



United States  
of America

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 115<sup>th</sup> CONGRESS, SECOND SESSION

Vol. 164

WASHINGTON, FRIDAY, OCTOBER 5, 2018

No. 166

## Senate

The Senate met at 9:30 a.m. and was called to order by the Honorable SHELLEY MOORE CAPITO, a Senator from the State of West Virginia.

### PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal God, our help in ages past and hope for years to come, we honor Your Name.

Today, have mercy upon us. According to Your loving kindness and tender mercies, have Your way in this Chamber and in the hearts of our lawmakers. Lord, our Senators are the clay, and You are the divine potter. Using Your wisdom, mercy, and might, mold and make our legislators to be instruments of Your divine purposes. Give them the courage and wisdom to surrender and yield to the unfolding of Your unstoppable providence as they acknowledge that our times are in Your hands.

We pray in Your sovereign Name. Amen.

### PLEDGE OF ALLEGIANCE

The Presiding Officer led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

### APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. HATCH).

The bill clerk read the following letter:

U.S. SENATE,  
PRESIDENT PRO TEMPORE,  
Washington, DC, October 5, 2018.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby

appoint the Honorable SHELLEY MOORE CAPITO, a Senator from the State of West Virginia, to perform the duties of the Chair.

ORRIN G. HATCH,  
President pro tempore.

Mrs. CAPITO thereupon assumed the Chair as Acting President pro tempore.

### RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

### CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

### EXECUTIVE SESSION

#### EXECUTIVE CALENDAR

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session to resume consideration of the following nomination, which the clerk will report.

The bill clerk read the nomination of Brett M. Kavanaugh, of Maryland, to be an Associate Justice of the Supreme Court of the United States.

The ACTING PRESIDENT pro tempore. The Senator from Iowa.

Mr. GRASSLEY. Madam President, would you inform me of the amount of time I have to speak.

The ACTING PRESIDENT pro tempore. There has been no time agreement made.

Mr. GRASSLEY. I thank the Acting President pro tempore.

Madam President, 100 days ago, Justice Kennedy announced his retirement from the Supreme Court. Shortly thereafter, on July 9, the President announced the nomination of Judge Brett Kavanaugh to serve as the newest Justice.

Judge Kavanaugh has spent 25 years of his career in public service. He spent the last 12 years on the DC Circuit—considered the second most important Federal court in the country. His record there has been extremely impressive because the Supreme Court adopted a position advanced in Judge Kavanaugh's opinions no fewer than a dozen times.

Judge Kavanaugh is also a pillar of his community and in the legal profession. He serves underprivileged communities, coaches girls' basketball, and is a lector at his church. He has shown a deep commitment to preparing young lawyers for their careers. He has been a law professor at three prestigious law schools and a mentor to dozens of judicial law clerks.

This should have been a respectable and dignified confirmation process. In a previous era, this highly qualified nominee would have received unanimous support in the Senate. Before leftwing, outside groups and Democratic leaders had him in their sights, Judge Kavanaugh possessed an impeccable reputation and was held in high esteem by the bench and the bar alike. Even the American Bar Association, which the Democrats say is their gold standard for judges, gave him its unanimous "well-qualified" rating.

What leftwing groups and their Democratic allies have done to Judge Kavanaugh is nothing short of monstrous. I saw what they did to Robert Bork. I saw what they did to Clarence Thomas. That was nothing compared to what we have witnessed in the last 3 months. The conduct of leftwing, dark money groups and their allies in this body has shamed us all.

The fix was in from the very beginning. Before the ink was even dry on the nomination, the minority leader announced he would oppose Judge Kavanaugh's nomination with everything he had. Even before he knew the President's nominee, the minority leader said he was opposed to all 25

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



Printed on recycled paper.

S6559

well-qualified potential nominees listed by this President. One member of my committee said those who would vote to confirm Judge Kavanaugh would be “complicit in evil.” Another member of the committee revealed the endgame when she suggested that Senate Democrats could hold the vacancy open for 2 years if they defeated Judge Kavanaugh and took control of the Senate in these midterm elections.

