

Testimony Before the United States Senate Committee on the Judiciary
on the Nomination of Brett Kavanaugh to the United States Supreme Court

September 7, 2018
By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Sterling Professor of Law and Political Science at Yale University, where I specialize in constitutional law.¹ I have previously testified before this committee on seven occasions; it is always a high honor and a solemn responsibility to appear here.² Here are my top ten points:

1. Brett Kavanaugh is the best candidate on the horizon.

The Supreme Court’s biggest job is to interpret and apply the Constitution. Kavanaugh has studied the Constitution with more care, consistency, range, scholarliness, and thoughtfulness than any other sitting Republican federal judge under age 60. He is the best choice from the long list of 25 potential nominees publicly circulated by President Trump.³ I say this as a constitutional scholar who voted for Hillary Clinton and strongly supported every Supreme Court nomination by Democratic Presidents in my adult lifetime.

2. Originalism is wise and nonpartisan.

Studying the Constitution requires diligence and intelligence—especially for those, like Kavanaugh, who are “originalists,” paying special heed to what the Constitution’s words originally meant when adopted. I too am an originalist. In prioritizing the Constitution’s text, history, and structure to discern its principles and to distill its wisdom, we originalists are

following in the footsteps of George Washington, Alexander Hamilton, James Madison, John Marshall, Joseph Story, and Abraham Lincoln, among others.

Originalism is neither partisan nor outlandish.⁴ The most important originalist of the last century was a towering liberal Democratic Senator-turned-Justice, Hugo Black, the driving intellectual force of the Warren Court, who insisted on taking seriously the Constitution's words and spirit guaranteeing free speech, racial equality, religious equality, the right to vote, the right to counsel, and much more. Among today's scholars, the originalist cited most often by the Supreme Court is also a self-described liberal and a registered Democrat—yours truly.⁵

The best originalists heed not just the Founders' vision but also the vision underlying its amendments—especially the transformative Reconstruction Amendments and Woman Suffrage Amendment. I believe that Justice Kavanaugh will be in this tradition.⁶ On various vital issues—voting rights, governmental immunities, congressional power to enforce the Reconstruction Amendments—Justice Kavanaugh's constitutional views may well be *better* for liberals than were Justice Kennedy's.

3. Kavanaugh's writings reflect proper respect for tradition and precedent.

Originalists start with the Constitution's text, history and structure, but almost always need to consult other constitutional sources such as tradition and precedent. Harmonizing these different constitutional sources requires great legal acumen. Kavanaugh's record shows that he is adept at harmonization.⁷

4. Kavanaugh's views on executive power have strong constitutional foundations.

Many of Kavanaugh's views about the executive branch are quite standard.⁸ On several other executive-branch topics, Kavanaugh's views are not yet conventional wisdom but are nevertheless sound, and indeed, align well with testimony I offered to this Committee in 1998 and 2017.⁹

5. The best basis for assessing would-be Justice Kavanaugh is the track record of Judge Kavanaugh.

This judicial track record is more proximate and relevant than Kavanaugh's pre-judicial life.¹⁰ As a judge, Kavanaugh has revealingly identified Justice Robert Jackson as a role model—a Justice who, once on the Court, famously repudiated some of his own earlier exuberant expressions of executive power as an executive official working closely with the president.¹¹

6. Kavanaugh would work well with his new colleagues.

Americans generally and with good reason view today's Court more favorably than today's Congress and Presidency. The current justices are outstanding lawyers who do loads of close reading, careful writing, and deep thinking; try hard to see other points of view; spend lots of time pondering constitutional law; and spend little time posturing for cameras, dialing for dollars, tweeting snark, or pandering to uninformed extremists or arrogant donors. Can today's President and Congress say the same?¹²

I predict that Kavanaugh—a studious and open-minded conservative who likes listening to and engaging with moderates and liberals—will be a pro-intellectual and anti-polarizing force on the Court.¹³

7. Judicial nominees should not make substantive promises about how they will rule on specific legal issues; nor should they make recusal promises that closely approximate substantive promises.

8. Senators may properly oppose a judicial nominee simply because they disagree with a nominee’s general constitutional philosophy or likely constitutional votes on the bench.

9. The current Senate confirmation process is flawed and should be changed for future vacancies.

For more on these three Advice and Consent process points, see Appendix D.

10. Back to Point 1: Responsible naysayers must become yaysayers of a sort; they must specifically name better nominees realistically on the horizon. If not Brett, who?

Distinguished Republicans: Kavanaugh is your team’s brightest judicial star. Rejoice!

Distinguished Democrats: Don’t be mad; be smart, and be careful what you wish for.

Our party controls neither the White House nor the Senate. If you torpedo Kavanaugh, you’ll likely end up with someone worse—less brilliant, less constitutionally knowledgeable, less studious, less open-minded, less good for America.¹⁴

Thank you, Mr. Chair.

