

A LIBERAL LAW PROFESSOR'S CASE FOR BRETT KAVANAUGH



The nomination of Judge Brett Kavanaugh to be the next Supreme Court justice is President Trump's finest hour, his classiest move.

Last week the President promised to select "someone with impeccable credentials, great intellect, unbiased judgment, and deep reverence for the laws and Constitution of the United States." In picking Judge Kavanaugh, he has done just that.

In 2016, I strongly supported Hillary Clinton for president as well as President Barack Obama's nominee for the Supreme Court, Judge Merrick Garland. But today, with the exception of the current justices and Judge Garland, it is hard to name anyone with judicial credentials as strong as those of Judge Kavanaugh.

He sits on the United States Court of Appeals for the District of Columbia Circuit (the most influential circuit court) and commands wide and deep respect among scholars, lawyers and jurists.

Judge Kavanaugh, who is 53, has already helped decide hundreds of cases concerning a broad range of difficult issues. Good appellate judges faithfully follow the Supreme Court; great ones influence and help steer it.

Several of Judge Kavanaugh's most important ideas and arguments — such as his powerful defense of presidential authority to oversee federal bureaucrats and his skepticism about

newfangled attacks on the property rights of criminal defendants — have found their way into Supreme Court opinions.

Except for Judge Garland, no one has sent more of his law clerks to clerk for the justices of the Supreme Court than Judge Kavanaugh has. And his clerks have clerked for justices across the ideological spectrum.

Most judges are not scholars or even serious readers of scholarship. Judge Kavanaugh, by contrast, has taught courses at leading law schools and published notable law review articles.

More important, he is an avid consumer of legal scholarship. He reads and learns. And he reads scholars from across the political spectrum. (Disclosure: I was one of Judge Kavanaugh's professors when he was a student at Yale Law School.)

This studiousness is especially important for a jurist like Judge Kavanaugh, who prioritizes the Constitution's original meaning.

A judge who seeks merely to follow precedent can simply read previous judicial opinions. But an "originalist" judge — who also cares about what the Constitution meant when its words were ratified in 1788 or when amendments were enacted — cannot do all the historical and conceptual legwork on his or her own.

Judge Kavanaugh seems to appreciate this fact, whereas Justice Antonin Scalia, a fellow originalist, did not read enough history and was especially weak on the history of the Reconstruction amendments and the 20th-century amendments.

A great judge also admits and learns from past mistakes. Here, too, Judge Kavanaugh has already shown flashes of greatness, admirably confessing that some of the views he held 20 years ago as a young lawyer — including his crabbed understandings of the presidency when he was working for the Whitewater independent counsel, Kenneth Starr — were erroneous.

Although Democrats are still fuming about Judge Garland's failed nomination, the hard truth is that they control neither the presidency nor the Senate; they have limited options. Still, they could try to sour the hearings by attacking Judge Kavanaugh and looking to complicate the proceedings whenever possible.

This would be a mistake. Judge Kavanaugh is, again, a superb nominee. So I propose that the Democrats offer the following compromise:

Each Senate Democrat will pledge either to vote yes for Judge Kavanaugh's confirmation — or, if voting no, to first publicly name at least two clearly better candidates whom a Republican president might realistically have nominated instead (not an easy task).

In exchange for this act of good will, Democrats will insist that Judge Kavanaugh answer all fair questions at his confirmation hearing.

Fair questions would include inquiries not just about Judge Kavanaugh's past writings and activities but also about how he believes various past notable judicial cases (such as *Roe v. Wade*) should have been decided — and even about what his current legal views are on any issue, general or specific.

Everyone would have to understand that in honestly answering, Judge Kavanaugh would not be making a pledge — a pledge would be a violation of judicial independence.

In the future, he would of course be free to change his mind if confronted with new arguments or new facts, or even if he merely comes to see a matter differently with the weight of judgment on his shoulders. But honest discussions of one's current legal views are entirely proper, and without them confirmation hearings are largely pointless.

The compromise I'm proposing would depart from recent confirmation practice. But the current confirmation process is badly broken, alternating between rubber stamps and witch hunts.

My proposal would enable each constitutional actor to once again play its proper constitutional role: The Senate could become a venue for serious constitutional conversation, and the nominee could demonstrate his or her consummate legal skill.

And equally important: Judge Kavanaugh could be confirmed with the ninety-something Senate votes he deserves, rather than the fifty-something votes he is likely to get.

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