# *Washington Insider*

William L. Saunders
Fellow and Director of the Program in Human Rights
Institute for Human Ecology
and
Codirector of the Center for Religious Liberty
Columbus School of Law
Catholic University of America
Washington, DC

## The Supreme Court: The Confirmation of Justice Kavanaugh and Important Recent Cases

On Monday, October 1, the Supreme Court's new term began. The Court that assembled was composed of eight justices, not nine, because at the conclusion of the prior term Justice Anthony Kennedy resigned, ensuring that the 2017–2018 term would be one of the most consequential in history.

On Saturday, October 6, the Senate, in a special session, voted 50–48–1[1] to confirm Brett Kavanaugh as the ninth justice. Later that day, Kavanaugh was sworn into the Court during a private ceremony, Justice Kennedy administering the judicial oath and Chief Justice Roberts the constitutional oath. (Though this is a bit unusual, it is not surprising, given Kavanaugh's relationship to Kennedy, the justice for whom he clerked and his mentor in some ways.)

On Monday, October 8, Kavanaugh was publicly and ceremonially sworn in by President Donald Trump at the White House. (Trump had been away from Washington from the day of the vote until Monday.)

Kavanaugh had been nominated by President Trump on July 9.[2] The nearly three months between that day and the day he was confirmed were filled with intense

1. Senator Lisa Murkowski (R-AK), who announced her opposition to the confirmation the previous day, voted "present." Senator Steve Daines (R-MT) was absent, attending his daughter's wedding in Montana, though a friend had volunteered to engage a private jet to fly him back if his vote was needed. See Jordain Garney, "Gianforte Offers GOP Senator Plane to Return for Kavanaugh Vote," *The Hill*, October 5, 2018, https://thehill.com/.

2. Some argued that since President Trump was subject to the investigation by Special Counsel Robert Mueller, no Supreme Court nominees of his should be confirmed while the

 

political activity, with many twists and turns, all marked by extreme rancor. As Maine's Republican senator, Susan Collins, said when announcing, the day before the vote, that she would vote for Kavanaugh, "Today we have come to the conclusion of a confirmation process that has become so dysfunctional it looks more like a caricature of a gutter-level political campaign than a solemn occasion."[3]

How has America come to this point? As Collins said, "Our Supreme Court confirmation process has been in steady decline for more than thirty years." She was referring to the historic, highly organized, and successful effort to defeat the nomination of Robert Bork in 1987, the term for which—"borking"—has entered the lexicon.[4] From that day forth, the confirmation process has been notably politicized.

Still, last year at this time, the Senate voted 54 to 45 to confirm Trump's first Supreme Court nominee, Neil Gorsuch. At that time, three Democrats joined the Republicans. This time only one Democrat joined the Republicans (Joe Mancin of West Virginia)—and one Republican, Lisa Murkowski, opposed the nominee. More strikingly, the public discourse was harsher and more inflamed, including angry demonstrations—and arrests—on Capitol Hill. Why the difference?[5]

Part of the reason is that, as with the nomination of Clarence Thomas in 1991, an accuser appeared alleging sexual misconduct by Kavanaugh. Those allegations became public after the first phase of the confirmation process—what one might call the "ordinary" phase, during which the nominee's judicial qualifications are vetted by the Senate Judiciary Committee, which holds hearings, with the nominee and others as witnesses—had concluded in mid-September. I will review this ordinary phase of the Kavanaugh confirmation proceedings first.

There has rarely, if ever, been a nominee more objectively qualified for the Supreme Court than Kavanaugh. An honors graduate of Yale College, he graduated from Yale's law school, where he was an editor of the law review. After law school, he clerked, successively, for two Court of Appeals judges and then, in 1993–1994, for Anthony Kennedy on the Supreme Court.

After that, he worked for the independent counsel, Ken Starr, during the investigation of President Bill Clinton. Then he became a partner at a top DC law firm. Next, he joined the administration of President George W. Bush. He was nominated by President Bush and confirmed by the Senate in 2006 to the US Court of Appeals for the DC Circuit, a court with great prestige because its handles important cases

investigation was on-going. However, this has never been the Senate's practice. For instance, during pending investigations of Whitewater and President Clinton, both Ruth Bader Ginsburg and Stephen Breyer were confirmed to the Court (in 1993 and 1994, respectively).

