

CONVERSATIONS

WITH BILL KRISTOL

Conversations with Bill Kristol

Guest: Harvey C. Mansfield, Professor of Government, Harvard University

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I: (0:15 – 29:05) The Gorsuch Confirmation Hearings

KRISTOL: Hi I'm Bill Kristol, welcome to CONVERSATIONS. I'm joined by Harvey Mansfield, Harvard professor, author.

MANSFIELD: Good to be here. Good to be here again.

KRISTOL: Good to have you back. So, we're speaking in early April, Judge Gorsuch is about to be confirmed by the United States Senate as a Supreme Court Justice. I'm supposed to watch the hearings and comment on these things on TV, but of course, I didn't and just depended on summaries, but you actually went to the trouble of watching?

MANSFIELD: Yes, I went to the trouble of watching and very glad for it, too. It was real drama.

If someone wanted to study American politics, I don't think you could find a better thing to look at – event – done as this was. It was a hearing, and each senator spoke in alternation, Republicans and Democrats. And they, at the end of it, had worked up a very good case, each for its own party, and its own position. These people are not intellectuals, they're not professors, they're not experts, but they did a very good job of presenting each party's view on the level that most people who are in politics or are interested in politics can understand. So, it was really impressive.

This was all on C-SPAN. It's better to go to C-SPAN than watch it on the networks. The networks interrupt with commercials and they also have commentary. It's better to see it without commentary. C-SPAN only tells you the names of the people and something of the procedures that are going on.

But here was a big event, which turned out to be a lesson in politics. You were learning from people who are actually in politics what was going on and what was the issue that was involved. Most generally, one could say, the issue was what's the relationship between law and politics. The two parties have quite different views on the Supreme Court.

Senator Grassley (R) – Charles Grassley from Iowa, who is the chairman of the relevant Senate committee – began, and he spoke of the people. The Supreme Court, this seemingly undemocratic institution is actually an instrument of the people. Which was an argument that was originally made by Alexander Hamilton in [Federalist 78](#), you can look it up. It still had its power for him. So, the people make

the Constitution, and that – directly – by ratifying, originally, and now by living under it and enjoying the opportunity to amend it when they wish. So, that gives the Constitution a greater authority than the legislature or Congress. Congress consists of representatives, not the people themselves. So, the representatives may get it wrong and the Court is needed to call the representatives to account – in that case, using as the standard the people's Constitution.

So that means that there are really two laws in America. One is the law that is passed by Congress – of course, that affects you and you have to obey. But then, the other is the law of the Constitution. The Constitution is not just a document, but it is a law that was put in the – That's a very strong statement by Justice Marshall right at the beginning of the history of the Supreme Court and that continues to flourish.

So with us, the rule of law is complicated by the fact of distinction between the two kinds of law, one above the other, but the other – the inferior law, the congressional law – is also the one that actually applies and has sanctions to it. If you disobey the law, something bad happens to you. Whereas, if you disobey the Constitution, well, that's what the Court works on and decides. Always in the name of the people.

So, that was Grassley's main point. The authority of the Supreme Court. That involves the separation of powers, which he and, then a little bit later, Senator Hatch (R), Orrin Hatch from Utah, emphasized. Separation of powers is a sterling, original principle of the Constitution, which the Court is bound to maintain. Separation of powers means that each power is independent of the others, and yet, made dependent, so that its independence doesn't permit it to encroach upon the other powers.

The Supreme Court is, in a way, the supreme institution in American politics, and yet, it's checked by this very proceeding and the fact that the president appoints them and Congress, or the Senate gets to advise and consent to his nomination.

If you look at this you have to understand that you're getting a view of American politics from the standpoint of the Supreme Court as it comes through the Senate. So, the senators were all more political in their talk than Judge Gorsuch was in his answers. He was talking like a judge; they were talking like politicians.

So that was – and the fact that there is this separation of powers means that each of the powers has its own point of view, and that means that that point of view is pushed or promoted by the party that holds that branch. So, when the Republicans have the Congress, they speak in favor of the powers of Congress, and the same with the presidency or – not quite the Supreme Court, at least, not to that same extent. This means that, in addition to your party, you've also got the power of the branch that you push. This kind of means that there is always a kind of built-in constitutional hypocrisy in American politics – that the two parties are pushing the power of Congress or the presidency, depending on whether they hold that particular power. And it's in their interest, obviously, to push the power of the branches that they hold. So, parties go back and forth in their devotion to a particular branch.