I oversaw the most transparent confirmation process in Senate history based on the fact of the more than 500,000 pages of judicial writings, publications, and documents from Judge Kavanaugh’s executive branch service. This is on top of the 307 judicial opinions he authored. Despite the Democrats’ efforts to bury the committee in even more paperwork, the Senate Judiciary Committee held a timely, 4-day hearing on Judge Kavanaugh’s nomination last month. Judge Kavanaugh testified for more than 32 hours over the course of 3 days. Judge Kavanaugh showed the Nation exactly why he deserves to be on the Supreme Court—because of his qualifications.

Judge Kavanaugh’s antagonizers couldn’t land a punch on him during his 3 days of testimony. Even when they made false or misleading arguments, they couldn’t touch him. Some of my colleagues accused Judge Kavanaugh of committing perjury. For that false claim, the Washington Post Fact Checker awarded my colleague three Pinocchios. Another colleague claimed Judge Kavanaugh described contraceptives as “abortion-inducing” drugs. The video my colleague shared on the internet was doctored to omit the fact that Judge Kavanaugh was describing the plaintiffs’ claims in a case that he had decided and not his own views. My colleague was awarded four Pinocchios. Those, of course, are the most Pinocchios you can get.

Yet they still had one big card to play, which they had kept way up their sleeves for a month—actually, for 45 days, I think. In July, the ranking member received a letter from Dr. Christine Blasey Ford, alleging that Judge Kavanaugh sexually assaulted her in high school 36 years ago. Instead of referring Dr. Ford to the FBI or sharing these allegations with her colleagues—either of which would have respected and preserved Dr. Ford’s confidentiality and is what Dr. Ford requested—the ranking member referred Dr. Ford to Democratic-activist attorneys who were closely tied to the Clintons. The ranking member shamefully sat on these allegations for nearly 7 weeks, only to reveal them at the eleventh hour, when it appeared that Judge Kavanaugh was headed toward confirmation because he was so qualified.

The ranking member had numerous opportunities to raise these allegations with Judge Kavanaugh personally. I will give you six examples.

She could have discussed them with Judge Kavanaugh during their private meeting on August 20—a meeting

which took place after her staff had sent Dr. Ford to Democratic lawyers—or shared them with 64 of her Senate colleagues who had also met with him individually; the ranking member’s staff could have raised them with Judge Kavanaugh during a background investigation followup call in late August; Senators could have asked Judge Kavanaugh about the allegations during his 32 hours of testimony over the course of 3 days; Judiciary Committee members could have asked Judge Kavanaugh about this in the closed session of the hearing, which the ranking member didn’t attend. The closed session is the appropriate place to bring up issues about which confidentiality is supposed to be respected, and there were no questions about these allegations among the 1,300 written questions that had been sent to Judge Kavanaugh after the hearing. This amounts to more written questions being submitted to this nominee after a hearing than to all Supreme Court nominees combined.

Keeping the July 30 letter secret deprived Senators of having all the facts they needed to have about this nomination.

It was not until September 13—July 30 to September 13, nearly 7 weeks after the ranking member received these allegations and on the eve of the confirmation vote—that the ranking member referred them to the FBI. Then, somehow, they were leaked to the press. It was not until those news reports on September 16 that I even learned of Dr. Ford’s identity. This is an outrage. The political motives behind the Democrats’ actions should be obvious to everyone.

Dr. Ford requested the opportunity to tell her story to the Senate Judiciary Committee. After a lot of foot-dragging by Dr. Ford’s attorneys, they finally agreed to a public hearing. As promised, I provided a safe, comfortable, and dignified forum for Dr. Ford as well as for Judge Kavanaugh. Dr. Ford was sincere in her testimony, as was Judge Kavanaugh, who emphatically denied the allegations.