3. "Read Susan Collins's Speech Declaring Support for Brett Kavanaugh," *New York Times*, October 5, 2018, https://www.nytimes.com/.

4. See, for example, *Merriam-Webster*, s.v. "bork," https://www.merriam-webster.com/dictionary/Bork.

5. Of course, the Gorsuch hearings were also quite partisan—after Democrats threatened to filibuster, the Republicans made a rule change that prevented them from doing so by requiring fewer votes to confirm.

dealing with federal agencies. (It is sometimes called the second highest court in the land, though technically it is merely one of the thirteen Courts of Appeal).

Kavanaugh served with distinction on the DC Court of Appeals for twelve years, issuing or joining opinions in more than three hundred cases.[6] His reasoning was subsequently adopted by the Supreme Court eleven times. More than half of his law clerks were women, and many were minorities. He was active in his church and in various charitable activities. All the while, he taught at major law schools (such as Harvard) and published articles in the most distinguished law reviews. Given his accomplishments, it is no surprise that the American Bar Association—whose judicial ranking was called the "gold standard" by Democratic Senator Chuck Schumer (NY)—gave him its highest rating, "well qualified."

Yet when his nomination was announced, the same Charles Schumer said he would "oppose Judge Kavanaugh's nomination with everything I have."[7] Democratic members of the Senate Judiciary Committee, without asking Kavanaugh a single question, did likewise.[8]

The hearings themselves opened with a spectacle unseen in the Senate in recent memory. Democratic members continually interrupted Chairman Chuck Grassley (R-IA), calling for an adjournment.[9] One of their complaints was that many documents that passed through the hands of Kavanaugh when he served as White House staff secretary under President Bush had not been produced, even though, eventually, more documents were produced from Kavanaugh's service than for any other Supreme Court nominee in history—and obviously, the best evidence of how he would rule as a Justice comes from the public opinions he wrote as a judge.

Furthermore, the hearings, lasting four days from September 4 to 7, were continually interrupted by hecklers in the public gallery, who had to be removed from the hearing room by the Capitol police.

During this first phase of the confirmation process, Supreme Court Justice Ruth Bader Ginsburg, who despite having been general counsel for the American Civil Liberties Union won Republican support, lamented the partisanship that had

6. His opinions were joined by Democratic-appointed colleagues at the same rate (88 percent) as they were joined by judges appointed by Republicans.

7. Charles Schumer (@SenSchumer), Twitter, July 9, 2018, 6:23 PM, https://twitter.com/senschumer/.

8. As soon as Kavanaugh was nominated, three Democratic members of the Judiciary Committee came out against him—Senators Richard Blumenthal (CT), Cory Booker (NJ), and Dick Durban (IL). See Christopher Keating, "Sens. Blumenthal, Murphy Say They Will Vote against Trump's Supreme Court Pick Judge Brett Kavanaugh," *Hartford Courant*, July 9, 2018, http://www.courant.com/; Cory Booker, "Booker Statement on Nomination of Brett Kavanaugh to the Supreme Court," press release, July 9, 2018, https://www.booker.senate.gov/; and Dick Durbin, comments, "Senate Democrats on Supreme Court Nominee," C-SPAN video, July 10, 2018, 11:54–14:30, https://www.c-span.org/.

9. Andrew Kugle, "Durbin Confirms Dems Held Meeting about Disrupting Kavanaugh Hearing," *Washington Free Beacon*, September 4, 2018, https://freebeacon.com/.

developed since she was confirmed in 1993.[10] During the hearing itself, Lindsey Graham (R-SC) chastised Democrats on the committee for opposing Kavanaugh because they believed he would not support their preferred outcomes on contested social issues. Graham, noting that he voted for Sonia Sotomayor and for Elena Kagan, said in effect (as he had when Kagan was confirmed) that elections have consequences and that the President has the right to choose nominees who are objectively qualified, as Sotomayor, Kagan, and Kavanaugh clearly are.[11] Indeed, the disruptive tactics of the Democrats and their allies might cause the Judiciary Committee to refrain from holding hearings on the next nominee, should another nomination occur while the Republicans control the Senate.[12]

During the hearings, Kavanaugh followed what is known as the Ginsburg rule when he declined to comment on particular cases, as had Ginsburg in 1993 when she said she would "offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular [future] case—it would display disdain for the entire judicial process." He did say he would respect precedent, which seemingly reassured pro-choice Republicans but not pro-choice Democrats. But precedent is not an iron-clad law that can never be changed. The Court has always been willing to overrule prior cases, and has done so, for instance, when overturning racial segregation laws and when finding a right to same-sex marriage.