Now then, after Grassley spoke, we had Senator Dianne Feinstein (D) from California. She was all politics. Grassley and Hatch were all law. She was all politics, and of course, she began – and so did most of the Democrats – with a fact that this was a very political event. Merrick Garland had been nominated by President Obama, and here was – and the Senate had – really, in an unprecedented move – refused to even hold hearings on Garland's nomination, saying that the election would be a kind of mandate as to whether Republican or a Democrat should be the next Supreme Court Justice to replace Justice Scalia, who had died. So, they were full of indignation. It was wonderful to see that and to listen to it. They had got a windfall in Scalia's death, something they weren't expecting but were so very happy to get, and suddenly, it had been snatched out of their procession and given back to the other party, so that the Republicans could make good on the death of one of their – actually, *the* mainstay on the Republican side or the conservative side in the Supreme Court.

KRISTOL: Plus, they expected to win the election, as most people expected Hillary Clinton to win. Even though they were angry about Garland, they kind of assumed they would end up with a Democratically nominated justice. That was a shock.

MANSFIELD: Right. It might have been Garland, himself. And Senator McConnell (R-KY), who worked out this strategy, didn't even hold hearings. I think he was perhaps afraid that Garland might be rather good, rather impressive. Justice Gorsuch turned out to be, in his replies. So, it's better not to let the other side make their case in the most favorable circumstances. So, he took a gamble, you're right, but he didn't have anything to lose. Whereas, the Democrats had plenty to lose, and they lost it.

KRISTOL: President Trump doesn't give [Senate Majority] Leader McConnell enough credit for providing this great opportunity for him. You know, the much-derided Republican establishment in Washington that allegedly can't do anything. This was a case where McConnell held 54 senators – some of whom were under pressure to go along with Garland and at least give him a hearing, as you say – which was sort of unprecedented. It's impressive what McConnell did.

MANSFIELD: Would we want to say that McConnell helped Trump get elected?

KRISTOL: Yeah. Making the Court more of a visible issue, you think?

MANSFIELD: Yes. Many Republicans, it seemed, came back to Trump towards the end of the campaign and voted for him on this issue. So yes –

Anyway, so this was a very political occasion, and here were all these Republican Senators pretending they were putting up this impartial fellow. It was a “Who, me?” kind of thing. So, it was very, very partisan. It was a kind of partisan triumph, you might say, for the Republicans.

Democrats put up a good debate and certainly made their points. Their points were that the Supreme Court is really a political institution, and you can see that from the fact that there are many issues on which, political issues, on which it has pronounced, like gun control, abortion, environment, campaign finance. All these are very contested political issues, and the Court was right in the middle of them. How can you say that law is up here and politics is over there? That doesn't seem to make sense.

KRISTOL: And the Court often dividing between Republican-appointees and Democratic-appointees, which also suggests it's somewhat political.

MANSFIELD: It's polarized, like the rest of our politics. Not always, but sometimes. Conservatives divide, I think, a little oftener than the liberals. Yes, it seems, in that way, quite partisan. So, that suggests, I think, the fact that there are these two ways of looking at the Constitution, and this came out very much in the debate.

The Democrats were saying Gorsuch is not in the “mainstream” of American politics, but what they meant was he wasn't a mainstream liberal. I think, it turns out that we have two mainstreams – a conservative one a liberal one.

The liberal one says that the Constitution is “a living Constitution,” and that was a phrase invented by a progressive, I think, in the early 1920s. “A living constitution,” meaning *organic*. This is a great point of Woodrow Wilson, that the Constitution should be understood not as a mechanical instrument or mechanism with counteracting powers, so much as an *organic* one. And he was thinking in terms of the theory of evolution. So, to live means to evolve. Circumstances change in your life, and you have to react and make adjustments or changes which correspond to the new facts. So, America has become more of a democracy, so it's the business of the Supreme Court to encourage, or at least, endorse, this greater movement toward more and more democracy, in a sense of equality. So, the Supreme Court should be a

progressive institution. It should teach people that we need and should bless greater equality than we have. That is the way in which we are most surely ourselves.

