



“The Nature of Judicial Independence”

The Hon. Stephanos Bibas, U.S. Court of Appeals for the Third Circuit (Interviewer)
The Hon. Anthony M. Kennedy, Associate Justice of the U.S. Supreme Court (retired)
David F. Levi, former dean of Duke University School of Law

Summary: With Justice Anthony Kennedy’s retirement in 2018, President Donald Trump was given his second appointment to the U.S. Supreme Court. This opening was widely seen as giving the president the chance to dramatically shift the balance of the U.S. Supreme Court to a more solid, conservative majority, even more so than the vacancy created by the death of Justice Antonin Scalia. Unlike Scalia, who was generally a reliable conservative vote, Kennedy had emerged as the “swing justice,” assuming a role previously taken by Justice Sandra Day O’Connor. Indeed, even more than O’Connor, Kennedy had played a key role in some of the Supreme Court’s most recent controversial decisions, particularly those involving, among other matters, abortion, homosexuality, and prayer in public schools.

Discussion Questions:

1. During his remarks, Kennedy notes several times that the Constitution must have relevance “in our own time.” What does he mean by this statement? Do you agree with the notion of a “living Constitution”? Scalia championed a “dead Constitution,” believing that changes in a democratic society should come in the form of amendments to the Constitution. To which of these concepts do you subscribe? Why?
2. Kennedy was praised for his willingness to engage with judges from other countries. His opinions sometimes cited the decisions of foreign courts. Do you think U.S. judges should be influenced by decisions from foreign nations? Why?

3. Kennedy's retirement attracted a great deal of attention because he was frequently the fifth vote in many of the Court's 5-4 decisions. As a result, he was known as "the swing justice." In reference to this, Kennedy quips, "The cases swing; I don't." What did he mean by this statement? Do you agree with him? Why?
4. In her earlier remarks, journalist Linda Greenhouse argues that Kennedy's opinion in a case involving late-term abortions represented an example of when the Court, without saying so, overturned a precedent. Do you agree with her? Do you think it is unusual for the Court to do this? Consider that most people would say that *Brown v. Board of Education* reversed *Plessy v. Ferguson*. It did not; only later was the *Plessy* precedent overturned.
5. One suggestion advanced to explain the highly charged debate about the U.S. Supreme Court's decisions is that some of the recent cases involve "social issues," e.g., abortion and homosexuality. Kennedy disagrees. Do you? Why?
6. Referring to the controversial Supreme Court decision upholding the First Amendment right of an individual to burn the American flag, Kennedy argues that over time the decision came to be accepted by most Americans. With this argument, Kennedy seems to imply that although the Court is a counter majoritarian branch of government, its decisions come, over time, to be accepted by the people. Do you agree with his argument? Why? Do you think there are exceptions to this argument? If yes, what are they?
7. Former presidential candidate Pete Buttigieg suggested that if elected, he would appoint individuals to the Supreme Court with a similar perspective to Kennedy's. Do you agree or disagree with this position? Why?
8. Regardless of party affiliation, U.S. Supreme Court justices today generally agree on the application of the First Amendment's guarantees of free speech and free press. Kennedy suggests a new area in which they may soon be forced to determine how to apply First Amendment principles regarding the Internet. For

example, should hate speech be protected? Is there a right to be forgotten?
Should there be a right to purge material one has placed on the internet?

The Fair and Impartial Judiciary Symposium was sponsored by the Rendell Center for Civics and Civic Engagement in partnership with the Annenberg Public Policy Center.