Appendix A: Akhil Reed Amar Bio

Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale University, where he teaches constitutional law in both Yale College and Yale Law School. After graduating from Yale College, *summa cum laude*, in 1980 and from Yale Law School in 1984, and clerking for then Judge (now Justice) Stephen Breyer, Amar joined the Yale faculty in 1985 at the age of 26. His work has won awards from both the American Bar Association and the Federalist Society, and he has been cited by Supreme Court justices across the spectrum in more than three dozen cases—tops in his generation. He regularly testifies before Congress at the invitation of both parties; and in surveys of judicial citations and/or scholarly citations, he invariably ranks among America’s five most-cited mid-career legal scholars. He is a member of the American Academy of Arts and Sciences and a recipient of the American Bar Foundation’s Outstanding Scholar Award. In 2008 he received the DeVane Medal—Yale’s highest award for teaching excellence. He has written widely for popular publications, including *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *Time*, and *The Atlantic*. He was an informal consultant to the popular TV show, *The West Wing*, and his constitutional scholarship has been showcased on *The Colbert Report*, *Tucker Carlson Tonight*, and *Constitution USA with Peter Sagal*. He is the author of dozens of law review articles and several books, including *The Constitution and Criminal Procedure* (1997), *The Bill of Rights* (1998—winner of the Yale University Press Governors’ Award), *America’s Constitution* (2005—winner of the ABA’s Silver Gavel Award), *America’s Unwritten Constitution* (2012—named one of the year’s 100 best nonfiction books by *The Washington Post*), *The Law of the Land* (2015), and *The Constitution Today* (2016—named one of the year’s top ten nonfiction books by *Time* magazine). In 2017 he received the Howard Lamar Award for outstanding service to Yale alumni. He is Yale’s only currently active professor to have won the University’s unofficial triple crown—the Sterling Chair for scholarship, the DeVane Medal for teaching, and the Lamar Award for alumni service.

Appendix B—More (3 Items) on Kavanaugh

Item 1 (of 3): New York Times op-ed, July 9, 2018

A Liberal’s Case for Brett Kavanaugh

By Akhil Reed Amar

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 ninetysomething Senate votes he deserves, rather than the fiftysomething votes he is likely to get.

Item 2 (of 3): Portland Press Herald op-ed, August 24, 2018

As Maine Goes, So May Go the Nation on Kavanaugh Confirmation

By Akhil Reed Amar

If Senator Susan Collins supports Brett Kavanaugh, he will almost certainly win confirmation as America's next Supreme Court justice. If Collins opposes Kavanaugh, his pathway narrows. As Maine goes, so may go the nation.

Collins and Maine should go with Kavanaugh for the simplest of reasons: He is the best person for the job compared to all other realistically imaginable nominees. Anyone who says differently should name the supposedly better candidate and explain how that candidate would actually get nominated by President Trump and then confirmed.

Supreme Court justices must correctly interpret the Constitution. Kavanaugh has studied the document more carefully and has written more thoughtful things about it than anyone else on the list of approximately 25 potential nominees that Trump has been publicly circulating for the last year.

I myself voted against Trump and previously supported all of Bill Clinton's and Barack Obama's court nominees – Ruth Bader Ginsburg, Stephen Breyer (my former boss), Sonia Sotomayor, Elena Kagan and Merrick Garland.

Republicans stonewalled Garland in 2016 – wrongly, in my view – and many leftists now want Senate Democrats to stonewall Kavanaugh as payback. But the situations are not symmetric. Garland needed lots of Senate Republican votes because of filibuster rules then in place, but Kavanaugh does not need any Senate Democratic votes. Republicans controlled the Senate in 2016 and control it today. Elections have consequences, and math is math.

Suppose Democrats successfully block Kavanaugh, with help from Republican moderates like Collins. What then? Trump would still be president; the court vacancy would still exist; and – to repeat – the others on President Trump's long list are less constitutionally impressive.

Nor has anyone else on Trump's list shown as much willingness as Kavanaugh to respectfully engage thoughtful moderates and liberals. Kavanaugh, a stalwart Republican, has often hired Democrats and independents to assist him as law clerks. This is exactly the sort of jurist whom free-thinking Mainers from Collins on down should applaud.

Collins cares deeply about women's reproductive rights. (So do I; unborn human life is precious, but pregnancies and potential pregnancies can raise intricate medical and moral complexities,

and in this domain I generally trust women more than I trust government officials.) On issues of reproductive choice, there are no guarantees that a future Justice Kavanaugh would rule the same way that Sen. Collins might prefer. But that is equally or more true of all the other would-be nominees on Trump’s long list. If Collins were to sink Kavanaugh, Trump could easily nominate someone else who would likely be less open to Collins’ vision of reproductive rights, but harder for senators to torpedo. Consider, for example, Judge Amy Coney Barrett, an earnest acolyte of Antonin Scalia with a compelling life story but less personal exposure to liberals and a less distinguished judicial track record. Moderates and liberals should be careful what we wish for.

Sen. Collins has repeatedly spoken of the importance of selecting jurists who respect precedent. Precedent is indeed important, but more so for lower-court judges, who must faithfully follow what the Supreme Court has decreed in past cases. As a lower-court judge, Brett Kavanaugh has generally been a dutiful deputy with an excellent record of affirmance by the Supreme Court.

But precedent operates differently on the Supreme Court itself. The justices can and at times must overrule or narrow their own previous rulings if it becomes clear that these rulings incorrectly interpreted the Constitution itself. The Constitution – and not the case law – is America’s supreme law of the land. In the greatest judicial decision of the last century, the Supreme Court in *Brown v. Board of Education* buried the erroneous segregationist ruling of *Plessy v. Ferguson*, and instead faithfully followed the Constitution itself, which promises racial equality.

Aligning precedent with the true meaning of the Constitution’s words and spirit requires consummate legal skill and judgment. Over many years and on many issues, Kavanaugh has shown just this sort of legal acumen. Other lower-court judges may call themselves “originalists” – jurists who pay special attention to the original meaning of the Constitution’s words – but Kavanaugh has demonstrated in his decisions and other writings that he actually has studied the Constitution and its history in impressive detail. He has also shown that he is an originalist who understands the role of precedent.

