

Michael Comiskey. *Seeking Justices: The Judging of Supreme Court Nominees.*
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Michael Comiskey's *Seeking Justices* has exquisite timing. It has been nearly ten years since a justice has been confirmed to the Supreme Court and now the drought is over. With the passing of Chief Justice William H. Rehnquist and the retirement of Justice Sandra O'Connor in the summer of 2005, George W. Bush now has the opportunity to remold the court to his conservative liking. His first nominee, John Roberts, sailed through the confirmation process with relative ease. His second nominee, Harriet Miers, withdrew her nomination after critics assailed her for not being sufficiently qualified. And now President Bush's next choice, Appellate Court Judge Samuel Alito, is coming under attack because liberals and conservatives do not see eye-to-eye on what qualifications a nominee should possess for the nation's highest bench.

Enter Michael Comiskey. Comiskey's book is a lively and well-informed discussion of the confirmation process, particularly as it relates to the latter half of the twentieth century. In it he raises important questions about the role of the media in the confirmation process, interest groups, as well

as the timeless debate on whether nominees should be confirmed according to their qualifications or ideology. Senators would do well to read this fine work as Alito's confirmation hearings proceed.

Comiskey sees two strands of thought that have characterized the nomination process during the last quarter century: the legalist school, which focuses on the candidate's legal credentials rather than ideology; and the political school, which focuses on the candidate's stand on particular legal issues rather than a candidate's legal credentials. Proponents of the legal position contend, with the nominations of Robert Bork and Clarence Thomas in mind, that the nomination process has turned into a circus, with the media distorting the legitimate purposes of the confirmation process by focusing on scandal and conflict, and by overly politicizing the process.[1] Thus, according to Comiskey, they condemn it for its "obsessive scrutiny of nominees' character, qualifications, and--especially--politicolegal views by hostile senators, the news media, and many interest groups active in the confirmation process" (p. 2).

The political school, by contrast, focuses "mainly on the Senate's inability to get most nominees to reveal their beliefs on legal issues, so that senators could give or withhold informed consent to nominations, and emphasize the president's ability to place nearly anyone of his choosing on the Court and thereby exert excessive influence over the development of constitutional law" (p. 3). Adherents of this view cite the importance of choosing justices who will uphold precedent, protect civil rights, and afford due process to the poor and dispossessed. According to Comiskey, that is why Senator Edward Kennedy, a leading proponent of this school, rejected Bork's nomination for the Supreme Court. In the Senator's words, a Bork confirmation would have meant "a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters" and "rogue police" would "break down citizens' doors in midnight raids" (p. 52).

Comiskey clearly aligns himself with the Kennedy camp. He finds that "the political school correctly advocates an active role for the Senate" (p. 185). Toward that end, he rejects the legalist view that the confirmation process should be shielded from the public eye. Instead, he contends that an open and visible confirmation process is a good thing, because it not only legitimizes the process but it enhances democracy by giving Americans a chance to participate in a constructive dialogue over who becomes a Supreme Court justice. Finally, Comiskey challenges the legalist assertion that the interpretation of the Constitution is the responsibility of the elected elites, and that the Constitution is an anti-democratic document designed to curb the democratic excesses of the masses. Here he rejects the elitist interpretations of Robert Bork, Antonin Scalia, and Alex Kozinski who contend that the Framers of the Constitution wanted to remove ordinary Americans from the confirmation process. As Kozinski bitterly notes, "there are things in government

that should not be decided by the rabble, because it does not always operate rationally" (p. 27).

Comiskey rightfully scorns this smug view of the Constitution, but his analysis is not beyond reproach. While there is much to admire in his fine work, there are two problems that mar the study. First, there is a static quality to the work that ignores nuance and change over time. For example, he fails to place both schools of thought in proper historical context or account for shifting views among members of Congress, interest groups, and the media regarding the role of ideology in the confirmation process.[2] Second, and less critical, is Comiskey's reliance on Bork's post-confirmation books—*The Tempting of America* and *Slouching Towards Gomorrah*—to claim that Bork would have been hostile to civil rights had he been confirmed.[3] Simply put, it is wrong to affirm that the views Bork articulated after his hearings would have reflected the views he would have espoused had he been confirmed in 1987. One only has to look at Earl Warren or perhaps David Souter to learn that justices are not always beholden to the men who appointed them.[4]

These criticisms notwithstanding, this is a fine book. It will do much to enrich our understanding of the confirmation process, and it will enliven debate for years to come about what criteria the Senate should emphasize when selecting justices of the Supreme Court.

Notes

[1]. For variations on this theme, see Gary J. Simson, "Mired in the Confirmation Mess," *University of Pennsylvania Law Review* 143 (1995): pp. 1035-1063; and especially Stephen L. Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* (New York: Basic Books, 1993). Carter's book is a synthesis of his two earlier articles, published as "The Confirmation Mess," *Harvard Law Review* 101 (1988): pp. 1185-1201; and "The Confirmation Mess, Revisited," *Northwestern University Law Review* 84 (1990): pp. 962-975.

[2]. See, in particular, David Strauss and Cass R. Sunstein, "The Senate, the Constitution, and the Confirmation Process," *Yale Law Journal* 101 (1992), pp. 1491-1524.

[3]. See Bork's books, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990); and *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996).

[4]. On this point, see Bruce A. Ackerman, "Transformative Appointments," *Harvard Law Review* 101 (1988): pp. 1164-1184; and Earl M. Maltz, "Anthony Kennedy and the Jurisprudence of Respectable Conservatism," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz (Lawrence: University Press of Kansas, 2003), pp. 140-156.

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