

How Supreme Court Nominations Became a Spectacle

BY MARY ZIEGLER*

LAURA KALMAN

THE LONG REACH OF THE 1960s:

LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT

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EVERY PRESIDENTIAL ELECTION brings reminders of how politicized Supreme Court nominations have become. There is certainly no shortage of unseemly stories about politicians and the nation's highest court. During the 2016 season, pundits speculated that conservatives uneasy about Donald J. Trump's candidacy overcame their doubts because the next president would likely be able to fill several vacancies on the bench. Prior to Trump's ascendancy, Senate Republicans prevented Barack Obama's final nominee, Merrick Garland, from receiving a confirmation vote.

We often assume that these problems began with the now-notorious 1987 nomination of Robert Bork, the failed selection of Ronald Reagan. Bork was one of the most outspoken proponents of originalism, an interpretive theory based on the presumed intentions of the Constitution's framers. In his academic writing, Bork had criticized well-known decisions, including *Roe v. Wade*. As important, when Reagan announced his nomination, Bork seemed likely to hold the deciding vote in a host of divisive cases. Progressive interest groups formed a coalition to block the nomination, and those on either side spent record-breaking amounts of money. Although Bork's nomination failed, the story goes, his nomination forever changed the way the country handles Supreme Court appointments. The choice — and success — of a Supreme Court nominee is one of the most closely-watched and hotly-contested political events in modern American politics, and it seems that we have Robert Bork to thank.

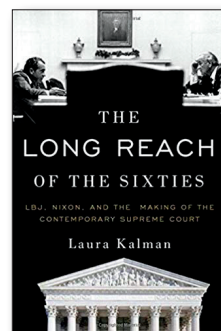
Laura Kalman's richly-researched, thought-provoking book, *The Long Reach of the 1960s: LBJ, Nixon, and the Making of the Contemporary Supreme Court*, tells a very different story. The ugly politicization of federal

judicial nominations, she argues, began not with Bork but much earlier. In the 1960s, consensus that senators should not interrogate nominees broke down. Media scrutiny intensified, and senators homed in on nominees' ethics and personal lives. Nominations failed because of the expected impact that a candidate would have on the Court's future jurisprudence. The Warren Court, known for its decisions on school prayer, school desegregation, vote reapportionment, and rights for criminal defendants, became the centerpiece of a political debate about the future of the Court.

Kalman starts *The Long Reach of the 1960s* with the presidency of Lyndon Johnson, a president who unwittingly ushered in a new era in Supreme Court nominations. Throughout the book, Kalman makes savvy use of recently-released tapes from both the Nixon and Johnson Administrations, making the reader part of many of the off-color conversations that unfolded in the White House. Johnson, she showed, assumed office eager to make a mark on the Court. Following the successful nomination of Abe Fortas in 1965 as associate justice, Johnson had a majority that would likely be sympathetic to his Great Society reforms. But John F. Kennedy's nomination of Arthur J. Goldberg in 1962 was the last to fit the model to which Johnson and his predecessors had become accustomed.

Thurgood Marshall, Johnson's next nominee after Fortas, experienced a very different kind of confirmation hearing. Kalman shows that in the summer of 1967, when Johnson got the chance to fill a second Supreme Court vacancy, a few Southern senators vowed to make Marshall's nomination a referendum on the ideology of the current Supreme Court majority. Marshall's record of bringing cases on behalf of the NAACP Legal Defense Fund certainly did nothing to appeal to segregationists in the Senate, but their interrogation of Marshall went beyond any of the nominee's own experiences. Instead, Marshall's confirmation hearings put ideology center stage for the first time, and Southern senators worked to make the Warren Court, as Kalman puts it, "the bogeyman."