No other would-be justice realistically on the horizon has shown comparable skill at harmonizing strong fidelity to original meaning with proper respect for precedent and tradition. Sen. Collins should say “yes” to Kavanaugh, and Mainers should say “amen.”

Item 3 (of 3): Washington Post mini- op-ed, August 31, 2018

A Careful and Subtle Opinion

By Akhil Reed Amar

I seldom assign my law students to read recently decided lower-court opinions, but last spring I made one exception: Brett Kavanaugh’s dissent in a case involving presidential control over the federal bureaucracy, *PHH Corporation v. Consumer Financial Protection Bureau*. The case is technical, but much of law is technical and far removed from hot-button social issues.

The Constitution does not expressly say the secretary of state serves at the pleasure of the president, but George Washington, James Madison and the first Congress all agreed in 1789 that this rule was implicit in the Constitution. The president is the chief executive, executive departments answer to him, and the heads of these departments must be removable at will. For the secretary of state, the president is the unfettered firer in chief.

But for certain “independent agencies,” the statutory rules are different: The president may remove agency commissioners only for “good cause.” But what’s the difference, and where to draw the line?

In *PHH Corporation*, Kavanaugh explains exactly how multimember commissions such as the Securities and Exchange Commission and the Federal Communications Commission are different from departments such as the State Department headed up by a single person. It’s a careful and subtle opinion, blending fidelity to the Founders’ original understanding of the Constitution with respect for modern developments such as the rise of the administrative state. It reflects a persuasive vision of the Constitution’s commitment to a “unitary executive.” The Constitution explicitly and emphatically vests the executive power in one president and all lower executive officials ultimately answer to him, in one way or another — albeit in slightly different ways, depending on the details of the lower office. Unlike extreme versions of “unitary executive theory” famously associated with the conservative legal scholar John Yoo, Kavanaugh’s is a modest version of the theory, respectful of modern independent agencies and noncommittal on contested issues of presidential war power.

Appendix C—More (1 Item) on Originalism

Item 1 (of 1): The Hill op-ed, August 21, 2018 (authored by The Federalist Society’s Co-Founder and Chairman of the Board)

Neither Kavanaugh Nor Constitutional Originalism Are Scary

By Steven G. Calabresi

A continuing theme in the criticism of Judge Brett Kavanaugh’s nomination to the Supreme Court has been that his references to constitutional originalism suggest he would reach a series of bad results in certain cases.

The standard indictment of originalism makes the following claims: 1) originalists think *Brown v. Board of Education* is wrongly decided and so they would resurrect segregation; 2) originalists oppose the incorporation of the Bill of Rights against the states and so they would let states violate fundamental individual rights; 3) originalists are opposed to equal civil rights for women and so they would uphold sexist laws and will overturn the recent Supreme Court ruling that legalized same sex marriage; 4) originalists would do away with the constitutional right to privacy; and, 5) originalists think that a constitutional provision means the same thing today as when it was adopted, which is unworkable because the world today is so different from what the world was like in 1791 or in 1868.

Every single one of these claims is demonstrably false. These claims overlook the fact that the great Warren court liberal Justice Hugo Black was an originalist; these claims overlook the votes cast by originalist Justices Antonin Scalia and Clarence Thomas on the Supreme Court; and these claims overlook 40 years of scholarship by originalist law professors. The law professors and law school deans who are making these claims are behaving in a sloppy fashion (or worse).

First, originalist Justice Hugo Black joined the Supreme Court’s opinion in *Brown v. Board of Education* and neither Justices Scalia nor Thomas have ever criticized that case or failed to follow it. Originalist Stanford Law Professor Michael McConnell published a lengthy and scholarly law review article defending *Brown v. Board of Education* on originalist grounds, and I have published a lengthy originalist article that also defends the decision in *Brown* on originalist grounds, as well as an article defending the decision in *Loving v. Virginia* on originalist grounds, which struck down state bans on racial inter-marriage.

Second, originalist Justice Hugo Black led the charge to incorporate the federal Bill of Rights to apply against the State on the Warren Court. Justices Scalia and Thomas supported incorporation of the Bill of Rights in *McDonald v. Chicago*, and Justice Thomas wrote a separate

concurrence making the best case yet made in any Supreme Court opinion in favor of incorporation. Originalist Yale Law Professor Akhil Reed Amar wrote a whole book defending incorporation on originalist grounds entitled: *The Bill of Rights: Creation and Reconstruction* (1998).

Third, originalist Yale Law Professor Akhil Reed Amar and I have both published originalist law review articles arguing that sex discrimination and sexual orientation discrimination are forbidden by the Fourteenth Amendment as read in light of the Nineteenth Amendment. We believe that once women got the political right to vote in 1920, they also got equal civil rights to those of men as well. Supreme Court Justice George Sutherland actually ruled in 1923 that the meaning of the Fourteenth Amendment was altered by the adoption of the Nineteenth Amendment. Moreover, there is settled Supreme Court precedent that establishes that sex and sexual orientation discrimination are forbidden.

From all that I know of Judge Kavanaugh and of Chief Justice Roberts, I would be astonished if those correct Supreme Court precedents on sex and sexual orientation discrimination were overridden. Judge Kavanaugh has hired more women law clerks than almost any other federal Court of Appeals judge, and he is obviously very sympathetic to the rights of women.

Fourth, the constitutional right to privacy is part of a larger originalist, unenumerated right, which provides that: “All human beings are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.” This right can be trumped by “just laws enacted for the general good of the whole people.” A law that forbids the use of contraceptives prevents an individual from enjoying liberty and is not a just law enacted for the general good of the whole people, so it is unconstitutional.