That Kavanaugh is a careful scholar regarding "precedent" is not surprising. He is the coauthor, along with twelve other judges (including now-Justice Gorsuch), of a nine-hundred-page tome on the subject, *The Law of Judicial Precedent*. The authors make it clear that precedent that is incorrect can and should be overruled, though, because of other considerations, it may take some time to do so: "A precedent may yield not just wrong results … but gravely wrong ones, as with Dred Scott—the infamous pre-Civil War case in which the U.S. Supreme Court held that no black person, enslaved or free, could be a citizen of the United States, nor any individual state, and therefore had no standing in federal court. … While unjust decisions can be overruled, that change can come slowly, very slowly."[13]

After the hearings, Kavanaugh answered 1,287 additional questions from Democrats, more questions by committee members than were posed to all the prior nominees to the Supreme Court.

Before the hearings began, the nominee, as is the usual practice, met with senators who wished to meet with him to answer questions. Several Democrats refused to meet with him. Among those who did meet with him, however, was Dianne Feinstein

10. Cheryl Miller, "RBG Laments 'Partisan Show' of SCOTUS Confirmation Hearings," *The Recorder*, September 12, 2018, https://www.law.com/therecorder/.

11. Andrew Kugle, "Graham Slams Democrats' 'Hypocrisy' for Opposing Kavanaugh over Republican Affiliations," *Washington Free Beacon*, September 5, 2018, https://freebeacon.com/.

12. The committee is not obligated to hold hearings and could simply hold a vote on the nominee and send it to the full Senate for a final vote.

13. Bryan A. Garner et al., *The Law of Judicial Precedent* (Eagan, MN: Thomson West, 2016), 13, internal citations omitted.

(D-CA), the ranking Democrat on the Judiciary Committee. Yet it was *only after the hearings had concluded and the Committee was preparing to vote* on whether to refer his nomination to the Senate floor for the ultimate vote that Feinstein revealed that she had been contacted by a constituent who claimed to have been a victim of sexual misconduct by Kavanaugh thirty-six years ago when they were in (different) high schools; she said further that she had already referred the matter to the FBI.[14] For more than six weeks, Feinstein had been in possession of this letter, yet she never raised the matter in private meetings with Kavanaugh or with her committee colleagues. If she had, the committee would have investigated the matter as part of its regular proceedings and could have maintained the confidentiality of the constituent, as that constituent had requested.

Within a couple of days, the name of the accuser, Christine Blasey Ford, was disclosed. Her lawyers said she wanted to testify, and the Judiciary Committee began negotiations to arrange that. Three times, Senator Grassley extended the deadline for these negotiations. Eventually, it was agreed she would testify—as would Kavanaugh, who had demanded this opportunity when the allegations became known—in a special session of the committee on September 27.

In a highly charged atmosphere reminiscent of the hearings involving Clarence Thomas and Anita Hill, first Ford and then Kavanaugh testified. The Republicans retained a public prosecutor from Arizona, Rachel Mitchell, to conduct their questioning of Dr. Ford. While Ford adhered to her original accusation,[15] Kavanaugh defended himself and his reputation in a strong and emotional manner, calling the hearings a "disgrace" that would dissuade good people from public service.[16]

During this entire period, a debate raged over whether Kavanaugh should be accorded a presumption of innocence or whether he should have to disprove the allegations. For instance, the ACLU, which does not take a position on judicial nominations, nonetheless asserted that the allegations alone disqualified him. Noted civil rights lawyer and retired Harvard Law professor Alan Dershowitz responded:

---

14. Alex Swoyer, "Top Democrat Sics Feds on Kavanaugh for High School–Era Incident," *Washington Times*, September 13, 2018, https://www.washingtontimes.com/.

15. The witnesses Dr. Ford had identified did not corroborate her account, during either the committee investigation or the subsequent investigation by the FBI.

