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# What Senators Should Ask Brett Kavanaugh

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# What Senators Should Ask Brett Kavanaugh

## **Abstract**

At today's confirmation hearing of Supreme Court nominee Brett Kavanaugh, senators are attempting to decipher how Kavanaugh will rule on certain issue areas should he be confirmed to the high court. Senators will undoubtedly demand answers to their questions that ask whether Judge Kavanaugh will vote to uphold certain past cases, such as *Roe v. Wade* or *Citizens United*, and they'll want a "simple yes or no" answer. While this line of questioning will primarily originate from the left side of the aisle this time around, this tactic is routinely used by both parties when vetting Supreme Court nominees.

There's little doubt, however, that answering questions relating to potential future cases would threaten the neutrality we expect from all jurists — not to mention those justices at the pinnacle of Article III's judicial hierarchy. [*excerpt*]

## **Keywords**

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# What senators should ask Brett Kavanaugh

BY SCOTT S. BODDERY, OPINION CONTRIBUTOR — 09/05/18 11:15 AM EDT

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At today's confirmation hearing of Supreme Court nominee Brett Kavanaugh, senators are attempting to decipher how Kavanaugh will rule on certain issue areas should he be confirmed to the high court. Senators will undoubtedly demand answers to their questions that ask whether Judge Kavanaugh will vote to uphold certain past cases, such as *Roe v. Wade* or *Citizens United*, and they'll want a "simple yes or no" answer. While this line of questioning will primarily originate from the left side of the aisle this time around, this tactic is routinely used by both parties when vetting Supreme Court nominees.

There's little doubt, however, that answering questions relating to potential future cases would threaten the neutrality we expect from all jurists — not to mention those justices at the pinnacle of Article III's judicial hierarchy.

Expecting a judicial nominee to signal his or her preferred outcome to a case before deliberating on the merits of a particular set of facts is exactly the type of judicial behavior that has garnered Supreme Court justices the pejorative reputation of being little more than politicians in robes.

Justice Ruth Bader Ginsburg famously pointed out the inappropriateness of answering such questions during her own confirmation hearing in 1993. During her confirmation, Ginsburg stated that "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." Her statement rings true today just as it did 25 years ago.

To guard against encouraging violations of judicial ethics, senators can—and should — take another approach when questioning Kavanaugh. Rather than asking particular questions that are likely to illicit nebulous answers from the nominee, senators should simply ask Kavanaugh whether he believes the Constitution affords citizens a fundamental right to privacy.

The right to privacy is not expressly laid out in the Constitution, yet the Supreme Court has ruled its existence is supported by a slew of other clauses within the Bill of Rights. The clauses that purportedly support this right include the First Amendment's right to association, the Third Amendment's prohibition against quartering soldiers, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth Amendment's protection against self-incrimination, and the Ninth Amendment's proclamation that the rights listed in the Bill of Rights don't deny other rights held by the people. The Supreme Court decided decades ago that these rights, when taken together, form a penumbra of rights by implication, and that the right to privacy is one of them.

The fundamental right to privacy, once articulated by the court, has since been used as legal authority in a number of different issue areas. It has been the cornerstone in cases that address women's reproductive rights, anti-sodomy laws, constitutional police procedure, and government surveillance, to name but a few — issues areas that are surely important to the American people and the senators on the Judiciary Committee.

What's more, by classifying the right to privacy as fundamental, the Supreme Court then employs a more rigorous standard of review when deciding whether a particular statute or government action violates that right. When the court uses this rigorous standard, the statute being scrutinized is nearly always struck down as unconstitutional.

This simple, straightforward question doesn't require Kavanaugh to pre-judge a case before it reaches the court, yet his answer to it will go a long way in signaling to senators his judicial philosophy and his likely stance on a number of salient issue areas.

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