Although Marshall joined the Court, other nominees would not be so lucky. *The Long Reach of the 1960s*



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unearths deeper meaning in the disastrous 1968 nomination of Abe Fortas to be chief justice following Earl Warren's retirement. Because of Fortas' role on the Warren Court, his nomination as chief justice faced opposition from the start. Ethical questions that emerged during the hearing only made things worse. Congress took the unprecedented step of asking Fortas to testify before the Senate Judiciary Committee, and senators became frustrated at what they saw as his efforts to evade questions about the cozy relationship that he maintained with the Johnson Administration while on the Court. Fortas's nomination soon became a media spectacle, fueled by revelations that he had accepted speaking fees from private business interests during talks that he gave at American University.

Although Supreme Court hearings had once seemed a formality, it soon became clear that Fortas's nomination was doomed. As Kalman demonstrates, Fortas's failed nomination bore all the hallmarks of a new era of Supreme Court politics. The nominee's ethics and personal life became a media preoccupation, and the politicization of the process seemed almost natural.

When Richard Nixon took office in 1969, Supreme Court nominations became no less political. In 1969, Nixon successfully nominated Warren Burger, a critic of the Warren Court, to replace Earl Warren as chief justice. But any honeymoon for Nixon's nominees was short-lived. When Nixon nominated Judge Clement Furman Haynsworth, Jr. to fill a Supreme Court vacancy, the president's selection seemed relatively uncontroversial. Haynsworth was a Southerner, improving the odds of his confirmation, and he was a moderate, which made him more attractive to liberals. However, civil-rights and union groups mobilized to defeat Farnsworth. Although his record alone did not seal his fate, opponents dug up ethical problems involving Farnsworth's part ownership of a vending machine company and defeated the nomination.

Nixon's next choice, G. Harrold Carswell, fared no better. Carswell came under fire for his previous support for segregation, his spotty record on women's rights, and his mediocrity as a jurist. That Supreme Court seat would remain vacant for more than 390 days before Nixon would successfully nominate Harry Blackmun. Nixon continued to flounder, and it was a stroke of luck that his 1971 nominees, Lewis Powell and William Rehnquist, succeeded.

Kalman steers clear of arguing that the transformations of the Johnson and Nixon years directly caused

us to arrive at the present historical moment. But *The Long Reach of the 1960s* compellingly proves that the Supreme Court nomination hearings of the era still cast a long shadow today. The Warren Court remains a touchstone for debate about how the justices should (and should not) interpret the Constitution. But the "Warren Court" we often discuss is far more radical than the reality many experienced decades ago. Kalman documents how the confirmation battles of the 1960s helped to forge the image of the Warren Court that still sets the terms of debate about new Supreme Court nominees.

Nor, Kalman writes, did the Bork nomination chart a new course for Supreme Court nominations. Although Bork's hearing was as contested and politicized as those of the 1960s, many of the nominees who followed him, including those chosen by Republican and Democratic presidents, were confirmed with little controversy or opposition.

Kalman's study is especially timely given the profound controversy sparked by the nomination hearings of Justice Brett Kavanaugh. Dr. Christine Blasey Ford, a former acquaintance, accused Kavanaugh of attempting to sexually assault her while the two were in high school. Additional accusations followed, along with an FBI investigation and an extraordinary hearing at which Kavanaugh accused Democratic senators of orchestrating a political "hit." The Kavanaugh hearings struck some as unprecedented. Kalman's book, however, shows us that the partisan rancor and high-stakes drama that characterized those hearings have roots that reach back decades.

Kalman's book plunges readers into the strategy discussions and inner thoughts of those who lived through the transformation she studies. The characters in her story, both familiar and unfamiliar, jump off the page. While *The Long History of the 1960s* provides a much-needed explanation of the evolution of our own confirmation battles, Kalman never loses sight of the humanity of the politicians, judges, and reporters she studies. Ultimately, Kalman shows that there was nothing preordained about how Supreme Court nominations changed before. And as much as it may seem that nominations will inevitably become more political, the story Kalman tells reminds us that Supreme Court selections have always reflected the political exigencies of a particular moment in time. The nature of the Supreme Court battles we know now could easily change again. ★

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