16. "There has been a frenzy to come up with something—anything, no matter how far-fetched or odious—that will block a vote on my nomination. These are last-minute smears, pure and simple. They debase our public discourse. And the consequences extend beyond any one nomination. Such grotesque and obvious character assassination—if allowed to succeed—will dissuade competent and good people of all political persuasions from serving our country." He subsequently apologized, in a *Wall Street Journal* op-ed, for any breach of etiquette or excessive language. See Brett Kavanaugh, "I Am an Independent, Impartial Judge," *Wall Street Journal*, October 4, 2018, https://www.wsj.com/. ("I hope everyone can understand I was there as a son, husband, and dad.") Several Democrats said his demeanor demonstrated a lack of "judicial temperament"; however, Republicans, such as committee member Orrin Hatch, saw this as "righteous anger" anyone would feel who found himself subject to a public campaign to destroy his reputation. See Orrin Hatch, "Brett Kavanaugh's Righteous Anger," *Wall Street Journal*, October 3, 2018, https://www.wsj.com/.

> The American Civil Liberties Union stood strong against McCarthyism by demanding due process and hard evidence. But the ACLU now argues that "unresolved questions regarding credible allegations of sexual assault" be resolved against the nominee. We have come a long way since McCarthyism, but we now live in an age that risks a new form of sexual McCarthyism. We must not go to that even darker place. The best way of assuring that we don't is to accord every person, regardless of his status, the kind of fundamental fairness we would expect for ourselves if we were accused.[17]

Two days after the hearing, the committee convened to vote on the nomination. The vote, along strictly party lines, approved the nomination of Kavanaugh 11 to 10. However, one of the Republicans, Jeff Flake (AZ), who was visibly shaken after having been verbally accosted in an elevator by a woman who claimed the Republicans were indifferent to the abuse of women, asked the Committee to delay an additional week so the FBI could conduct a background check of the accusations against Kavanaugh.[18] In this request, he was joined by various Democrats on the committee, including Chris Coons (D-DE), and by non-committee Republicans Collins and Murkowski. Grassley and Senate Majority Leader Mitch McConnell (R-KY) agreed to the delay to let the FBI investigate.

After a week, the FBI issued its report, finding no collaborating witnesses or additional evidence supporting the claims of Dr. Ford.[19]

As noted above, the Senate then voted to confirm Kavanaugh on October 6.

Kavanaugh will replace Kennedy, who was the swing vote many times between the four "liberals" and the four "conservatives" on the Court. (More about these misleading labels below.) This is highly significant, as can be seen from an examination of two of the most significant decisions of the Court at the end of the last term.

The first decision is *National Association of Family and Life Associates (NIFLA) v. Becerra* (June 26, 2018). The case involved requirements under California law for pro-life resource centers to display information about how to obtain an abortion, despite the fact that doing so would be directly contrary to the mission of those centers. The Supreme Court ruled that these laws "targeted" (were aimed to control) the speech of the resource centers and in doing so violated the free speech guarantees of the First Amendment.

However, it was a 5–4 decision. Kennedy joined the four conservatives to invalidate the law. Indeed, Kennedy even wrote a concurrence to emphasize the threat this posed. He said,

> The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking."

17. Alan M. Dershowitz, "This Is No Mere Job Interview," *Wall Street Journal*, September 30, 2018, https://www.wsj.com/.

18. Because of his career in public service, Kavanaugh had previously undergone six FBI background checks.

19. A couple of other claims arose during this time against Kavanaugh, but the FBI found no witness corroborating those claims either.

> But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come.[20]

Significantly, the four liberals disagreed, finding that the California law, upon further proceedings, would "likely" be found to be constitutional—in other words, pregnancy resource centers would have to display information about how to obtain an abortion.

The second case was decided on June 4. It is *Masterpiece Cakeshop v. Colorado*. The issue in the case was whether the state of Colorado, through its Civil Rights Commission, could force a baker, who objected on religious grounds, to prepare a cake for a same-sex marriage. The Court held 7 to 2 that the baker could not be forced to do so.

Though this appears at first glance to depart from the liberal–conservative split on social issues (after all, seven justices formed the majority), a closer look reveals that is not the case. While two "liberals" joined the majority, they filed a concurrence indicating that if there had been no evidence of actual discriminatory intent by Commission members against the baker, they would have ruled against the baker.