Fifth, and finally, originalists do believe that the meaning of the words of the constitution do not change over time, but their application may change in huge ways because of new technologies and changed circumstance. As the great originalist Judge Robert H. Bork wrote in *The Tempting of America* (1990), “The world changes in which unchanging values find their application.” What this means is that today the Necessary and Proper Clause empowers Congress to set up an Air Force and a “Space Force” even though no one imagined these things in 1787. It also means that the First Amendment freedom of the press applies to freedom of expression via broadcasting and the internet and not just to freedom of expression via printing presses.

The attacks on a crude caricature of originalism reveal more about the sloppiness (or worse) of those who make these attacks than they do about originalism.

Appendix D—More (2 Items) on the Advice and Consent Process

Item 1 (of 2): Excerpt from Akhil Reed Amar, America's Constitution: A Biography (Random House 2005), 192-95, 219-20

. . . In appointments, as with treaties, the Senate could say no to what the president proposed but could not compel the president to say yes to the Senate's first choice. Just as a president could refuse to formally ratify a treaty after it won the Senate's consent, so he might decline to commission an officer who survived the confirmation ordeal. . . .

Textually, Article II treated high-level executive and judicial appointments alike, yet Senate practice quickly distinguished between them, giving the president more leeway in choosing his executive deputies. By 1830, the Senate had defeated three Supreme Court nominations—the first in 1795, when it rejected John Rutledge, whom Washington had named to replace John Jay as chief justice—but had yet to turn down any of the much larger number of cabinet candidates. This pattern made structural sense. Cabinet officials were part of the president's branch—secretaries who existed largely to help him carry out his responsibilities and answered directly to him under the opinions clause. A president could closely monitor these men and remove them at will; and no newly elected president would be saddled with his predecessor's picks unless he so chose. Article III judges would be independent officers in a separate branch that emphatically did not answer to the president. Nor could they be removed by him or by a new administration. For these lifetime posts, more Senate scrutiny was appropriate. . . .

Although senators would have broad discretion to say no in the confirmation process, the president would enjoy several structural advantages in the foreseeable give and take. A presidential nomination would define the agenda, forcing the Senate to consider not merely an abstract ideology but a flesh-and-blood person, with friends and feelings. Even if senators preferred someone else, they could not guarantee that the president would ever propose that person; indeed, senators who sank the president's first choice might face a worse (to them) candidate the next time around. Different senators might be at cross-purposes, making it difficult for the body to speak with one voice, as could the president. (Partially counterbalancing this dynamic, the Senate from its earliest days has tended to give special deference to the views of the two senators from the nominee's home state.) When senators left for home, the president would stay put and could make interim recess appointments ensconcing his men in office, temporarily. The president's sweeping right to remove executive subordinates enabled him to expand various appointment opportunities at will, while the Senate lacked symmetric removal power. . . .

The Constitution allowed the president and the Senate to consider political and ideological factors in selecting Supreme Court justices and lower court judges, and such variables did in fact figure prominently in early appointments. Every one of the eight men to sit on the Supreme Court before 1796 had been a highly visible Federalist in 1787-88. The first

former Anti-Federalist whom Washington named to the Court, Samuel Chase, did not win the president's favor until Chase had shown himself to be a strong post-ratification supporter of the president's administration. Of Washington's sixteen initial nominees to the district bench—all of whom the Senate confirmed but three of whom declined to serve—nine had publicly supported the Constitution in their respective ratifying conventions, and several others had demonstrated their commitment to the Federalist cause in other ways. Conversely, none had voted against the Constitution in state convention.

After Washington's departure, as openly partisan competition heated up in federal legislative and executive races, so too did federal judicial politics. John Adams sought to stuff the bench with fellow Federalists; Jefferson, with fellow Republicans. In 1810, ex-President Jefferson counseled his incumbent friend James Madison not to appoint Joseph Story to the Court because Story was, in Jefferson's view, "unquestionably a tory" who as a congressman had "deserted" Jefferson on the administration's embargo policies. In the end (after three failed attempts to appoint other men) Madison named Story, who described himself as "a decided member of what was called the republican party, and of course a supporter of the administration of Mr. Jefferson and Mr. Madison," albeit a republican of "independent judgment" and not a "mere slave to the opinions of either [president]." Not until Republican Abraham Lincoln named Democrat Stephen Field would a president openly reach across party lines in a Supreme Court nomination—and when Lincoln did so in 1863, the deepest ideological divide ran not between Republicans and Democrats but between Unionists and Secessionists. (In 1864, Lincoln would run under a "Union Party" banner alongside a War Democrat, Andrew Johnson.)

From its earliest days, the Senate in its confirmation process felt free to consider the same broad range of factors that a president might permissibly consider in his nomination decisions. For example, senators in 1795 voted down John Rutledge for the chief justiceship largely because they doubted his political judgment. The Judicial Article thus provided for an openly political and ideological process of initial appointment. Presidents and senators could not properly extract promises from a judicial nominee but were free to indulge in predictions about how that nominee might rule, and to factor such predictions into their appointments calculus.*

* On the promise/prediction distinction and the Senate's general role in judicial appointments, see Vikram D. Amar, Note, "The Senate and the Constitution," *Yale LJ* 97 (1988): 1111

Item 2 (of 2): Online op-ed, Findlaw.com, July 8, 2005 (updated version of online op-ed originally posted in January, 2002)

What are the Rules and Standards in the Judicial Appointments Game?