It is true that confirmation hearings aren’t a trial, but trials have rules based on commonsense notions of fairness and due process, not the other way around. It is a fundamental aspect of fairness and a fundamental aspect of due process that the accuser have the burden of proving allegations. Judge Kavanaugh was publicly accused of a crime, and his reputation and livelihood were at stake. So it was only fair that his accuser have the burden of proof. The consensus is, the burden was not met.

Ultimately, the existing evidence, including the statements of the three alleged eyewitnesses named by Dr. Ford, refuted Dr. Ford’s version of the facts. Our investigative nominations counsel, Rachel Mitchell, who has nearly 25 years of experience in advocating for sexual assault victims and in investigating sex crimes, concluded there

was a lack of specificity and simply too many inconsistencies in Dr. Ford’s allegations to establish that Judge Kavanaugh committed sexual assault even under the lowest standard of proof.

She concluded:

A “he said, she said” case is incredibly difficult to prove. But this case is even weaker than that. Dr. Ford identified other witnesses to the event, and those witnesses either refuted her allegations or failed to corroborate them. For the reasons discussed below, I do not think that a reasonable prosecutor would bring this case based on the evidence before the Committee. Nor do I believe this evidence is sufficient to satisfy the preponderance-of-the-evidence standard.

We have thoroughly investigated Judge Kavanaugh’s background.

In addition to the prior six FBI full-field background investigations with the interviews of nearly 150 people who have known Judge Kavanaugh his entire life, the committee also separately and thoroughly investigated every credible allegation we received. Our more than 20 committee staff members have worked night and day over the last many weeks in tracking down virtually all leads, and at the request of undecided members, the FBI reopened Judge Kavanaugh’s background investigation for another week.

The FBI interviewed 10 more people related to the latest credible sexual assault allegations, and the FBI confirmed what the Senate investigators already concluded, which is this: There is nothing in the supplemental FBI background investigation report that we didn’t already know.

These uncorroborated accusations have been unequivocally and repeatedly rejected by Judge Kavanaugh, and neither the Judiciary Committee nor the FBI could locate any third parties who can attest to any of the allegations. There also is no contemporaneous evidence.

This investigation found no hint of misconduct, and the same is true of six prior FBI investigations conducted during Judge Kavanaugh’s 25 years of public service. Nothing an investigator, including career FBI special agents, does could ever be good enough to satisfy the Democratic leadership in Washington, who staked out opposition to Judge Kavanaugh before he was even nominated.

There is simply no reason, then, to deny Judge Kavanaugh a seat on the Supreme Court on the basis of the evidence presented to us. The Democratic strategy used against Judge Kavanaugh has made one thing clear: They will never be satisfied, no matter how fair and thorough the process is.

Thirty-one years after the Senate Democrats’ treatment of Robert Bork, their playbook remains the same. For the leftwing, advice and consent has become search and destroy, a demolition derby.

I am pleased to support Judge Kavanaugh’s confirmation. I am sorry for what the whole family has gone through the last several weeks. We

should all admire Kavanaugh's willingness to serve his country, despite the way he has been treated. It would be a travesty if the Senate did not confirm the most qualified nominee in our Nation's history.

The multitude of allegations against him have proved to be false. They have also proved that no discussion of his qualifications have shown he wasn't qualified. We had a campaign of distraction from his outstanding qualifications, a campaign of destruction of this fine individual.

What we have learned is the resistance that has existed since the day after the November 2016 election is centered right here on Capitol Hill. They have encouraged mob rule.

When you hear about things like "Get in their face; bother people at every restaurant where you can find a Cabinet Member"—these are coming from public servants who ought to set an example of civility in American society, and it has been made worse by what has happened to Judge Kavanaugh.

I hope we can say no to mob rule by voting to confirm Judge Kavanaugh.

I yield the floor.

The ACTING PRESIDENT pro tempore, The Senator from California.

Mrs. FEINSTEIN. Madam President, I understand that in the order I have 15 minutes; is that correct?

The ACTING PRESIDENT pro tempore. The Senator is recognized.

Mrs. FEINSTEIN. Thank you very much.

Madam President, this has been my ninth Supreme Court nomination hearing, and I must say, I have never experienced anything like this.

