousness. The strongest example of this is *Roe v. Wade*. Unlike many other decisions, such as *Brown v. Board of Education v. Gideon v. Wainwright*, which were controversial at their time but have since become accepted, *Roe v. Wade* remains stubbornly unresolved, a fifty-fifty issue in 1973 and a fifty-fifty issue in 2007. Abortion has become the de facto judicial litmus test, evidenced well enough by *Election Justice*'s compilation of most-quoted interest groups during confirmation hearings: NARAL, Planned Parenthood, and National Right to Life are three of the top five. Abortion has drawn millions of—probably—previously apathetic citizens into the Supreme Court debate.

The activist Court of the 1960s and 1970s drew further attention from citizens as it struck other previously unmolested nerves: affirmative action, flag burning, and student rights. So many decisions, handed down then to protests and cheers, remain raw wounds or protected treasures to differing groups. Conciliation has not occurred, so the Court's stakes remain high. Thus, the public has primed the media for increased attention to judicial confirmations, not the other way around.

Democratization of the Supreme Court, whether by one of the modes suggested by Davis or another, is an attractive alleviant, particularly those who feel they have been ill-served by the Supreme Court. Election dynamics
suggest that presidents would be forced to nominate cen­
trist rather than ideological nominees. Therefore, the logic
goes, the Supreme Court will not make polarizing decisions,
and the people will finally get the decisions from the Court
that they wanted all along. The public will be pleased further
as its role in the process is legitimated, in contrast to today,
where the public influences judicial selection only indirectly
through senatorial pressure and interest group leverage. In
short, public empowerment will cleanse both the selection
process and the Supreme Court.

Unfortunately, democratizing the judicial selection
process will muddy the Supreme Court like nothing else.
Davis correctly notes that the selection process does
“have all the trappings of an electoral campaign,” but
sloganeering and stump speeches alone do not democracy
make. The whole point of the “trappings” is to advertise
the consequences of an official’s election or rejection.
There is no election without expectation.

And what would expectation mean for an elected
Supreme Court? Why, just what its agitators on the right
and left want—a Court of preclusion, one that has made its
rulings before taking the bench. In this Court, the public’s
desire is legitimated by its role as elector, and the added
pressure may force its justices to bow to opinion polls rather
than justice. The alternative is for the Court to alienate
the public to a degree it could not without election, which
would result in more polarization, more rancor, and more power
to special interests. Electing Justice says much about a
judiciary that is both accountable and independent. I cannot
see these two ideals as anything but contradictory.

Conclusion

E lecting Justice is a fabulous history, studious, in­
cisive, well-documented, and refreshing. Davis deserves
tremendous credit for shedding light on how the Supreme
Court selection process has changed and for proposing a
remedy to its current system.

The book’s most valuable use may be as a guide to the
future. The nomination and confirmation battles of Justices
John Roberts and Samuel Alito fit the book’s models ex­
tremely well and confirm the permanent and powerful role
of the media, interest groups, and the public in the selec­
tion process. A second edition of the volume accounting
for these two selections would be most welcome. As the
Court’s recent rulings on school integration, campaign ad­
vertising, and other issues demonstrate, the judicial branch
is alive, well, and as powerful as ever. Davis’s work is a
valuable contribution to understanding the judicial branch’s
power and to encouraging its proper use.

NOTES
1. Davis, Richard. Electing Justice: Fixing the Supreme Court
2. Ibid., p. 6.
3. Ibid., p. 170.
4. Ibid., p. 9.