



THE CIVIL RIGHTS RECORD OF JUDGE BRETT KAVANAUGH

EXECUTIVE SUMMARY

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LDF opposes the confirmation of Judge Kavanaugh to the Supreme Court. LDF takes this position in consideration of both the unprecedented context in which this nomination arises and based on our review of the available record of Judge Kavanaugh's long career in public life.

Context always matters, and the context of this political moment is unique and important to a fair evaluation of this nomination. President Donald Trump's administration is laboring under the cloud of federal investigations emanating from the proven interference of a foreign adversarial government in the 2016 presidential election. Those investigations have already resulted in six guilty pleas and thirty-six indictments.³⁰ A collateral federal investigation has implicated the involvement of the President in illegal campaign activity. The President has publicly taken a number of highly questionable positions regarding his power and authority in relation to these investigations. The resolution of the President's claims, should he advance them in litigation, raises fundamental questions about Presidential authority under the Constitution. Such questions can only be answered, ultimately, by the Supreme Court. The nomination of a justice within the context of this looming set of circumstances raises extraordinary concerns.

Not only has the nomination been rushed forward despite these investigations and allegations, it has been rushed forward while a substantial portion of Judge Kavanaugh's pre-judicial records remain unavailable to the public. Since Justice Kennedy announced his retirement, LDF has taken the position that the Senate should refrain from moving forward with a confirmation process until the Special Counsel's investigation is complete, in order to avoid the taint of these investigations on the nominee, and to avoid conflicts that might compel recusal of the nominee from hearing matters emanating from the pending investigation.

³⁰ Editorial Bd., *The Case for Robert Mueller's Probe of Russian Meddling*, NEWSDAY, Aug. 25, 2018, <https://www.newsday.com/opinion/editorial/robert-mueller-russian-election-meddling-1.20655665>.

This context is made even more troubling by the nomination of Judge Brett Kavanaugh, whose record reveals him to be an executive power maximalist, and who appears to believe in nearly unbridled Presidential power, including freedom from federal indictment. Judge Kavanaugh went so far as to write in a published opinion that a President may choose not to enforce some congressional statutes if he or she believes that enforcing it would be unconstitutional, even if a federal court has held that the law is constitutional.³¹ That is a breathtaking position, which is inconsistent with the basic rule set forth by Chief Justice Marshall in 1803 that it is the duty of the judiciary, and not the executive, to “say what the law is.”³²

A review of Kavanaugh’s record also calls into question his judicial values on core issues of civil rights and racial justice. The nature of the docket of the D.C. Circuit Court of Appeals where Judge Kavanaugh has served has limited his opportunities to speak on some of the issues most important to LDF. Yet, he has given us ample evidence of his ideology through his career and record to this point for us to draw firm conclusions about what sort of judge he is and what sort of Justice he would be. It is clear, on close examination, that Judge Kavanaugh’s judicial philosophy would place in jeopardy fundamental statutes and constitutional precedent designed to protect civil rights and advance racial justice. For example:

- **Race Consciousness and Affirmative Action.** Judge Kavanaugh’s work as a private lawyer for an anti-affirmative-action organization in a case challenging Hawaii’s right to remedy past discrimination against indigenous Hawaiians reflects a strong hostility to considering race even to remedy entrenched racial discrimination. His advocacy in connection with the case showed disturbing blindness to the need for legal remedies for historic discrimination. For example, quoting a noxious passage from Justice Antonin Scalia’s dissent in *Adarand Constructors, Inc. v. Peña*, he asserted that “there can be no such thing as either a creditor or debtor race.” His confirmation would threaten the government’s ability to use race to promote diversity and halt discrimination.

³¹ See *Seven-Sky v. Holder*, 661 F.3d 1, 50 & n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

³² *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

- **Criminal Justice.** Judge Kavanaugh’s criminal justice record is generally consistent with the reactionary criminal justice record of Chief Justice William Rehnquist, who Judge Kavanaugh called his first judicial hero and whose criminal justice jurisprudence he has praised at length. Judge Kavanaugh has shown nearly reflexive deference to assertions made by law enforcement and skepticism of the experience of people arrested for alleged crimes.
- **Economic Justice.** LDF’s research indicates that Judge Kavanaugh has generally ruled against workers raising claims of employment discrimination and workers seeking to work together to protect their rights. His record suggests that he also could threaten the critical civil rights theory of disparate impact, which would seriously undermine efforts to remedy the persistent segregation that plagues our country.
- **Political Participation.** Judge Kavanaugh upheld a restrictive voter photo ID law, and he has consistently hampered political participation by striking down campaign finance laws that seek to ensure that money does not drown out the voices of Americans without it.
- **Administrative Law.** The broad portfolio Congress has assigned to administrative agencies means that the technical area of administrative law has significant implications in every area of law, including civil rights and racial justice. Judge Kavanaugh has advanced radical, precedent-challenging administrative law views that would hamper the good agencies can do.
- **Access to Justice.** Ensuring that those who are most marginalized have the opportunity to “have their day in court” is fundamental to our system of justice. Judge Kavanaugh has been anything but even-handed in considering who deserves such access. He has shown special solicitude to well-heeled business interests, yet has failed to appreciate the harms suffered by the less politically and economically powerful.