Never before have we had a Supreme Court nominee where over 90 percent of his record has been hidden from the public and the Senate. Never before have we had a nominee display such flagrant partisanship and open hostility at a hearing, and never before have we had a nominee facing allegations of sexual assault.

The nominee before us being considered for a pivotal swing seat, if confirmed, would be the deciding vote on some of the most important and divisive issues of our day.

I would like to start by speaking about some of the issues in relation to Judge Kavanaugh.

President Trump promised to nominate to the Supreme Court only individuals who would be pro-life and pro-gun nominees and who would automatically overturn *Roe v. Wade*. In my judgment, Judge Kavanaugh clearly meets the test.

In a speech in 2017, Judge Kavanaugh focused on praising Justice Rehnquist and his dissent in *Roe v. Wade*, where he challenged the right to women's privacy as protected in the Constitution.

Also, last year, Judge Kavanaugh argued in a dissent in a Texas case that a Jane Doe should not be able to exercise her right to choose because she did not have family and friends help her

make the decision. If adopted, this argument could rewrite Supreme Court precedent and require courts to determine whether a young woman has a sufficient support network when making her decision, even in cases—as is in this one—where she had gone before a court.

His reasoning demonstrates that Judge Kavanaugh not only is willing to disregard precedent, but his opinions fail to appreciate the challenging realities women face when making these most difficult decisions.

When I asked him about whether *Roe* and *Casey* were settled law and whether they were correctly decided, he refused to answer. He would say only that these cases are "entitled to respect."

As we all know, *Roe v. Wade* is one of a series of cases that upheld an individual's right to decide who to marry, where to send your children to school, what kind of medical care you can receive at the end of life, as well as whether and when to have a family. According to these cases, the government cannot interfere with these decisions.

Another issue that gives me great pause is Judge Kavanaugh's extreme view on guns. In reviewing his record and judicial opinions, it is clear his views go well beyond simply being pro-gun.

During a lecture at Notre Dame Law School, Judge Kavanaugh himself said he would be "the first to acknowledge that most lower-court judges have disagreed" with his views on the Second Amendment.

Specifically, in *District of Columbia v. Heller*, Judge Kavanaugh wrote in a dissenting opinion that "unless guns were regulated either at the time the Constitution was written or traditionally throughout history, they cannot be regulated now."

In his own words, he said gun laws are unconstitutional unless they are "traditional or common in the United States."

Judge Kavanaugh would have struck down DC's assault weapons ban because they have not historically been banned. This logic means that as weapons become more advanced and more dangerous, they cannot be regulated at all.

When I asked Judge Kavanaugh about his views that if a gun is in "common use," it cannot be regulated, he replied this way:

There are millions and millions and millions of semi-automatic rifles that are possessed. So that seemed to fit "common use" and not be a dangerous and unusual weapon.

Think about that. Judge Kavanaugh made up a new standard that had nothing to do with "common use" but instead relied on whether a gun is widely possessed and owned as determinative of whether it is subject to any regulation.

The United States makes up 4 percent of the worldwide population, but we own 42 percent of the world's guns. By Judge Kavanaugh's standard, no

State or locality will be able to place any limitation on guns because of widespread ownership in this country.

I am also concerned about his views on Presidential power. Specifically, he has said that sitting Presidents cannot be indicted, cannot be prosecuted, should not be investigated, and should have the authority to fire a special counsel at will. In other words, the President of the United States is above and outside the law.

These views raise serious concerns that should concern us all, especially at a time when the President continually threatens to fire the leadership of the Department of Justice for failing to be loyal and reigning in the Mueller investigation.

These views alone are sufficient for me to vote against Judge Kavanaugh, but what we have seen and experienced in the past several weeks has raised serious new concerns—concerns I believe should worry us all.

Judges are expected to be "even-handed, unbiased, impartial, [and] courteous"; however, at the hearing last week, we saw a man filled with anger and aggression. Judge Kavanaugh raised his voice. He interrupted Senators. He accused Democrats of "lying in wait," and replacing "advice and consent with search and destroy."