Indeed, as Kennedy, who wrote the opinion, stated things, it is unclear whether the baker would have won in the absence of evidence of anti-religious prejudice by the Commission: "When it comes to weddings, it can be assumed that a member of the clergy who objects … could not be compelled to perform the ceremony. … This refusal would be well understood in our constitutional order as an exercise of religion. … Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to so for gay persons."[21]

In other words, the question is, What about the next case? Who wins when there is no evidence of anti-religious hostility by the government? Where will the line be drawn? The issue is unclear in the wake of the Court's 2015 decision in *Obergefell v. Hodges*. This opinion, written by Kennedy, was a 5–4 decision that recognized a right to same-sex marriage under the Constitution. A strong dissent, written by Chief Justice John Roberts and joined by the other "conservatives," argued that the holding endangered religious freedom for those who opposed such marriage on religious grounds. Kennedy dismissed those concerns in a single paragraph. Nevertheless, the question remains: How will same-sex marriage rights be reconciled with religious freedom rights?

And that brings us back to Kavanaugh, who now replaces Kennedy. What is his judicial philosophy? Is it that of the four "liberals" and (on this issue at least)

---

20. *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018) at 2 (Kennedy, J., concurring), internal citations omitted.

21. *Masterpiece Cakeshop v. Colorado*, 584 U.S. ___ (2018) at 10.

Kennedy, that the job of a justice is to unpack the meaning of "liberty" in the Fourteenth Amendment as their own understanding of its meaning evolves, as they stated in *Obergefell*? Is it that of Kennedy himself, who upheld the abortion right in 1992 in *Planned Parenthood v. Casey* by claiming abortion was part of "liberty" in the Fourteenth Amendment, which he interpreted "as the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? The "living constitution" philosophy of the liberals converts judges, through their assumed right to interpret the Constitution to solve matters not mentioned in the Constitution, into the real rulers of America, while the textualist-originalist philosophy allows the people to govern themselves on matters on which the Constitution is silent.

Notice that the Constitution itself does not make the Supreme Court into the supreme branch of government; rather, it divides power between all three branches of government, with the Court, in article 3, having the most modest role. Our democratic republic, created through the Constitution, establishes a system of checks and balances to prevent power from becoming concentrated, which could lead to tyranny. Thus, whenever a right is claimed to exist, the question is never, Do I believe there should be such a right? Rather, the question is always, Where is that right provided in the text of the Constitution? Otherwise, one person's "beliefs" become tyrannical over those who disagree. If Congress claims a right to do something, in light of the fact that Congress is given only specified (or "enumerated") powers under the separation of powers within the Constitution, the question is, Does Congress have the power to so act? In either case, if the right or power does not exist, those who believe it should exist are not without remedy, but that remedy is to convince their fellow citizens to create the right or the power, either by amending the Constitution or by passing a new national law.[22]

While the "liberals" on the Court believe in the expansive "living constitution" philosophy at evidence in *Obergefell* and *Roe v. Wade*, Kavanaugh does not. Rather, Kavanaugh's philosophy is *textualism*, or originalism[23]—that is, he starts from the Constitutional text and interprets it in light of history and jurisprudential tradition, respecting (but not bowing down to) precedent.[24] (Textualism is, generally, the philosophy of those usually called conservatives on the Court.) A careful reading of the Constitution shows that it does not mention abortion or same-sex marriage, while it expressly guarantees religious liberty in the very first phrase of the First Amendment.

22. That does not mean that a right could not be inferred from the text. However, the freedom for the Court to infer a right is extremely limited, as described by Chief Justice William Rehnquist in his majority opinion in *Glucksberg v. Connecticut*. Writing for a 5–4 majority, Rehnquist rejected the call to find a right to assisted suicide in the "liberty" interest, instead insisting that no implied right could be found unless "rooted in the nation's history and tradition." This approach stands in sharp contrast to the expansive approach taken by liberal jurists.

23. Alex Swoyer, "Brett Kavanaugh Best Described as Originalist, Say Legal Scholars," *Washington Times*, September 3, 2018, https://www.washingtontimes.com/.

24. As Kavanaugh and his coauthors note, "The American judiciary doesn't treat precedent as an ironclad edict." Garner et al., *Law of Judicial Precedent*, 14.

In the end, it seems fair to conclude that this argument about judicial philosophy is the chief reason for the venom with which the Democratic leadership and its cultural allies attacked Kavanaugh, a nominee whom they knew they lacked sufficient votes to defeat.

William L. Saunders