

ISSUE ADVISORY: Brett Kavanaugh – A Conservative Partisan Who Will Protect Trump, Repeal Roe

August 22, 2018

Supreme Court nominee Brett Kavanaugh is an ideologically-motivated conservative with an extensive record of partisan Republican activism. Kavanaugh was the one of the authors of the Starr Report, arguing for the impeachment of President Bill Clinton for allegedly lying about an affair with an intern. In the George W. Bush White House, Kavanaugh was a top presidential assistant during a time of numerous scandals and controversies such as the wars in Iraq and Afghanistan, torture of detainees, Hurricane Katrina, battles over abortion and immigration, and the vetting of several Supreme Court justices.

Alarming,ly, Kavanaugh believes that presidents are above the law, should not be indicted and should have the power to fire special counsels investigating the president. Kavanaugh will be a reliable vote on the Supreme Court to defend the Trump. A sham confirmation process is underway with hundreds thousands of Kavanaugh's records kept from public scrutiny and others being scrubbed by Bush lawyers. Expedited hearings begin September 4 – 6; Majority Leader Mitch McConnell wants a vote on Kavanaugh by Oct. 1, well before the mid-term elections. Tens of millions of dollars are being spent on television ads and pressuring moderate Democrats to vote for this unsuitable nominee.

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Overtun Roe and Criminalize Abortion - Donald Trump has promised that he would appoint only judges who pass a litmus test for overturning *Roe v. Wade* and, in fact, during the 2016 presidential campaign, Trump told an interviewer during that he believed that 'women who had abortions should be punished.' True to this troubling vow, Trump has nominated for the Supreme Court someone whose record on abortion is clear, former Bush White House staff member and current U.S. Court of Appeals for the D.C. Circuit Judge Brett Kavanaugh. Unlike Trump's previous appointee, Neil Gorsuch, whose opposition to abortion rights was suspected, but undefined, Kavanaugh's views are quite clear. Judge Kavanaugh is hostile to women's reproductive freedom; he will likely vote to overturn *Roe v. Wade* providing the key fifth vote with four likely anti-Roe voters currently on the Court.

A graduate of Yale Law School, Judge Brett Kavanaugh, 53, believes that there is no basis in the Constitution for abortion rights, praising Chief Justice William Rehnquist's dissent in the 1973 ruling. In *Garza v. Hagan* (2017), Kavanaugh backed the Trump administration's blocking of an abortion for a 17-year old undocumented immigrant woman in detention – a move that was seen as Kavanaugh's auditioning for the Supreme Court nomination. In this case, Kavanaugh argued that this young woman as an undocumented immigrant did not have the right to obtain an abortion and through a series of procedural hurdles refused to release her

from government custody to receive abortion care. His order was overturned by a majority ruling of the D.C. Circuit Court.

Kavanaugh recently told Sen. Susan Collins (R-Maine), one of the very few Republican abortion rights supporters in the Senate, that in his view *Roe* is “settled law.” According to *The Washington Post*, Collins appeared to be leaning towards Kavanaugh following the meeting. In contrast, Senate Minority Leader Chuck Schumer (D-N.Y.) said that Kavanaugh whom he met with on Tuesday that “the judge failed to answer basic questions on executive power, health care and other issues while providing no reassurance that he would uphold *Roe*.”

Sen. Schumer added at a later press conference, “I asked Judge Kavanaugh if he agreed that *Roe v. Wade* and *Casey v. Planned Parenthood* were correctly decided. He would not say “yes.” That should send shivers down the spine of any American who believes in reproductive freedom for women.”

Attempted to Rollback ACA Birth Control Access - Kavanaugh is also an outspoken critic of the Affordable Care Act’s (ACA) requiring insurers to provide access to no copay birth control coverage. He attempted to roll back this provision under the guise of religious freedom; the ACA’s contraceptive coverage requirement has helped 55 million women obtain affordable birth control.

In the case of *Priests for Life v. U.S. Department of Health and Human Service*, one of dozens of challenges to the Affordable Care Act’s mandate of insurance coverage for contraception as orchestrated by conservative and religiously-related organizations, Kavanaugh argued that the accommodation that the Obama administration made with religiously-affiliated entities did not go far enough. Kavanaugh’s dissent would have given more employers the ability to deny employees’ access to no copay birth control coverage.