He even went so far as to say that Dr. Ford's allegations were nothing more than "a calculated and orchestrated political hit, fueled with pent-up anger about President Trump and the 2016 election," and "revenge on behalf of the Clintons." How could he?

This behavior revealed a hostility and belligerence that is unbecoming of someone seeking to be elevated to the U.S. Supreme Court. His display was so shocking that more than 2,400 law professors from around the country have expressed their opposition.

They wrote: "Instead of trying to sort out with reason and care the allegations that were raised, Judge Kavanaugh responded in an intemperate, inflammatory and partial manner, as he interrupted and, at times, was discourteous to senators."

The professors concluded: "We have differing views about other qualifications of Judge Kavanaugh. But we are united as professors of law and scholars of judicial institutions, in believing he did not display the impartiality and judicial temperament requisite to sit on the highest court of our land."

Madam President, finally, I want to mention the serious and credible allegations raised by Dr. Christine Blasey Ford and Deborah Ramirez, the two women who came forward to tell their experiences facing sexual assault.

When Dr. Ford decided to make her story public, she faced all her worst fears. She was harassed. She received death threats. She had to relocate her home, her husband, and two children. Yet, in less than a week, she came before the Senate and told 21 Senators she had never met, along with millions

of Americans, about the most tragic, traumatic, and difficult experience of her life. She did so with poise, grace, and, most importantly, bravery.

Unfortunately, she was met with partisanship and hostility. My Republican colleagues have largely chosen to ignore her powerful testimony.

Senators weren't allowed to hear from any witnesses who could corroborate or refute her account. They refused to gather evidence or do an impartial investigation into her allegations.

Deborah Ramirez also reluctantly came forward to tell her story. Like Dr. Ford, Ms. Ramirez offered to speak to the FBI. Both Ford and Ramirez submitted evidence to support their allegations, including naming over two dozen witnesses each.

Unfortunately, the limited investigation that was conducted by the FBI failed to interview any one of the witnesses these who women identified who could support her account.

Let me say that again. They refused to investigate—to talk with—any of the 24 witnesses that could have supported their accounts.

I think it is important to remember why we are here today. We are here to determine whether Judge Kavanaugh has demonstrated the impartiality, the temperament, and the even-handedness that is needed to serve on this great High Court of our land.

If confirmed, he will join eight other individuals who are charged with deciding how the laws of the land are interpreted and applied. He would be a deciding vote on the most important issues affecting our country and every American for generations to come.

Based on all of the factors we have before us, I do not believe Judge Kavanaugh has earned this seat.

Thank you.

#### RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Democratic leader is recognized.

Mr. SCHUMER. Madam President, from start to finish, President Trump's nomination of Judge Brett Kavanaugh to the U.S. Supreme Court will go down as one of the saddest, most sordid in the long history of the Federal judiciary.

The well was poisoned from the outset when President Trump selected Judge Kavanaugh from a list of names preapproved by hard-right special interest groups for whom the national interest is a trifling concern compared to repealing *Roe v. Wade*, cutting people's healthcare, and achieving a partisan majority on the Supreme Court. The rot worsened when the Republican majority on the Judiciary Committee shielded the bulk of Judge Kavanaugh's records from the public, discarding decades of bipartisan precedent and thwarting norms of transparency and fairness. Finally, the dam broke under the weight of credible allegations that Judge Kavanaugh committed a sexual assault in high school.

In 2018, the Republican majority conducted a hearing that made the Anita Hill hearings in 1991 look fair by comparison. At this hearing, there were no corroborating witnesses on either side and no independent investigation of the facts to inform the questioning. They even hired an outside counsel to put a witness, Dr. Ford, on trial. Only at the eleventh-hour urging of break-away Members of their caucus, Republicans submitted, reluctantly, to a 1-week investigation of the allegations—an investigation which was then severely circumscribed by the White House.