These facts raise further concerns when placed in the context of this Administration’s judicial nomination strategy. This Administration has nominated judges who demonstrate remarkable hostility not only to civil rights and principles of equality but also to well-established judicial norms and standards. Several such nominees have refused even to acknowledge that the Supreme Court’s seminal, unanimous 1954 decision in *Brown v. Board of Education* was rightly decided. *Brown* stands for a principle that is essential to both civil rights and to the rule of law, i.e., that our Constitution does not permit racial apartheid in our public schools. In this context, the Senate must press Judge Kavanaugh to demonstrate his commitment to

enforcing the rule of law, the legacy of *Brown*, and this nation’s civil rights laws and show that he stands behind and supports racial equality and justice.

LDF has identified all of these threats to civil rights that would be posed by Judge Kavanaugh’s confirmation even without meaningful access to Judge Kavanaugh’s records from his time in the White House, or his time working for independent counsel Kenneth Starr. Those records are essential to a full understanding of Judge Kavanaugh’s values, which are key to the judicial process, and particularly important during this incredible presidency.³³

The failure to release Judge Kavanaugh’s entire record should halt any movement until that voluminous record is fully released and reviewed. Most egregiously, although Judge Kavanaugh spent just under three years as Staff Secretary to President George W. Bush, the Judiciary Committee has refused to request any documents involving work he performed during that time.³⁴ As discussed in Part I of this report, a host of significant events occurred during that time, and Judge Kavanaugh would have been at the center of those events as Staff Secretary to President Bush. Indeed, when considering “what prior legal experience ha[d] been most useful for [him] as a judge[.]” Judge Kavanaugh has emphasized that of his “five-and-a-half years at the White House” his “three years as staff secretary . . . were the most interesting and informative” for him.³⁵

To be sure, the Judiciary Committee has requested that the National Archives provide a subset of the documents pertaining to Judge Kavanaugh’s time in the White House Counsel’s Office.³⁶ But the National Archives will be unable to complete its review of those documents for production to the public until the end of October 2018 at the earliest.³⁷ In an unprecedented maneuver, the Judiciary Committee has

³³ Accordingly, LDF will continue its review and update its analysis of Judge Kavanaugh’s record as appropriate as documents become available.

³⁴ See Letter from Jud. Comm. Chairman Charles E. Grassley to Brigadier Gen. Patrick X. Mordente, Director, George W. Bush Pres. Library & Museum, at 1 (July 27, 2018), <https://www.archives.gov/files/foia/07.27.2018-grassley-to-bush-library-re-kavanaugh.pdf> (hereinafter “July 27 Grassley Request”); Seung Min Kim, *Clearinghouse for Kavanaugh Documents is a Bush White House Lawyer, Angering Senate Democrats*, WASH. POST, Aug. 15, 2018, https://www.washingtonpost.com/politics/clearinghouse-for-kavanaugh-documents-is-a-bush-white-house-lawyer-angering-senate-democrats/2018/08/15/224973dc-a082-11e8-b562-1db4209bd992_story.html?noredirect=on&utm_term=.2963ad6f7ca4 (“Republicans have requested Kavanaugh’s White House counsel records but have ruled his staff secretary papers out of bounds.”).

³⁵ Hon. Brett M. Kavanaugh, *One Government, Three Branches, Five Controversies: Separation of Powers Under Presidents Bush and Obama*, MARQUETTE LAWYER, Fall 2016, <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2016-fall/2016-fall-p08.pdf>.

³⁶ See July 27 Grassley Request, *supra* note 34.

³⁷ See Letter from Gary M. Stern, Nat’l Archives Gen. Counsel, to Jud. Comm. Chairman Charles E. Grassley, at 2 (Aug. 2, 2018), <https://www.archives.gov/files/foia/stern-letter-to-grassley-8-2-2018.pdf>.

essentially outsourced the review of the documents that the National Archives is reviewing to a private lawyer who works for President George W. Bush, and who was Judge Kavanaugh’s deputy when he was Staff Secretary.³⁸ That private lawyer is the one making the calls on which documents the American public may see and which are “exempt.”³⁹

Finally, the National Archives has also not yet finished reviewing and producing documents from Judge Kavanaugh’s time in the Office of the Independent Counsel in the 1990s.⁴⁰ That Office handled some of the most sensitive and complex legal issues connected with President Bill Clinton’s eventual impeachment trial, and it is fair to assume that there may be valuable information bearing on Judge Kavanaugh’s legal views and philosophy in those documents.

LDF takes seriously its responsibility to provide a timely review of the record of all Supreme Court nominees. Thus, it has proceeded with this report despite the rushed pace of the process and incomplete record. We turn now to Judge Kavanaugh and his record.

³⁸ See Seung Min Kim, *supra* note 34 (“[T]he National Archives . . . has effectively been sidelined. In its place is a team led by attorney Bill Burck, who also served in the Bush White House as Kavanaugh’s deputy when the nominee was staff secretary.”); *National Archives Works to Release Records*, *supra* note 22 (describing Burck’s review as “something that has never happened before”).

³⁹ See Letter from William A. Burck to Jud. Comm. Chairman Charles E. Grassley (Aug. 2, 2018), <https://www.democrats.senate.gov/imo/media/doc/2018.08.02%20Letter%20Burck%20to%20Grassley.pdf> (stating privilege decisions were made based on Burck’s “assessment of [the documents] contents”).

⁴⁰ See Josh Gerstein, *More Documents Emerge from Kavanaugh’s Work for Starr*, POLITICO, July 30, 2018, <https://www.politico.com/story/2018/07/30/brett-kavanaugh-ken-starr-documents-749713>.