To do this, the Court must have a kind of empathy for those who profit the most from great equality. And those who profit the most are the most vulnerable parts of our country. So, the government should take as its primary goal the succoring and improving, promoting of those who are most vulnerable, so they're brought into the whole of our country. The equality is not so much the end in itself as an instrument to the end of making a whole. Everybody is to be included. So, the Democrats often speak of inclusiveness as their goal. This is a way in which the Constitution must "live," by responding in the mode of evolution. In a way – of course, Darwin's theory is the theory of survival: that each species survives by making these adjustments to a new environment. Here, it's more than survival; its survival as a whole. Our country must be made a whole in which everyone feels equally involved and equally respected.

But, on the other hand, you have a Republican point of view, which has been called "originalism." Scalia had a lot to do with the formulation and promotion of that idea, originalism. What is the Constitution if it isn't a fixed way of proceeding? What it is requires you to be faithful to what it was when it was first made, and for the purposes of when it was first made.

That raises a question as to whether original means *literally* original, the text is an absolute Bible – but even the Bible has to be interpreted – so that text is an absolute authority that can't be questioned. Or is it a principle? Like the principle of the separation of powers. An example would be of something that must be changed, even according to Republicans, is the fact that the Constitution doesn't – it mentions the Army and Navy but not the Air Force. For some reason, we didn't have an air force in the 18th century, but now we do. [Laughter]. And so, the president, it seems, is given his power over the armed forces – includes that, even though it's not mentioned. So, that would be an example of how you can't quite be simply literal.

So, this is put up against the progressive notion, and it depends on the distinction between the fixed original law and the changeable congressional laws. Which requires a certain distance between the political context and the constitutional framework, which is also a context, larger context. There are all kinds of difficulties, and so on.

As the country goes on, it passes laws and those laws are put up to the Supreme Court to see whether they match the Constitution or not. And really, the question is, is this law required for, or permitted by, a free way of life? Can you have a free society, and for example, and not have a right of abortion? So, when the Court looks on that, it tends to – that type of question – it tends to pick one side or the other.

And that means that the Constitution sort of acquires more substance. But originally, the Constitution seems to be purely procedural. It tells you how to do things; it doesn't tell you, except in the most general terms, what your goals should be: A more perfect union, prosperity, and so on. And freedom. As it goes on, and so this, obviously, is what's called precedent – that the Constitution becomes the Constitution plus precedent, and you *can* change precedent. Sometimes the liberals want to change precedent in order to make the Constitution more living, more alive, more relevant; and the conservatives want to change it to go back against the progressive changes to something which came before.

You can say, then, the procedural aspect or precedent aspect of the judiciary complicates the whole question of law and politics by adding substance to the Constitution.

KRISTOL: I suppose that you could say, also, that under the original distinction of the Constitution up here and the laws down here, so to speak, constitutional law is the middle ground. Or the precedent that gets fought over, where the fights then take place. And conservatives have a slight, you know, prefer the Constitution to constitutional law, in a way, or want it to be more anchored in the Constitution.

MANSFIELD: Yes, that's true.

KRISTOL: Liberals seem to prefer constitutional law to the Constitution, sometimes, if it's progressed. So, this partisan split, like I say, I have two questions. One is, do you prefer one or the other of these views? [Is one] better for the country? Or is it a healthy dynamic between the two?

And relatedly, I guess, I would say this – I was struck, in Washington, you know, the conventional kind of commentary, I would say, on the hearings and on the whole process of this Supreme Court nomination is that “It’s too bad it’s so partisan.” You know? “In the old days, they didn’t have such partisan fights” – which is true to some degree – “over Supreme Court justices. And if only we could get back to a more – respect for good judges and all that.”

But it seems to me, you actually like, rather, or either you like or you think it’s inevitable, the partisan fight, and you think there is something educational about it, as well. You’re not a critic of the Democrats all voting, really, against Gorsuch and the Republicans voting for him. That’s a kind of a dynamic that –

MANSFIELD: Teaches you something about, yea. That law is not as impartial or universal as it wants to be, or as the people who are in charge of the law at present want it to be.

KRISTOL: Neither party, presumably.

MANSFIELD: Right. I prefer the original Constitution, but that’s partly because I think the people who made it are more intelligent than we are. And that if you wanted to study American politics and the American Constitution, you should go to the [Federalist](#), above all. First and foremost.