By Akhil Reed Amar and Vikram David Amar

Citizens need to understand the basic ground rules of the appointments game. (By calling appointments a “game,” we seek not to trivialize the principals and principles involved, but rather to highlight the range of permissible moves and countermoves that give the appointments process a coherent structure.)

These ground rules--deduced from the Constitution’s letter and spirit, and from the institutional practices that have emerged over the years—define what is fair play and what is out of bounds.

Rule One: Appointments Are Not the Only Game in Town

The basic constitutional text governing appointments appears in Article II, Section 2 of the Constitution, which provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” various high-level executive and judicial officers.

This basic text does not exist in a vacuum. Rather, it is nested in a Constitution that has much to say about Presidents and Senators in other contexts, including legislation, treaty-making, and constitutional amendment.

The appointments game is thus one of many interrelated games governed by the Constitution. Just as a team that overuses its ace reliever in game 1 of the World Series might end up losing later games as a result, so too an overly aggressive President might end up winning an appointments game only to lose more important legislative games down the road.

For example, if President Bush heeds the advice of many and nominates someone many Democratic Senators can support, then there may be no need to test the contours of the cease-fire concerning the use of the filibuster . . . reached in the Senate this spring.

In addition, a moderate appointment now may help build a spirit of bipartisanship and increase Republican majorities in the Congress after the 2006 election. And that, in turn, may give the President more leverage not only in subsequent Supreme Court appointments he is likely to make, but also on his domestic legislative agenda concerning things like energy policy and even social security reform.

Rule Two: Executive and Judicial Appointments are Very Different Ballgames

The language of Article II, read in isolation, might seem to suggest that all major appointments are identical, governed by a uniform “advice and consent” standard. But here too, it makes sense to construe the clause in light of the rest of the Constitution, and traditional institutional practice.

The rest of the Constitution identifies key differences between executive officers serving the President in Article II, and judicial officers independent of the President in Article III: Executive officers answer to the President (quite literally, in the Article II, section 2 Opinions Clause) and will typically leave when he leaves. A President is generally entitled to have his

branch filled with his people, whom he directly oversees. If these underlings misbehave, voters can hold the President responsible.

Federal judges (especially Supreme Court Justices) are different. They do not answer directly to the President. They are not part of his Administration. When he leaves his office, they will stay in theirs.

Because of these differences, the Senate has always given a President more leeway in picking his Cabinet than in picking Justices. The pattern began in 1795 when the Senate rejected George Washington's pick for Chief Justice, John Rutledge. By 1830, the Senate had stymied three Supreme Court nominees, but had yet to nix any Cabinet nominees.

Since 1960, although Presidents have nominated roughly ten times as many persons to the Cabinet as to the Supreme Court, there have actually been fewer failed Cabinet nominations than failed Court nominations. (Compare John Tower, Zoe Baird, and Linda Chavez on the Cabinet side with Abe Fortas, Clement Haynsworth, G. Harrold Carswell, Robert Bork, and Douglas Ginsburg on the Court side.)

Rule Three: The Foul Lines are the Same for Both Sides

If, as we argue below, the President may properly consider a judicial candidate's overall ideology and predicted performance in office in deciding whom to nominate, the Senate may likewise properly consider these factors in deciding whether to confirm.

Nothing in the Constitution's text or structure says that the President may consider judicial ideology, while the Senate may consider only personal character and professional competence. In general, the Appointment Clause text envisions a partnership in which the President goes first and the Senate goes second, but both may consider the same general factors. Elsewhere in the Constitution, the actor who goes second is generally entitled to consider the same things as the one who went first. In treaty-making, the Senate may weigh the same things as the President who proposed the treaty; in lawmaking, the President is free to veto a bill based on the same broad range of policy factors that the Congress considered when enacting it; and in the constitutional amendment process, the states acting at the end have the same broad discretion as the Congress acting at the beginning.

Institutional practice supports this reading of text and structure: Senators have often (sometimes openly, sometimes quietly) gone beyond nominees' character and credentials to consider judicial ideology and likely judicial voting patterns.

Rule Four: He Who Goes First Often Laughs Last

As with chess and tennis, the appointments game gives the first mover an advantage. The President defines the appointments agenda by going first, forcing the Senate to confront not merely an abstract ideology but an actual person who embodies that ideology. Voting down a real person may be harder than voting down an abstract idea or bill, especially if the person is exceptionally articulate or charming, or has a compelling biography.

Even if the Senate succeeds in defeating a nominee, there is no guarantee that next nominee will be better (from its perspective). The President may threaten to send up a second nominee who may be worse but harder to oppose, politically. (The President might be bluffing, but Senators cannot always be sure.)

If a President has a slight preference for Smith over Jones, that slight preference may suffice to give Smith the nomination. But if the Senate has a slight preference for Jones over Smith, they should hesitate before rejecting Smith; there is no guarantee that they will end up with Jones.

Rule Five: One Head Is Better than Two (or One Hundred)

The unity of the President—he is both a single person, and the unitary head of an entire branch of government—gives him additional advantages.

Even if a single Senator resolves to vote against all nominees falling below the mark of excellence, she cannot be sure that her colleagues will be similarly resolute, or will share her rankings.

Indeed, while the President will typically choose a nominee that he considers best overall, there may be no single nominee that the Senate as a group considers superior to all rivals. Each Senator may have her favorite candidate, but the Senate as a whole may be unable to identify a clear favorite.

In addition, the President is the only actor with his eye on the entire package of appointments, involving nominees from every region and on every subject matter. He and his staff may easily meet with potential nominees behind closed doors; it is harder for the Senators as a group to do this.

