

Ilya Shapiro on how we got here and what to do about it

The Contentious History of Supreme Nominations

Once again, Americans have faced a contentious vacancy on the Supreme Court with Republicans and Democrats bickering along party lines in Judiciary Committee hearings. A new book by Ilya Shapiro, director of Cato's Robert A. Levy Center for Constitutional Studies, examines how we got to this point and where the court wars will go from here. *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court* was released on September 22, which happened to be four days after the death of Justice Ruth Bader Ginsburg.

The first portion of *Supreme Disorder* explores the history of Supreme Court nominations since George Washington. Nomination controversies aren't new, and presidents throughout the history of the republic have had nominees rejected by the Senate. These fights were sometimes partisan, as when the defeated Federalists and John Adams passed the Midnight Judges Act during their lame duck tenure to rapidly create and fill new judgeships before the inauguration of Thomas Jefferson. In most cases, however, disputes were about geographic concerns, and presidents were usually less concerned with appointing ideologues who agreed with their policy agenda. Many nominations sailed through with little to no debate on voice votes.

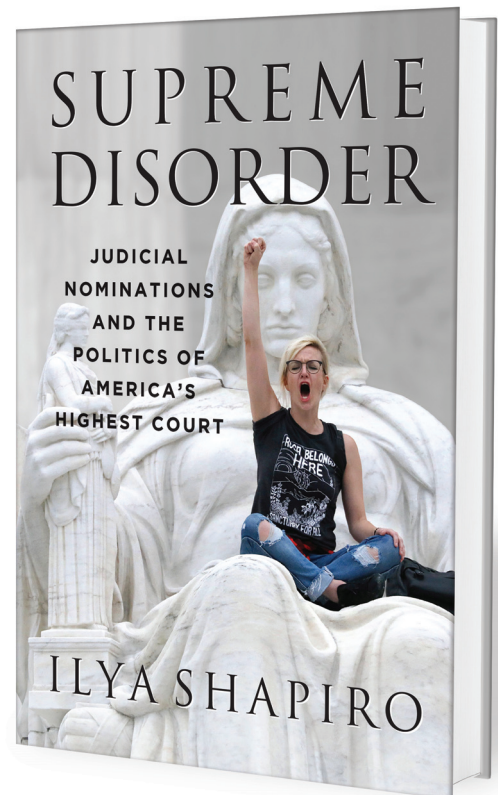
One aspect of these fights is very modern: high-profile and contentious public hearings in the Senate Judiciary Committee. As Shapiro explains, "The Senate didn't even hold public hearings on Supreme Court nominations until 1916... It wouldn't be until 1938 that a nominee testified at his own hearing. In 1962, the part of Byron White's hearing where the nominee himself testified lasted less than 15 minutes." As recently as Ronald Reagan's nomination of Antonin Scalia in 1986, the nomination provoked no opposition on the Judiciary

Committee and was unanimously approved by the Senate with little debate.

The modern era of escalating partisan politics in Supreme Court nominations began with the Senate's rejection of Reagan nominee Robert Bork. Senate Democrats launched an attack on Bork's conservative and originalist judicial philosophy with dire warnings of the possible policy results. Sen. Edward M. Kennedy (D-MA) decried an America where "women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, school children could not be taught about evolution, [and] writers and artists could be censored at the whim of [the] government" if Bork was confirmed.

In recent years, partisan fighting over Supreme Court seats has led to several escalating changes to the Senate's rules, culminating in the total elimination of the filibuster and its requirement for 60 votes rather than a simple majority. Allegations of personal misconduct have caused explosive controversies over the nominations of Clarence Thomas and Brett Kavanaugh. And Republicans in 2016 refused to hold hearings or a vote on Barack Obama's nominee, Merrick Garland.

After discussing the recent escalation of battles over the future of the Supreme Court, Shapiro considers possible reforms. One popular proposal that has attracted bipartisan support is term limits for the court, usually proposed to be set at 18 years. Shapiro finds this proposal worthwhile and finds that it would have benefits in restoring public confidence but would not have many of the wide-ranging effects ascribed by its proponents: "But even if term limits won't change the Court's decision making, they might be worth trying anyway because



at least there would be less randomness about when vacancies arise."

More radical proposals include court packing, or increasing the number of justices. That proposal has recently become a point of contention in the 2020 presidential election as Democrats consider it as a means of retaliation for recent Republican dominance in judicial confirmations. Others would have justices selected by a random lottery among judges on the circuit courts of appeal. These proposals would all produce poorer results than the current structure, and Shapiro notes reasons to doubt their political viability.

The ultimate message of *Supreme Disorder* is "The reason we have these heated court battles is that the federal government is simply making too many decisions at a national level for such a large, diverse, and pluralistic country." ■

SUPREME DISORDER, PUBLISHED BY REGNERY, IS AVAILABLE FROM ALL BOOKSELLERS.