

Kavanaugh understands a good judge is an umpire — not a diva

“A good judge must be an umpire,” proclaimed Judge Brett Kavanaugh on the opening day of his Supreme Court confirmation hearing. It’s easy for sophisticated observers to mock this homespun and hokey metaphor. But the metaphor, though imperfect, illuminates three important truths about judges and about the nature of our current judicial selection process.

First, the umpire is not the star athlete. The game is not and should not be about the umpire. Not all judges understand this. One of the judges for whom Kavanaugh clerked long ago, Alex Kozinski, had an outsized ego that ill fit his robes. (The judge recently resigned in disgrace.) Justice Scalia, for all his judicial talent, was a diva — and to that extent not as towering a judge as he might otherwise have been. Nor is Ruth Bader Ginsburg a better jurist now that she has become “notorious.”

Contrast the ideal judicial/umpireal temperament — epitomized by publicity-shy Justice David Souter, who retired early from the Supreme Court and D.C circuit judge [Merrick Garland](#), who has maintained a quietly dignified profile throughout his distinguished career of public service — with today’s Senate, filled with anti-umpireal star-athlete egos, preening and posing for their close-ups and turns at bat: Look at me! Vote for me! Work for me! Give to my campaign! Me for president!

Second, just as the umpire is not a member of either baseball team on the field, so too a judge should not be red or blue. She should wear black. Sophisticates can mock this judicial ideal, but it captures a profound truth. Tuesday’s raucousness in the hearing room illustrates what can happen when red and blue teams play hardball. True, Kavanaugh believes in teams

and teamwork — and umpires themselves often work as teams, conferring on difficult calls.

But how does Kavanaugh define judicial teamwork? He sees the court as a team of nine justices, and promised Tuesday not simply to play ball with the squad of five Republican appointees: “If confirmed to the court, I would be part of a Team of Nine ... I would always strive to be a team player on the Team of Nine.”

Even if the court at times makes interstitial policy decisions of a certain sort — even if the court “makes law” in some sense, at least some of the time — the one-team lawmaking process suggested by Kavanaugh is vastly different from the two-team lawmaking system on full display in the Capitol across the street from the court. As Kavanaugh astutely observed: “The justices on the Supreme Court do not sit on opposite sides of an aisle. They do not caucus in separate rooms.” Tuesday’s hearings were about two teams — 11 Reds against 10 Blues, with rather little evidence of any teamwork among all 21.

But how can we be sure Kavanaugh means what he says about transcending partisanship on the Supreme Court? After all, Kavanaugh was a stalwart red-team politico for much of his early career. What we do know is that once he put on black robes and hung up his red jersey, he has chosen for the last dozen years as a federal appellate judge to surround himself with assistants — law clerks — from both political teams. Contrast this with the senators on Tuesday, flanked by true-blue staffers on one side of the room arrayed against red-hot staffers on the other.

A huge problem for the judge-in-black-just-an-umpire vision is that America’s judicial selection process enables the teams themselves — our two national political parties — to pick the umpires. The process of judicial selection is highly partisan. The saving grace of the system is that once

selected, a justice need not curry favor with the party that put him on the high court. Senators by contrast must regularly appease their respective bases to win re-election.

The third aspect of the judge as umpire metaphor is that the good judge — like the good umpire — generally follows existing rules and does not invent new rules out of whole cloth.

But where are these existing rules to be found? There's the rub, and there is the biggest difference between umpiring and judging. For major league umpires, the real rule book is not actually the text of the hoary rules themselves; rather, it's how the rules have come to be applied in practice. And for many thoughtful judges, the real rule book is, similarly, the set of precedents laid down by earlier judges. But for textualist and "originalist" judges — and Kavanaugh is a textualist and originalist in key respects — the most fundamental rule book is the text of the Constitution itself, as originally understood by the generation that ratified the text. Text and precedent sometimes conflict, and this makes the art of proper judging far more difficult than good umpiring.

Kavanaugh himself is of course acutely aware of this — but for all its imperfections, his umpire metaphor usefully tells us what kind of justice he wants to be: a modest, nonpartisan rule-follower.

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