Rule Six: Judicial Promises are Out of Bounds

Appointments—even to the judiciary—are part of a political process. In some European countries, judges are picked and promoted by fellow judges. In America, they are picked and promoted by politicians.

But once confirmed, federal judges are to be shielded from further dependence on the political branches. Thus, it is generally impermissible for politicians to seek promises from judicial nominees about how they will vote once confirmed. Such promises impermissibly leverage politics past the Article II appointments process into the actual Article III adjudication process, where it has no proper place.

Conversely, those who suggest that judicial ideology should play no role in appointments impermissibly seek to bleach politics out of a place where it does, indeed, constitutionally belong. Unlike the European model, the American model allows political leaders and voters to weigh more than technical legal competence and personal character in deciding who shall be our judges.

The proper line is one dividing predictions from promises. Presidents and Senators are free to base (and often have based) their decisions on the likely voting patterns of nominees, but may not extract (and typically have not tried to extract) pledges or promises. During the nomination and confirmation process, the Senate may question candidates about their past and current legal views—using specific examples to nail points down—and the nominee should try to answer candidly; but once confirmed, judges must be free to change their minds when presented with sound legal arguments.

Though the line between prediction and promise is sound in theory, it may be difficult to honor in practice. Is the Senate really capable of having candid conversations about judicial ideology? How might such conversations best unfold? In the balance of this column, we offer some specific guidelines for Senators vetting judicial nominees.

The Need for Nuance: Different Questions and Judgments for Different Judicial Positions

Just as executive branch appointments differ from judicial ones, not all judicial appointments are the same. The qualities that make for a good trial judge, for example, often differ from the qualities needed on the Supreme Court.

The attributes most needed on a given court will also depend in part on who is already sitting on that court at the time a vacancy happens to open up. As Senator Charles Schumer has argued, Senators may properly consider not merely the credentials and ideology of the nominee before them, but also the desirable overall balance on the court in question.

Considerations like these may explain why many Senators who voted against Robert Bork's 1987 nomination to the Supreme Court had voted to support his nomination to the Court of Appeals of the District of Columbia Circuit some five years before. They also explain why, we suspect, these Senators likely would have been happy to confirm Bork again to this lower court had he stepped down and been renominated.

These Senators may have believed that Bork's brand of conservative strict construction would provide a good counterweight to the more freewheeling philosophy of some other D.C. Court of Appeals judges. But they may also have believed that it would, alongside the promotion of William Rehnquist to the position of Chief Justice and the appointment of Antonin Scalia, overrepresent one methodological approach on the Supreme Court at the expense of other legitimate judicial philosophies, thereby tilting the Court too far in one direction.

Nor is ideological balance the only kind to consider. Throughout American history, the Supreme Court and many lower courts have benefited from having judges drawn from diverse parts of the legal world—the bench, the private bar, the government and the academy. How, precisely, should the Senate canvass these varied legal experiences to assess what impact a nominee might have if confirmed? In a word, carefully—with due understanding of the way in which lawyers in today's world are often asked to play roles.

How Senators Should Evaluate Sitting Judges

Consider, first, nominees who are sitting judges. It might initially seem that the Senate's task here is easy: simply read a jurist's past decisions to glean her approach to judging and compare that approach to the Senate's own vision(s). But in fact, past decisions may not tell us much, and may indeed be misleading in what they do suggest.

For one thing, *stare decisis*—the principle that precedent should generally be followed, and that precedent from higher courts is binding on judges lower down in the pyramid—limits all lower courts, federal and state. This principle may force individual judges to reach decisions and embrace reasoning deeply in conflict with the judge's own views.

Ironically, the willingness to reach such a decision, or employ such reasoning, based on precedent despite the judge's personal views may in fact illustrate a virtue, even as it is condemned during the confirmation process as a flaw. . . .

How Senators Should Evaluate Nominees from Private Practice

How about nominees who are drawn from private practice? Positions a lawyer has taken in court representing clients may not always tell us everything about the lawyer's own views of the law,

because a lawyer ordinarily has an ethical duty to make all plausible legal arguments (whether he personally embraces them or not) on behalf of a client. But a nominee's conduct as a private lawyer can tell us what kinds of legal positions she thinks are plausible under the law as it now exists, or is likely to exist.

Also, a lawyer's decision to take a case that she knows will involve the making of certain kinds of arguments may be quite informative. There is no requirement that a private lawyer accept every client, and in many situations an attorney could, if she so chose, agree to represent a client only on the condition that certain kinds of arguments not be made.

Some courts may be unwilling to enforce some limitations on representation that an attorney imposes (seeing these limitations as in conflict with, for instance, the attorney's duty to represent her client zealously). Moreover, Senators should tread carefully here, since asking, for example, what arguments a client requested that the attorney make might reveal attorney-client communications. But there is at least some room for questioning here—particularly about the decision to take a particular case.

For example, consider the case of a nominee who is a private lawyer who has represented the tobacco industry and, in the course of that representation, makes First Amendment arguments against tobacco advertising restrictions. It is fair to ask whether the voluntary decision to accept the case says something about the nominee's vision of free speech, and about his ethical vision more generally.

Of course, even here, Senators must be aware of nuances in roles. A young associate at a law firm may not have much say about the cases to which he is assigned, and no say at all with respect to the ones his firm accepts.

Just as a lower court judge can sometimes point to clear Supreme Court guidance as an explanation for an otherwise troubling opinion, so too a junior lawyer may be able to point to a senior partner who is calling the shots. But this is not always true. A young associate who joins a firm known for its tobacco defense work should be able to be held accountable for it by those Senators who disapprove of such work. Similarly, an associate who joins a firm that does some tobacco defense work, but has the choice to opt out, even at a cost to his own career, should be held accountable for doing the work.