Our Republican friends blame us for this process. They are always finding a straw man. But nothing could be further from the truth. First, they blame us for delay, knowing full well that Majority Leader MCCONNELL has complete control of when nominees are brought to the floor. Leader MCCONNELL could have moved this nominee 2 weeks ago or 1 week ago. Democrats had no say—and don't—when it comes to what is scheduled for floor debate. But in each case, Leader MCCONNELL couldn't move the nominee forward because he was blocked by fellow Republicans—not Democrats—from moving forward. When it comes to complaining about delay, two words never come from our Republican friends' lips: "Merrick Garland."

Republicans are also saying that we engaged in "a smear campaign" or the "politics of personal destruction" with this nomination. In reality, again, they are using Democrats as a straw man, because what they are really talking about is what Dr. Ford said. Democrats did not induce her to come forward; her conscience did. Are our Republican friends accusing Dr. Ford and her deeply held memories of what happened to her of a smear campaign? Are they accusing Dr. Ford of a smear campaign, of engaging in the politics of personal destruction? Because that is who they are actually blaming. They are decrying her testimony and then trying to blame Democrats. I don't blame them—they have a flawed nominee. They don't want the focus on the nominee.

When future Americans look back at these proceedings, let them draw no lessons from the Senate's conduct here. Let them look back on this chapter as the shameful culmination of the scorched-earth politics practiced by the hard right in America—people who will stop at nothing to entrench an advantage on our Nation's courts. Let the confirmation process for Judge Kavanaugh be recorded as a sorry epilogue to the brazen theft of Justice Scalia's seat, the ignominious end of bipartisan cooperation and consultation on the confirmation of Supreme Court Justices. And for what? For whom were Senate Republican leaders willing to discard all semblance of fairness to confirm? Judge Brett Kavanaugh—certainly a product of an elite education but also someone with a hard-right, conservative jurispru-

dence, far, far away from what average Americans believe.

Why most Democrats opposed his nomination at the outset feels like ancient history now, but let's not forget that, most importantly, we strongly disagree with a number of Judge Kavanaugh's views. He is deeply skeptical of unenumerated rights, including a woman's right to make fundamentally private decisions about her medical care. He is deeply skeptical of the government's role in protecting Americans with preexisting conditions. He is deeply skeptical of nearly all rules and regulations that protect consumers, workers, and the environment.

The flashing red warning sign at the center of Judge Kavanaugh's jurisprudence is his views on Executive power and accountability. Somehow, this conservative judge and scholar of the Constitution sees at the heart of American democracy a President-cum-King; an Executive who is unaccountable to the laws he is sworn to uphold; a head-of-state who, while in office, should be beyond the reach of subpoenas, criminal investigations, or civil investigations.

This moment in American history demands deep skepticism about Judge Kavanaugh's views on Executive power, nominated as he was by an Executive who disdains the constraints of his office and who is, at this very moment, the apparent subject of investigations his Supreme Court nominee believes should be invalid.

I met with Judge Kavanaugh for almost 2 hours, and I asked him about all of those issues. His answers were constantly evasive and utterly unsatisfactory. It was *deja vu* all over again in the first round of hearings, when Judge Kavanaugh deliberately avoided talking about his views on *Roe*, healthcare, Presidential accountability, and more. There was no legal reason, rule, or logic that prevented him from being clear and saying what he thought. He was evasive because he knows that his views are deeply at odds with the progress America has made over the last half century of jurisprudence and at odds with what most Americans believe. His performance was not only unfair and frustrating to the Senate, it was unfair to the American people. When a nominee refuses to disclose their views, chances are you have a nominee whose views are far outside the mainstream of America, whether they be far right or far left.

My colleagues on the other side of the aisle may not have as grave a concern about these views as we do, but let no American be surprised if Judge Kavanaugh becomes a decisive vote to restrict the rights and privileges of the American people, while stretching the bounds of privilege for the current occupant of the White House.

Judge Kavanaugh's nomination ultimately does not only encompass questions of ideology or credentials but questions of character. Here again, Judge Kavanaugh falls woefully short of what Americans expect and deserve