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Why Kavanaugh Should Not Attend the White House Ceremony

It would be a first step in demonstrating that he is the independent jurist he claims to be.

Oct. 8, 2018

By Michael Eric Herz

Mr. Herz is a law professor.

Brett Kavanaugh is now Justice Kavanaugh. He has been nominated, confirmed and — in a private ceremony on Saturday conducted by Chief Justice John Roberts and the retired Justice Anthony Kennedy — sworn in. There is nothing left to do. So why is he scheduled to be at the White House on Monday evening for a public ceremony, one that President Trump has inaccurately called a “swearing-in ceremony”?

Like all new justices, Justice Kavanaugh took a judicial oath in which he swore to “faithfully and impartially discharge and perform all the duties incumbent upon me.” But in the wake of his highly politicized remarks at his confirmation hearings, a large portion of the country has doubts that he will live up to that noble aspiration. He needs to demonstrate the independence and neutrality that he himself has stressed is essential to the work of the Supreme Court. A first step would be to politely decline to go to the White House for the ceremony.

In recent decades, there has often been a White House ceremony for a new appointee to the Supreme Court. Usually, as with Justice Neil Gorsuch, it is the occasion for the administration of one of the oaths new justices take. But that swearing-in is also a pretext for what has become a highly politicized victory lap for the president. Since Justice Kavanaugh has already been sworn in, this time even the pretext would be absent.

Like so much else that is unseemly in American politics, the White House swearing-in ceremony is not limited to one president or one party. The practice seems to have begun with Ronald Reagan, but Bill Clinton kept it up. Each of the current justices except Elena Kagan and Sonia Sotomayor had a White House ceremony. In each instance, a beaming president (or, in Stephen Breyer’s case, the vice president) expressed approval, pride and the expectation that the new justice would do the right thing — often with not very subtle indications of what the right thing would be.

The retired Justice John Paul Stevens has lamented this practice of swearing in Supreme Court justices at the White House, calling it “both offensive and inappropriate.” In his words: “The president and the Senate play critical roles in the nomination and confirmation process. After that process ends, however, the ‘separate but equal’ regime takes over.”

Justice Stevens said recently that Justice Kavanaugh was not qualified to sit on the Supreme Court. His view did not prevail. But his view on the impropriety of a White House ceremony should.

At the White House ceremony in June announcing his nomination, Judge Kavanaugh delivered an inappropriately fawning statement of praise for Mr. Trump: “No president has ever consulted more widely, or talked with more people from more backgrounds, to seek input about a Supreme Court nomination.” The statement was worrisome even at the time. Considered in retrospect, it has disconcerting resonances with subsequent concerns about Justice Kavanaugh’s willingness both to tell the truth and to stand up to President Trump.

After all that has transpired since, Justice Kavanaugh should not repeat that performance. He is a life-tenured member of the Supreme Court. The president cannot tell him what to do. Justice Kavanaugh will be on the bench Tuesday morning. He should tell the president that he is sorry but he can’t make it on Monday as he is too busy preparing.

Of course, much more than ceremonial independence will be necessary for Justice Kavanaugh to convince doubters he is the independent jurist he claims to be. But not slouching dutifully back to the White House for a phony ceremony so the president can crow and give him his marching orders would be a good start.

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