No Check Against Trump’s Abuse of Power - A second and very grave concern is Judge Kavanaugh’s alarming view of presidential power. This is critically important as Donald Trump is systematically weakening key elements of our democracy, especially in his repeated attacks on the press, lying about his collusion with the Russians, engaging in many acts of obstruction of the Mueller investigation, stripping security clearances from his opponents, including former CIA director John Brennan, and many other harmful and deceptive statements and actions.

Kavanaugh’s writings raise concern that he would allow Donald Trump’s abuses of power to go unchecked. He has argued that “criminal investigations and prosecutions of the President” should be deferred while he is in office. In 1998, he wrote that “Congress should give back to the President the full power to act when he believes that a particular independent counsel is “out to get him”. Kavanaugh believes that a sitting president should not be able to be criminally indicted and that the President should be able to monitor and even terminate a special counsel’s investigation.

A Sham Confirmation Process – Senate Judiciary Committee Chair Chuck Grassley (R-Iowa) has announced that confirmation hearings for Judge Kavanaugh are scheduled for Sept. 4 to 6,

after Senators return from Labor Day recess. The hearings will proceed despite the fact that hundreds of thousands of documents that relate to Kavanaugh's time in the George W. Bush White House will not have been made available. Grassley is going against a long-standing non-partisan, transparent process of reviewing all or nearly all the records of a Supreme Court nominee. This fast track process is intended to deny Democrats access to pertinent documents and provide only those that have been vetted and scrubbed of any controversial information and to hold a floor vote well before the mid-term elections on Nov. 6. A team of Bush lawyers are screening these documents and, reportedly, cherry picking ones that will be posted online.

If the Republicans have their way, we can be assured that any information that would raise concerns in the slightest about Judge Kavanaugh will not appear in that collection. Senate Majority Leader Mitch McConnell (R-Ky.) has said that he wants a vote on Kavanaugh before Oct. 1.

Democrats Take Action to Obtain Records - Grassley, himself, requested only a fraction of documents from the National Archives; the Archives said retrieving those documents would take several months. On August 8, Democrats sent Freedom of Information Act (FOIA) requests to the National Archives, The Department of Justice, the Department of Homeland Security, and the Central Intelligence Agency. Senate Minority Leader Chuck Schumer (D-N.Y.), with Sens. Sheldon Whitehouse (D-R.I.) and Richard Blumenthal (D-Conn.) announced recently that they will sue if the National Archives does not answer within 20 working days in responding to their FOIA.

So What's the Hurry? Perhaps Republicans are afraid that Brett Kavanaugh who served in the George W. Bush White House Counsel's office as Associate Counsel to the President and then as Assistant to the President and Staff Secretary from 2001 to 2003, may have played an important role in some of the numerous scandals and controversies of the period. Records for those years have not been requested by the Republicans.

Potentially embarrassing disclosures might relate justifications for going to war with Iraq on the basis of falsified information, President Bush's claim to override a ban on torture potentially in violation of the Geneva Convention, the revelation of the identity of classified information about CIA covert agent Valerie Plame by a White House advisor, a harmful ban on abortion procedures, repeated efforts to amend the Constitution to prohibit marriage equality, opposition to hate crimes legislation, a secret Dick Cheney-led energy task force, the outrage over prisoner abuse at Abu Ghraib, warrantless wiretapping, the botched response to Hurricane Katrina, and many more.

Public Deserves To Know - The important question remains, to what extent did Brett Kavanaugh influence policies and decisions on any of those contentious issues. Kavanaugh told the Senate Judiciary Committee in 2004 that his job (as a White House counsel) was to "give recommendations and advice" while ultimately carrying out directions from superiors. But he denied any involvement in the debate over torture, for one thing. The senators and the public

deserve to know more about Judge Kavanaugh's actions and views from those tumultuous years.

Equally important are Kavanaugh's writings and thoughts about impeachment in the highly partisan and some say farcical recommendations for impeachment of President Bill Clinton. That part of the nominee's career deserves a careful examination by the Judiciary Committee.

Kavanaugh's service for two Republican White Houses identified him as a partisan activist and, as such, his confirmation for a judgeship on Court of Appeals for the D.C. Circuit was fiercely opposed by Democrats. The nomination languished for several years until a series of negotiations between Democrats and Republicans let his confirmation go forward. Should someone so closely affiliated with top Republican leadership sit on the Supreme Court?

