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Kavanaugh and the Ginsburg Standard

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Don't blame Brett Kavanaugh when he demurs at his confirmation hearing from answering questions on legal issues that might come before the Supreme Court. It's the senators who will be in the wrong, for demanding commitments that no judicious nominee could provide. To answer "direct questions on stare decisis on many other matters, including *Roe* and health care"—as Minority Leader Chuck Schumer has called for—would itself be disqualifying.

That principle has come to be called the Ginsburg Standard, after Justice Ruth Bader Ginsburg. As she explained in the opening statement of her 1993 confirmation hearing: "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case—it would display disdain for the entire judicial process." Or, as she later responded to a question about constitutional protections against discrimination based on sexual orientation: "No hints, no forecasts, no previews."

It would be a mistake to associate the rule too closely with Justice Ginsburg, who honored it inconsistently at her hearing, or to view it as driven only by policy considerations. In fact, the standard has deep roots in the law and history.

Begin with the Constitution. The Appointments Clause provides that judges, including Supreme Court justices, are appointed by the president "with the Advice and Consent of the Senate." From the nomination of John Jay as the first chief justice in 1789 through the mid-1950s, public confirmation hearings were rare. Few nominees attended them when they did occur, and only a handful testified. Senators had no occasion to grandstand by demanding that a nominee declare his stance on legal controversies.

Since hearings became the norm, the number of questions asked of nominees has exploded, with recent nominees facing more than 700 apiece. Yet two aspects of the process haven't changed. The first is the refusal of nominees to opine on actual or hypothetical cases that may come before the high court. The second is senators' griping in response. At a 1968 hearing, Sen. Sam Ervin (D., N.C.) bemoaned that the nominee, Judge Homer Thornberry, had "virtually created a new right not found in the Constitution, which might well be designated as the judicial appointee's right to refrain from self-incrimination."

Ervin was wrong. Judges are appointed to exercise the "judicial power." As per the Constitution, this involves deciding specific "cases" or "controversies"—that is, concrete disputes involving real facts, as opposed to abstract questions of law. Judging, in turn, entails the application of law

to the facts of a particular case. The facts matter greatly: The way in which the circumstances of a given case can be distinguished from one in the past or one in the future is often what creates the basis for a legal rule, because it is that distinction that becomes legally material.

Judges don't decide cases in a vacuum or through divine inspiration. They do it in the crucible of adversarial testing. Appellate judges read the parties' briefs. They hear the lawyers' arguments. They review the precedents and the factual record. Then they piece it all together, rendering a decision that, in Justice Ginsburg's formulation, "should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives present." Opining on a legal question divorced from the context of a particular case is not judging at all. It is speculation, a guess as to what the right rule might be.

In that sense, a senatorial demand that a nominee take one side or the other on a given "issue" is futile. Who is to say which of any number of possible factual circumstances might be relevant when, because there is no case, there are no facts? How can anyone judge the correctness of an argument when, because there are no parties, no one has argued for or against it? Answering at all would be deceptive.

It also would run up against another constitutional guidepost, the Fifth Amendment's guarantee of due process of law. Litigants are entitled to a "fair trial in a fair tribunal," including a judge who is impartial and whose mind is not implacably closed to persuasion. A nominee's advance commitment to decide a question a certain way is incompatible with the appearance of fairness and impartiality that gives the law its legitimacy. It also compromises the independence of the judicial branch, a crucial check on overreaching by the political branches. Even a judge who has a decided an issue in an earlier case remains open to the prospect of going the other way in a later case, on different facts or different arguments. A judge who exchanges a commitment for a confirmation vote—or merely appears to do so—will forever be tainted.

All this holds true for issues already decided by the court, given that what constitutes "settled law" on the Supreme Court is in the eyes of the beholder. Nearly any issue may arise again, and the justices, unlike their counterparts on lower courts, are free to reconsider high-court precedent.

This week senators would do well to stick to more illuminating lines of inquiry: the more than 300 written opinions Judge Kavanaugh issued over his 12 years on the bench, his speeches and articles, his judicial philosophy, his character. There is no legitimate reason to demand hints, forecasts and previews that Judge Kavanaugh is duty-bound to deny.

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