Now, I also think there is a certain inadequacy to the progressive notion of greater and greater equality. There needs to be – Democracy is not improved by always making it more and more democratic, in the sense of more and more equal. There are human inequalities, too, that need to be respected and given their due. And so, just a headlong rush – without really considering the consequences, without looking to any situation in which we would have had *enough* progress.

Progress is progress if it’s getting better and better. You wouldn’t call it progress unless it was surely irreversible, because then you might fall back. So, is it really possible? Is it even a good idea that we never reconsider what we once called progress? It would seem that a free society would want to have the choice whether to do that. And the Democrats, with their progressivism, aren’t sure of where they want to stop.

You can only call it progress if you know what’s worth stopping at, or where you should stop. What is *good*. Progress would be getting closer and closer to what is good. So, progressivism shouldn’t be something that is simply infinite and unending; it needs to know and be more knowing of, more cognizant of the limits to progressivism. That would be the general criticism I would make of the Democratic point of view.

KRISTOL: But this tension between originalism and progressivism, or whatever one – it’s not going away? And nor should it, I guess?

MANSFIELD: No, it’s not going away, and nor should it. Our democracy is something essentially progressive. It has trouble sitting still. It’s restless, and it needs to move. So, change, change, change. That’s going to be a reoccurring theme of our politics. It doesn’t always amount to much – maybe that’s good, too – but still, it’s – If it’s not good, it’s inevitable. I think that our parties are going to continue pretty much as they are. There is always going to be a conservative party and a progressive one.

KRISTOL: And Gorsuch, himself? You’ve spoken about the senators more than about him. Are there lessons to be learned from his replies? His manner of conducting himself?

MANSFIELD: Yes, he did very well. He's intelligent, but not too intelligent. He didn't show off; he didn't try to explain things too deeply.

Now, that's where the senators are so good. They gave good examples, things that people understand. Gorsuch knew not to be too much the constitutional lawyer. Of course, he set himself up as a man of great propriety who would never be disturbed or influenced by anything unjudicial. Very impartial.

KRISTOL: And I think, a little bit contemporary and sort of very fair and judicious, not quite the spirit of Bork or Scalia, the two great originators, you might say, of the point of view – not originators, but revivers, maybe, of the point of view that Gorsuch, more or less, holds.

MANSFIELD: He writes well but there are no barbs. He doesn't take shots at people.

KRISTOL: I sort of miss that, in Scalia. And I'm not sure we will ever have a justice like Scalia again, because one is not rewarded for that.

MANSFIELD: Right. It's good to have a rather belligerent person on your side sometimes. But he's not going to be that. But, maybe that has its virtues, too.

II: (29:05 – 39:32) Aristotle on Law and Politics

KRISTOL: Generally – I mean, what struck me, just reading about it a little, it does remind Americans of the rule of law, I mean, whether from the progressive point of view or a conservative point of view.

MANSFIELD: That's right. In both cases, it's law; that's true. And in both cases, that's questionable.

KRISTOL: Yes, talk about that a little bit, in conclusion.

MANSFIELD: Now, let's talk a little bit about Aristotle and his view.

KRISTOL: He didn't come up that much in the hearing.

MANSFIELD: He didn't come up. I don't think he was mentioned, and certainly not commented on. So, maybe there's something, a constitution which is even more original than our Constitution. And that is a kind of question mark which [Aristotle](#) raises in his [Politics](#).

In Book Three, there's a chapter on the question on whether is it better to be ruled by the best man or the best laws? So, even if you could get the best, most perfect laws, would that be better than the best man?

And so, law, it seems, in his argument – in Aristotle's argument – is a virtue and a defect. The virtue is that it's impartial. It doesn't have passion in it. It states what you must and must not do, but it doesn't express indignation or anger. And because it's impartial, it applies to everything. Even though it may be, say, passed – a certain law might be passed because of a terrible murder that wasn't adequately cared for in the previous law – still, it doesn't attack that particular person, or that criminal, or that event by itself but describes it in universal terms. Which means it cools down. Cools down – that's why it's better to have a law than lynching. Lynching is passionate, but rule of law slows you down, makes you follow a procedure, makes you identify and give proof.