How Senators Should Evaluate Nominees from Government Practice

Nuanced distinctions like these also apply when we look at nominees who have been government attorneys. Unlike private lawyers, government attorneys do not choose their clients, but they do often have discretion to define their client's interests, and are also ethically bound to do justice.

The discretion enjoyed by government attorneys, though, may vary because different departments within government play different roles. An attorney prosecuting crimes for the Criminal Division of Department of Justice, for instance, has less leeway to stake out his own views of the law than does an attorney in the Office of Legal Counsel, whose job is not so much to win cases but rather to figure out what the law is or should be.

And even within a department, some lawyers will have much more power to dictate positions and set agendas—and thus will more properly be required to explain those positions and agendas—than others. For example, arguments a Solicitor General advances before the Supreme Court are rarely dictated by anything other than the SG's sense of what makes the most

legal sense for the United States, whereas deputy SGs have much less decisionmaking authority, and assistant SGs, less still.

Again, in each case, Senators may question a nominee about a past position, but sometimes the sincere answer will be “it was my job to make that argument.” Even then, though, a Senator can follow up by asking whether the nominee now believes the past argument he made was correct or not.

This question is not too hypothetical or abstract to yield a helpful answer. Nor will a candid response—so long as it does not take the form of a guarantee—create an impression of prejudice should the issue recur in a case down the road.

How Senators Should Evaluate Nominees from the Academy

In contrast, legal academics can rarely defend their past positions by pointing to someone else like a client or a superior. Academic freedom means that scholars are able, and encouraged, to say what they really believe.

Still, even here, Senators should be sensitive to the nuanced roles academics play. Professors are taught to be, and rewarded for being, provocative. Thus, an academic will sometimes float an argument to generate discussion and dialogue, even when he is not yet convinced that he is right. (Some of Robert Bork’s controversial scholarship may belong in this category.)

Moreover, and relatedly, good academics, like good judges, are open-minded and sometimes abandon even deeply-held views when new arguments and evidence emerge. Again, this is an instance where what may really be a virtue—an ability to be persuaded and not to be rigid in one’s thinking—can wrongly be painted as a vice during the confirmation process: a hypocrisy or a weakness of the mind.

The Costs of Senate Error

Although we believe that the Senate capable of a meaningful and productive dialogue with nominees, we admit that there is always a chance the Senate will misplay the game, with unfortunate consequences.

We focus less on the injustice to nominees whose past may be mischaracterized, because the constitutional process is not about fairness to individual nominees so much as it is about safeguarding the federal judiciary. No one has a vested property right to a federal judgeship, so very little “due process” to nominees is required.

But above and beyond possible unfairness to individual nominees, are larger systemic concerns. First, those who want to be judges may avoid taking positions that may be distorted later, with the result that much good speech and lawyering will be chilled and lost.

Second, and relatedly, the only people who make it through the Senatorial gauntlet will be “stealth” candidates who have scrupulously avoided talking (and perhaps thinking) about the great issues of the day.

¹ For more biographical information, see Appendix A.

² My previous testimony has addressed issues of presidential succession (Feb. 2, 1994 and Sept. 16, 2003); exclusionary-rule reform (March 7, 1995); anti-hate-speech legislation (May 11, 1999); a proposed constitutional amendment to broaden presidential eligibility to certain naturalized citizens (Oct. 5, 2004); questions concerning the immunity of sitting presidents from criminal prosecution (Sept. 9, 1998—Subcommittee on the Constitution, Federalism, and Property Rights); and most recently, statutory proposals to restructure the law governing special counsels, including Robert Mueller (September 26, 2017).

³ For the list of twenty-five potential nominees made public by the White House nearly a year ago, see <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/>

⁴ A great deal of journalistic nonsense has been published of late by some critics of originalism. One prominent scholar has recently purported to illustrate how honest originalism would create a parade of absurd and unthinkable results, see Erwin Chemerinsky, “Originalism is Bad for Justice. And Kavanaugh is a Big Believer,” *Sacramento Bee*, Aug. 15, 2018. For pointed refutations of this and related canards, see Akhil Reed Amar, “Foreword: The Document and the Doctrine,” 14 *Harv. L. Rev.* 27 (2000); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); Steven G. Calabresi, “Neither Kavanaugh Nor Constitutional Originalism Are Scary,” *The Hill*, Aug. 21, 2018 (reprinted in Appendix C).

⁵ According to a recent survey of scholarly (as distinct from judicial) citations, the two most cited originalist scholars in recent years are Professor Jack Balkin and yours truly—both self-described liberals and registered Democrats. See <http://originalismblog.typepad.com/the-originalism-blog/2018/08/most-cited-originalist-scholars-2012-2017michael-ramsey.html>

⁶ Some modern conservative originalists—Justice Scalia most egregiously—failed to pay sufficient heed to the Reconstruction and Woman Suffrage Amendment. By contrast, Kavanaugh has taken pains to highlight the constitutional amendments made by post-Founding amendments, in language more reminiscent of Thurgood Marshall than Antonin Scalia:

We revere the Constitution in this country, and we should. We also, however, must remember its flaws. And its greatest flaw was the tolerance of slavery. That flaw cannot be airbrushed out of the picture when we celebrate the Constitution. It was not until the 1860s, after the Civil War, that this original sin was corrected in part, at least on paper, by ratification of the 13th, 14th, and 15th Amendments to the Constitution.

