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Why Supreme Court nominations went off the rails

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On Dec. 13, 1909, President William Howard Taft nominated Horace Lurton to the Supreme Court. A week later, Lurton was confirmed by a voice vote. The appointment merited two paragraphs in the *New York Times*, which noted that "no opposition appeared" and that Taft was "deeply gratified by the prompt action of the Senate in the matter."

By modern standards, there was plenty of cause to complain about Lurton: He was a Confederate veteran and, although Taft and a majority of senators were Republicans, a lifelong Democrat. But Lurton's confirmation was unremarkable for his time, and many similar examples can be found from the period.

Times have changed, as Ilya Shapiro explains in his book, *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court*. Supreme Court confirmations are now national crises, full of posturing and partisan vitriol. The problem, as Shapiro sees it, is not just that recent nominees have been treated poorly, but that the Supreme Court itself has gradually transformed from what Alexander Hamilton called "the least dangerous branch" into the seat of the nine most important people in politics.

This change was gradual. The Senate first held public hearings about a nominee in 1916, when President Woodrow Wilson nominated Louis Brandeis to the Supreme Court. Many senators opposed Brandeis because of his career as a crusading progressive lawyer, but Brandeis himself did not testify, and the Senate confirmed him by a 25-vote majority.

Supreme Court nominations returned to normalcy after Wilson and continued to be mostly uncontroversial for decades. Court-watchers today speak of Robert Bork's 1987 nomination as the beginning of the judicial wars, but Shapiro correctly notes that the politicization of the nomination process started much earlier. Like many of the destructive forces working against old norms, it began in the 1960s.

Chief Justice Earl Warren's resignation in 1969 led President Lyndon Johnson to nominate Associate Justice Abe Fortas to the position. The Senate, despite a 63-37 Democratic majority, refused to proceed to a vote. It was both a reaction to the excesses of Warren's left-leaning court and a rejection of Fortas, who was implicated in corruption.

Fortas's failed nomination changed the course of the high court's history. His 1969 resignation opened a second seat for President Richard Nixon to fill when he took office, shifting the

Supreme Court slightly more to the center. The politically charged atmosphere of his nomination process carried over to later nominations, too. It also marked the last time a justice resigned in a presidential election year. Members of the Supreme Court hoped to avoid what we are now witnessing after the death of Justice Ruth Bader Ginsburg: the added intensity that an election brings to any confirmation process.

The 1970s were quieter on the nomination front, but the court continued to have a massive political impact, in no case more so than *Roe v. Wade* in 1973. In those days, conservatives generally responded to a wrongly decided court case by attempting to overturn it through legislation. But after this strategy failed, they tried a new one: making the Supreme Court more conservative. For liberals, too, the high court steadily grew in importance. If the Supreme Court gave them policy victories they could not win through the ballot box, then preserving its liberal majority became a paramount political objective.

President Ronald Reagan's nomination of Bork in 1987 was the prototype for the kind of explosive confirmation hearing we are accustomed to today. Bork was a scholar, not a politician, so when senators asked him questions about his theory of law, he made the crucial mistake of answering them honestly. Among other things, Bork called the right to privacy at the heart of *Roe* a "radical innovation" and explained that the First Amendment would not prevent states from passing laws against obscenity. It was the last time a nominee would be so forthcoming. The Democrats, led by Sens. Joe Biden and Ted Kennedy, defeated Bork's nomination 42-58 and, in the process, gave rise to a new verb: "to bork."

By President George W. Bush's time, circuit court nominations were causing more tumult than Supreme Court nominations had a few decades before. In 1980, President Jimmy Carter could place a staffer for Ted Kennedy, Stephen Breyer, on the 1st Circuit in a barely contested lame-duck nomination, but by 2003, Bush's ordinary circuit court nominees were filibustered as often as not.

The book's historical overview ends with the nominations of Justices Neil Gorsuch and Brett Kavanaugh. Those hearings will be familiar to anyone unfortunate enough to have witnessed them, but for those who did not, Shapiro weaves them into a general trend of increasing dysfunction in the confirmation process. As Republican Sen. Susan Collins of Maine lamented in late 2018, "One can only hope that the Kavanaugh nomination is where the process has finally hit rock bottom."

One indeed hopes so, but worse may be yet to come. With Gorsuch and Kavanaugh, President Trump was merely replacing one conservative justice with another. Now, he is primed to replace Ginsburg, a staunch liberal and heroine of the Left. The dysfunction is all but guaranteed to grow.

Shapiro concludes that the only way to fix the nomination process is to restore the courts to their place in our constitutional order — as interpreters, not authors, of law. Doing so would benefit the country, but it would require a level of restraint from judges that has been lacking since the 1950s. It would also require Congress to reclaim its proper place in the constitutional order, something it has shown no inclination of doing.

In the meantime, some of Shapiro's other suggestions could prove helpful. He believes the Senate should get rid of judicial confirmation hearings altogether. Based on the Kavanaugh affair, it is hard to disagree. All ten Democrats on the committee announced they would vote against Kavanaugh before the hearings began. So what was the point of holding them?

Senators would learn more about the nominees' views by speaking with them privately or, if necessary, in closed session. The process would likely speed up if senators no longer had cameras to posture in front of. And eliminating the hearings or closing them to the public would deprive radical protesters of a focus for their rage.

In the meantime, the political class looks ready to defy Collins's wish. The next few weeks of tumult over Ginsburg's replacement will further raise the temperature of the country. As Shapiro shows us, only a serious recommitment to limited government will break the fever.