So, that makes the law impartial. But the trouble with impartial is that it's also abstract. In order to be impartial, it has to be universal. It has to set a state of rational category of crime and criminal. But then, to do that, it has to abstract from particular cases that don't quite fit the universal. And that's where the best man would come in. The man with the most prudence would be able to see where the law is too harsh or too lenient. And act prudently and accordingly. But the trouble with that is, the more you do that, the more you enthrone the idea of prudence rather than law. And also, when you exercise your prudence to evade,

or to get around, or to make an exception in the law, you set a precedent, and if the same or similar difficulty arises again, then you have to do what you did before in those same circumstances.

So, you tend to recreate the whole idea of law that you're first questioning. Prudence, in other words, becomes a kind of law of its own. At the end, after you've made all these exceptions, you want to get back to the ease and the seeming justice of the law.

So, you can oscillate between perfect prudence and perfect legality, and neither position is tenable. This is in Aristotle. He wants the rule of prudence, but it has to be through law. So, a wise man, if he could give full expression to his wisdom, would be a king and run everything on his own because of his terrific wisdom. He would always know the best thing to do, and he would always know the best way to do it.

But still, he would accept this limitation on his rule, on the rule of wisdom, in the form of law or customary law. He, in his wisdom, would accept limits on his wisdom. That's kind of the fundamental prudence which, you could say, is behind a constitution. It's a sort of living prudence. You need the reminder that law is not perfect.

Now, Justice Gorsuch sort of gave the impression that law is perfect. And the best judge would be the most impartial judge. So, the Democrats have a certain point when they object to this, and say, well, you have to look at the consequences. How is this going to hurt people? How is this going to effect – ?

I wouldn't call that empathy; I would call that prudence. Empathy is a kind of feeling, which can often be irrational. This gives you a sympathy to somebody who's hurting. Maybe he's hurting for good reason. You have to use your prudence, your reason, to discipline your empathy. Empathy is a little too loose, I think. I believe Aristotle would say. Still, what's behind it, the idea behind it that law is not perfect.

KRISTOL: I suppose, this role for prudence or wisdom is smuggled into the rare constitutional system primarily through the president and the executive who does have some discretion and some prerogative, even. And in this instance, in a way, nicely manifested in the fact that the president has to select a particular individual to be a Supreme Court Justice, so it is a judgement – there's no law to tell you that it should be Gorsuch rather than John Smith. That's a judgement –

MANSFIELD: It's an individual, credential judgement of Donald Trump, as it turns out. Of course, the president isn't elected on the basis that he's the wisest man that we have. Whatever wisdom he has, we take advantage of. But also, with the check, the Senate does get to advise and consent with a check.

KRISTOL: That system, in a way, embodies both the nominating the particular individual –

MANSFIELD: In general, the Constitution has room for what is extra-constitutional. What is outside the Constitution. The necessities that arise and must be met quickly. Emergencies. Government isn't only policy; it's also scrambling in dire situations.

KRISTOL: And particular choices and particular individuals, both for the cabinet and courts. That's not just relegated to some rule.

MANSFIELD: Nor do we give it to a committee or commission of some kind. A commission that's empowered to pick out smart people.

KRISTOL: Some states do, in a way, a version of that, right? A list of judges that can be appointed that is given to the governor or whatever. But the federal Constitution, I think, leans against that pretty strongly, leans towards a strong president using his individual judgement to pick good individuals.

MANSFIELD: So all in all, I would encourage everybody to become a fan of C-SPAN.

KRISTOL: Okay, to watch the hearings.

MANSFIELD: I mean, you don't have to become an actual fan in the sense of bound to it and feel obliged to – it does sort of pick you up and catch you and take you along; so, there are limits to that. But still, it rewards; it's very rewarding to see your government at work. Makes it feel as if it belongs to you a little bit more than if you don't know anything and just read the results in newspapers and magazines.

KRISTOL: That's good. That's heartening in a day where we probably need a little heartening. Kind of a reminder of citizenship and self-government as opposed to merely watching the spectacle, right? They're your congressmen, your senators, at least, representing people in different states asking these questions.

MANSFIELD: And doing a pretty good job, actually.

KRISTOL: Yea. Good. Well, on that note, thank you for this conversation about the Gorsuch hearing and its implications. And thanks for joining us on CONVERSATIONS.

[END]