But that example illustrates a broader point as well. When we think about the Constitution and we focus on the specific words of the Constitution, we ought to not be seduced into thinking that it was perfect and that it remains perfect. The Framers did not think that the Constitution was perfect. And they knew, moreover, that it might need to be changed as times and circumstances and policy views changed.

And so they provided for a very specific amendment process in Article V of the Constitution. The first 10 amendments, as we all know, came very quickly after the new Congress met in 1789. And those amendments were ratified in 1791. The 11th and 12th Amendments followed soon thereafter, and that process has continued. Indeed, the amendments have altered fundamental details of our constitutional structure. The 12th Amendment changed how presidents and vice presidents are elected. The 22nd Amendment changed how long presidents can serve. The 17th Amendment altered how the Senate is selected, changing it from a body selected by state legislatures to a body directly elected by the people. The 13th, 14th, and 15th Amendments altered the autonomy of the states and created new constitutional rights and protections for individuals against states.

Brett M. Kavanaugh, “From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist,” AEI (2017), pp. 2-3.

⁷ For an excellent example of this harmonization, see Judge Kavanaugh’s *PHH* decision, discussed in more detail in Appendix B, Item 3. For a closely analogous effort, see AMAR, *supra* note 4, at 319-24, 381-86.

⁸ This may come as a surprise to persons—perhaps including some Senators and staffers—who have not done their constitutional homework. See e.g. Manuela Tobias, “Bernie Sanders’ Claim that Brett Kavanaugh Defies Supreme Court Precedent a Stretch,” *Politifact*, July 16, 2018:

Sanders said Kavanaugh’s belief that a president “may decline to enforce a statute . . . when the president deems the statute unconstitutional” is “contrary to 200 years of Supreme Court precedent.”

In practical terms, presidents have indeed declined to enforce statutes they deemed unconstitutional. The question has never come before the Court, however. *Marbury vs. Madison* held that the Supreme Court could declare statutes unconstitutional, but did not deny that presidents could also enforce constitutional principles.

We rate this [Sanders] statement Mostly False.

Politifact was if anything too generous to Senator Sanders, whose statement was plainly false, even though it was, I presume, an honest mistake. I suspect that Judge Kavanaugh got it right and Senator Sanders got it wrong because, unlike Senator Sanders, Judge Kavanaugh is familiar with the relevant scholarship on this topic. See, e.g., Frank H. Easterbrook, “Presidential Review,” 40 *Case Western Reserve L. Rev.* 905 (1980); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005), 60-61, 179-80; AMAR, *supra* note , at 428-29.

⁹ On whether sitting presidents can be criminally prosecuted against their will, see my testimony of Sept. 9, 1998 before this Committee’s Subcommittee on the Constitution, Federalism, and Property Rights. On issues related to independent counsels and the Mueller investigation, see my testimony of Sept. 26, 2017. By a 14-7 vote on April 26, 2018, this Committee apparently disregarded my claim that the proposed Mueller bills were flatly unconstitutional. For a very recent ruling by a Federal District Judge here in D.C. squarely agreeing with my analysis—and indeed, expressly citing my Sept. 26, 2017 testimony and sources cited therein with strong approval in the case, directly involving one of Mueller’s investigations—see *United States v.*

Concord Mgmt. & Consulting LLC, 2018 U.S. Dist. LEXIS 135826, __ F.SUPP.3D __, 2018 WL 3827021 (Aug. 13, 2018).

¹⁰ See generally Appendix D, Item 2.

¹¹ For details see Brett M. Kavanaugh, “One Government, Three Branches, Five Controversies: Separation of Powers Under Presidents Bush and Obama,” *Marquette Lawyer* (Fall 2016), 8, 10:

Prior White House experience also helps, I think, when judges need to show some backbone and fortitude, in those cases when the independent judiciary must stand up to the president and not be intimidated by the mystique of the presidency. I think of Justice Robert Jackson, of course, as the role model for all of us executive branch lawyers turned judges. We all walk in the long shadow of Justice Jackson.

For my elaboration of the significance of this passage, see my response essay, “Walking in the Long Shadow of Justice Jackson,” *id.* at 20:

Jackson took pains to stress that he was not bound as a justice to endorse all the things he might have previously argued as the president’s lawyer. “A judge cannot accept self-serving press statements of the attorney for one of the interested parties [i.e., the president] as authority in answering a constitutional question, even if the advocate was himself.” Once a pol (or a pol’s mouthpiece), but now a judge. Black robes and life tenure freed Jackson to act in a judicial fashion even though he had not been entirely free to do so in some of his earlier assignments. In all these openly autobiographical musings by Jackson, we see that one of the most canonical decisions of all time was greatly and self-consciously enriched by the non-judicial experience that one of its notable members brought to the bench.

¹² Here is what a towering constitutional scholar and former federal appellate judge wrote in an op-ed written last week for and about the current Senate: “Senators today live in fear of the extreme wings of their party and cannot do the responsible thing even when they know it is for the good of the country.” Michael McConnell, “Brett Kavanaugh will Bring Middle Principles to our Polarized Nation,” *The Hill*, Sept. 1, 2018.

¹³ “With Kavanaugh on the Supreme Court and Justices Breyer and Kagan showing signs of willingness to break with their more leftward brethren or sistren, the new Supreme Court could have a serious principled middle for the first time in decades. That would be therapeutic for our obsessively polarized country.” McConnell, *supra* note 12. On Kavanaugh’s intellectual openness to moderates and conservatives, see Appendix B, Items 1 and 2.

¹⁴ For the structural and game-theoretic reasons that this is so, see Appendix D.