

THE JUDICIARY: YOUR WORST SUSPICIONS CONFIRMED

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Benjamin Wittes, a Washington Post editorial writer, was recently introduced by a Harvard law professor as "the most important legal analyst you've never heard of." No byline accompanies Wittes's editorials, but they, along with his frequent essays in the Atlantic Monthly, have already marked him as a highly cogent legal commentator.

Wittes's target in his short but acutely argued Confirmation Wars: Preserving Independent Courts in Angry Times (Rowman & Littlefield, \$22.95) is the Senate process that confronts federal judicial nominees, particularly prospective Supreme Court justices. Wittes writes that, in recent years, "the process has changed fundamentally and for the worse," and he condemns "activists and senators who willingly trumpet gross distortions of the nominee's record, misleading insinuations about his or her character, and sometimes even outright lies."

Chief Justice John G. Roberts Jr. told Wittes in a rare interview that some interest-group tactics used against his confirmation (including an ad linking arguments he'd once made to an abortion clinic bombing) were "beyond the pale." Wittes worries that "the increasingly partisan nature of Senate votes on nominees" such as Roberts and Justice Samuel A. Alito Jr., "probably imprints upon" newly seated justices "a stronger partisan identity than they had prior to nomination."

That may not trouble ideologues who view "the task of judging merely as an exercise of raw political power," but Wittes believes it should very much trouble everyone else. Yet he takes no side in the Republican vs. Democrat argument over who is more to blame for the recent warfare. Instead, Wittes explains that "the rise of Senate fights over nominees" should be seen as "an institutional reaction on the part of the legislative branch to the growth of judicial power in the years since the Supreme Court handed down *Brown v. Board of Education* in 1954." Personal testimony by nominees before the Senate Judiciary Committee commenced only after *Brown* struck down school segregation. Southern racists, worried that new judges might rule against them, wanted an opportunity to ferret out potential opponents.

Wittes argues that a return to the pre-*Brown* process, which would mean "either eliminating -- or at least limiting -- live testimony of nominees at their hearings," would "remove the central event" from what is now "an embarrassing spectacle that yields minimal information" about the nominees. But any change that would reduce senators' time before live national television cameras is inconceivable. Still, he rightly recommends that senators shift their focus away from "the wrong actors -- the nominees" to an earlier stage in the process when they might "maximally influence what sort of person presidents put forward in the first place." Confirmation Wars offers no magic bullet, but it does underscore that Wittes's name is one you should remember.