



The Most Dangerous Branch: Inside the Supreme Court's Assault on the Constitution

By David A. Kaplan

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Reviewed By Alfred C. Frawley

The Most Dangerous Branch: Inside the Supreme Court's Assault on the Constitution refers to the staggering power and overreach of the Supreme Court of the United States. David A. Kaplan, a former legal affairs editor of *Newsweek*, has examined the decisional processes and outside influences on Supreme Court jurisprudence in a most engaging and thoughtful way.

Much ink (metaphorically speaking) is often spilled in any season in which a vacancy on the Supreme Court occurs. Kaplan's book is timely in this regard, recounting the path to nomination of all the current members of the Court, together with recent nomination failures. Kaplan has done his homework, and has talked on and off the record, to many of the participants in the events leading to the current demographics of the Court. He has even talked to a

majority of the justices. This reportage is an appetizer for the core of the book—namely how successful nominees, once approved, have approached their jobs.

Kaplan has a gift for small elements, which contribute to an understanding of his larger discussion of how the Court operates. His engaging description of the locus of Justice Antonin Scalia's untimely passing subtly personalizes the Court: "The ranch was owned by John Poindexteter, a Houston-born multimillionaire, conservative and decorated Vietnam veteran.... Scalia's only expense was airfare—a Southwest flight from Washington to Houston and his share of a small chartered prop plane to [the ranch's] private air strip." Scalia sat next to a large man on his final Southwest flight, declaring, "Look, it's King Kong!"

With the same narrative skill, Kaplan explains the personal and psychosocial elements of now-retired Justice Anthony Kennedy's tenure on the bench, which led or perhaps compelled Kennedy to see himself as a central figure in the waveform of large societal issues which the Court has taken on in recent decades. Kaplan engages in a similar treatment for the chief justice, whose institutional faithfulness has acted as a brake on some of the competing ideological push and pull among his brethren.

These days, reporting about the Court's business borders on real-time hagiography. The justices, once they make it through their swearing in, then pass through a veil of secrecy and opacity which, in popular understanding at least, sets them apart from the rough and tumble of the political sphere. Of course, as Kaplan admirably points out, getting successfully appointed to the Supreme Court is the ultimate example of political legerdemain. A justice must curry favor with the "right people," go to a small subset of law schools (really only Harvard or Yale Law School graduates need apply), clerk for a select group of federal jurists and follow a career path, mostly, but never exclusively, in government service (including sitting as a lower federal court judge). All whilst never leaving any visible tracks that might be interpreted or misinterpreted as allowing the

tracker to presume how the nominee might rule from the bench.

The popular notion is that the Senate hearing process is a crucible in which the true mettle of the nominee is revealed. Kaplan rightly points out that if this were ever true, it most certainly is not anymore. Court nominees, according to Kaplan, never appeared before the Senate before 1925, and questions to nominees concerning their individual philosophy emerged in hearings only in the 1950s. Kaplan gently reminds the reader that the most polarizing justice of recent decades, Scalia, was approved by the Senate on a vote of 98-0. To be sure, Clarence Thomas had some rhetorical swordplay with the Democrats en route to his confirmation, and other nominations have ginned up some partisan froth, but, as described by Kaplan, the nomination process most often exemplifies highly stylized shadowboxing over larger political issues at play.

The main event, in Kaplan's telling, goes to the heart of the title of his book. Kaplan's central thesis is this: "The modern history of the Court shows that the real institutional problem isn't this or that unwise ruling. It's that the justices are involving themselves too often and with too much certitude."

Kaplan writes that, for the last three decades, the executive branch and the legislative branch have, for a number of reasons, avoided making firm policy choices and have left the specifics of policy to the interstices of existing statutes, not to mention a 240-year-old Constitution adopted when African-Americans were held as property, women couldn't vote, and 140 characters referred to the dramatis personae of Homer's *Odyssey*. The Supreme Court, in Kaplan's telling, has filled in these interstices, through a series of policy decisions, beginning with 1954's *Brown v. Board of Education* and continuing to the current term. Same-sex marriage, abortion rights, and corporate dark money funding of campaigns elucidate further examples of this judicial overreach. Kaplan recounts the policy choices and philosophical challenges taken on by the Court, to recognize rights where other branches have either been too timid, hidebound, or

simply politically gridlocked to act. This has not always worked out well, and consistency in reasoning among justices is rare. Kaplan has done an outstanding job of examining how the country, in general, and the Court, in particular, has reached this point.

Referring to the Supreme Court as “the most dangerous branch,” Kaplan demonstrates how the Court has evolved, since Alexander Hamilton and constitutional scholar Alexander Bickel referred to the Court as “the least dangerous branch” many years ago. Kaplan is a lively writer, which contributes in great measure to allow the reader to absorb the weighty subject he

tackles. Before this excellent tome, Kaplan aptly reported on the 2000 election in *The Accidental President: How 413 Lawyers, 9 Supreme Court Justices, and 5,963,110 Floridians (Give or Take a Few) Landed George W. Bush in the White House* and on the rise of the greedy “bro culture” in Silicon Valley in *The Silicon Boys: And Their Valley of Dreams*, which were similarly entertaining and insightful works. ☺

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