An 'Originalist' in Judicial Philosophy - Judge Kavanaugh calls himself an 'originalist' and a 'textualist' when it comes to a judicial philosophy – in the mold of Justice Antonin Scalia. Originalism, invented in the 1980's by conservative legal theorists, is a way to interpret the Constitution's meaning as stable from the time of enactment, which can be changed only by the steps set out in Article Five. Kavanaugh apparently subscribes to the original meaning theory which holds that interpretation of a written constitution or law should be based on what reasonable persons living at the time of adoption of the U.S. Constitution would have understood the ordinary meaning of the text. (Definition from Wikipedia).

Certainly, an originalist would not see in the Constitution a right to privacy – as *Roe* does -- that would protect a woman's right to an abortion.

Judge Kavanaugh's views and judicial rulings on wide range of issues are well known from his 12 years on the DC Circuit Court of Appeals. That information, plus what can be learned from the records that are being sought by Senate Democrats, are critically important and deserve stringent examination. For many, Brett Kavanaugh, as a conservative ideologue and having an extensive partisan background make him unsuitable for the high court

What are the Desired Qualities? For a description of qualities to be desired in a judge, former president Barack Obama, a Harvard Law School graduate and former constitutional law professor, advises:

First and foremost is a rigorous intellect -- a mastery of the law, an ability to hone in on the key issues and provide clear answers to complex legal questions. Second is a recognition of the limits of the judicial role, an understanding that a judge's job is to interpret, not make, law; to approach decisions without any particular ideology or agenda, but rather a commitment to impartial justice; a respect for precedent and a determination to faithfully apply the law to the facts at hand.

Judge Kavanaugh is Not Suitable - There is little in Judge Kavanaugh's record to indicate that he would be the fair-minded constitutionalist this nation needs. The nominee's extensive paper

trail, including the 12 years he has served as judge with the D.C. Circuit Court of Appeals, demonstrates that his views are far out of the mainstream.

Among our major concerns are the following:

Crucial issues affecting millions of Americans will come before the Court, including those related to access to health care, reproductive rights, voting rights, employment discrimination, public education funding, environmental protection, regulation of firearms, campaign finance, church-state separation issues and many others.

Judge Kavanaugh dissented in the D.C. Circuit's 2015 ruling on the Affordable Care Act birth control benefit, writing that he believed employers have the right to deny their employees' health insurance coverage for birth control. He wrote an opinion that the Consumer Financial Protection Bureau was unconstitutionally structured and he sided with telecommunications companies in opposing the FCC's net neutrality rule. Judge Kavanaugh upheld a South Carolina voter ID law, refusing to join in a later opinion by fellow judges which re-affirmed the Voting Rights Act. Judge Kavanaugh has consistently found against employees in numerous cases concerning violations of anti-discrimination laws.

Judge Kavanaugh's stance on women's rights to control their bodies is well known: last year he used his judicial power to prevent a young woman in U.S. custody from accessing the safe, legal abortion she requested. Earlier in his career, Kavanaugh complimented former Chief Justice William Rehnquist for his dissent in the 1973 *Roe* decision.

Judge Kavanaugh holds a dangerous view on presidential power. He believes that "criminal investigations and prosecutions of the President" should be deferred while he is in office. Even more onerous, Kavanaugh asserts that the President should have the power to fire the investigators, and that the President can "decline to follow" laws he believes to be unconstitutional. That Donald Trump has nominated someone with such extreme views about a president's abuse of power is alarming.

Judge Kavanaugh will be a pivotal vote on the Supreme Court in reversing decades of progress in expanding and affirming the important rights and protections that all Americans – especially, women – now enjoy. He should not be confirmed..

Additional Resources:

Leadership Conference on Civil and Human Rights –

Oppose the Confirmation of Brett Kavanaugh to the Supreme Court of the United States
<https://civilrights.org/oppose-confirmation-brett-kavanaugh-supreme-court-united-states/>

Supreme Court Nominee First Look – Brett Kavanaugh

<https://www.afj.org/wp-content/uploads/2018/07/Kavanaugh-SCOTUS-First-Look>

