



THE CIVIL RIGHTS RECORD OF JUDGE BRETT KAVANAUGH

NOMINATION BACKGROUND AND CONTEXT

The nomination of Judge Kavanaugh to be a justice on the Supreme Court comes at a unique and unprecedented moment in our country’s history. Our review of Judge Kavanaugh’s record grapples with the judicial philosophies he holds and the rulings he has issued. It also reflects the highly unusual context surrounding his nomination. His record on and off the court independently shapes our assessment of his fitness to serve on the nation’s highest court and our evaluation of the likely effect he would have on the Court’s jurisprudence concerning fundamental civil rights and protections. Together, this record and the fraught context of Judge Kavanaugh’s nomination cement our position that he is unfit to serve as the next justice of the Supreme Court.

Indeed, the context of Judge Kavanaugh’s nomination provides a critical framework within which to evaluate his fitness for elevation to the Supreme Court. We set forth four critical elements of this context below.

First, in selecting Judge Kavanaugh as the nominee, President Trump undertook a most unusual process. Multiple uncontested reports confirm that President Trump outsourced to activist conservative legal organizations the creation of short-lists of nominees from which the President would select his choice to fill vacancies on the federal bench, including on the Supreme Court.⁵ One of the primary organizations involved in this enterprise is the Federalist Society for Law and Public Policy Studies (“the Federalist Society”), a thirty-five-year-old organization founded to advance extremist conservative legal positions, including a cramped approach to constitutional interpretation that depends on a one-sided, limited, and archaic view of constitutional provisions. In action, that interpretive approach, commonly known as “originalism,” has consistently threatened Supreme Court decisions that guarantee the human and civil rights of women, people of color, and criminal defendants. Another influential organization in creating President Trump’s slate of nominees for the federal judiciary has been the Heritage Foundation. The Heritage Foundation has been explicit in its hostility to the principle of stare decisis—the judicial canon that the Court should stand by its prior decisions absent extraordinary circumstances. Specifically, the Heritage Foundation has identified Supreme Court

⁵ See Ed Kilgore, *A Look at Trump’s Shortlist for Replacing Anthony Kennedy*, N.Y. MAG, July 3, 2018, <http://nymag.com/daily/intelligencer/2018/07/trumps-shortlist-for-kennedy-replacements-on-supreme-court.html>; Andy Kroll, *Inside Trump’s Judicial Takeover*, ROLLING STONE, Aug. 19, 2018, <https://www.rollingstone.com/politics/politics-features/trumps-judicial-takeover-711200/>.

decisions that it believes should be reversed, such as *Roe v. Wade*,⁶ and *Grutter v. Bollinger*,⁷ and has expressed hostility to critical provisions of the Voting Rights Act of 1965, which was passed to ensure equality in all election processes.⁸

The list developed by these organizations was made public on May 18, 2016, supplemented on September 23, 2016, and finally supplemented on November 17, 2017.⁹ Judge Brett Kavanaugh, a long-time Federalist Society Member, was added to the list for the first time in November 2017, and has been regularly discussed by court observers as one of the candidates most favored by the Federalist Society.¹⁰

Second, in considering Judge Kavanaugh's placement on these specially curated lists of potential nominees, we cannot ignore the clear and consistent promise that President Trump made during the 2016 presidential campaign concerning how he would treat a vacancy on the Supreme Court. On multiple occasions, then-candidate Trump vowed that he would only appoint justices to the Supreme Court who would overturn *Roe v. Wade*,¹¹ the 1973 landmark decision which upheld the

⁶ See Monica Burke, *Why Pro-Lifers Have Cause for Hope*, HERITAGE FOUND., Jan. 22, 2018, <https://www.heritage.org/civil-society/commentary/why-pro-lifers-have-cause-hope> (calling the *Roe* decision an “invent[ed] . . . constitutional right to abortion on demand”).

⁷ See Hans A. von Spakovsky & Elizabeth Slattery, *Discriminatory Racial Preferences in College Admissions Return to the Supreme Court: Fisher v. University of Texas at Austin*, HERITAGE FOUND. Dec. 3, 2015, <https://www.heritage.org/poverty-and-inequality/report/discriminatory-racial-preferences-college-admissions-return-the> (criticizing the Court's “past decisions allowing the use of racial preferences in college admissions,” including *Grutter v. Bollinger*, and advocating that the Court hold that the use of race in college admissions “for any reason is a violation of equal protection”).

⁸ See Hans A. von Spakovsky, *Voting Rights Act's “Preclearance” Was Meant to Be Temporary*, HERITAGE FOUND., Feb. 27, 2013, <https://www.heritage.org/election-integrity/commentary/voting-rights-acts-precleanance-was-meant-be-temporary> (arguing that the “Supreme Court should strike down Section 5, which was a temporary, emergency provision that was only supposed to last five years”).

⁹ Alan Rappaport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES, May 18, 2016, <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html> (noting initial list and reliance on Federalist Society and Heritage Foundation); Reena Flores & Major Garrett, *Donald Trump Expands List of Possible Supreme Court Picks*, CBS NEWS, Sept. 23, 2016, <https://www.cbsnews.com/news/donald-trump-expands-list-of-possible-supreme-court-picks/> (list supplemented); Press Release, White House, President Donald J. Trump's Supreme Court List, Nov. 17, 2017, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/> (latest list).

¹⁰ See Dylan Matthews, *Brett Kavanaugh, Donald Trump's Supreme Court Nominee, Explained*, VOX, July 9, 2018, <https://www.vox.com/explainers/2018/7/9/17540334/brett-kavanaugh-trump-supreme-court-anthony-kennedy> (observing that Federalist Society mainstay Leonard Leo had “been Trump's most important adviser on court nominations” and had “singled Kavanaugh out as one of the two most promising contenders for [Justice] Kennedy's seat[.]”).

¹¹ See, e.g., Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, WASH. POST, March 21, 2017, https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?noredirect=on&utm_term=.690f1bc0747d (quoting

right of women to decide whether to carry a pregnancy to term. While presidential candidates have routinely signaled the qualities of the kind of justices they would appoint if able, President Trump’s statements vowing only to select nominees who would overturn an existing Supreme Court case were unprecedented.¹² President Trump’s selection of Judge Kavanaugh and our review of Judge Kavanaugh’s record suggest that, if confirmed to the Supreme Court, he very well may help President Trump keep his promise to overturn *Roe v. Wade* and other critical Supreme Court precedent.

The third and, perhaps, most troubling and distinctive contextual fact is that Judge Kavanaugh’s nomination has occurred while the President is facing multiple federal investigations of his businesses and his campaign, including the investigation of potential felonious activity involving collusion with a foreign power in the very election process that brought him to office and enabled this nomination. Among these multiple investigations is that of Special Counsel Robert Mueller who began investigating the now-established interference of a foreign adversary in the 2016 presidential campaign that led to the election of Donald Trump. It is unclear whether the President is a target of these investigations, but recent developments demonstrate that these investigations raise important questions that go to the very legitimacy and breadth of the President’s power and authority.

As of this writing, Special Counsel Mueller’s investigation into Russian governmental interference in the 2016 election—and any potential involvement with then-Candidate Trump’s campaign—is still ongoing and has resulted in thirty-six indictments and six guilty pleas.¹³ Recently, in connection with this investigation, the President’s former campaign chairman Paul Manafort was found guilty of financial fraud.¹⁴

Even more alarmingly, on the same day Mr. Manafort was found guilty, the President’s former personal attorney Michael Cohen pled guilty in a separate proceeding in the United States District Court for the Southern District of New York

the court”); Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC, Oct. 19, 2016, <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> (discussing candidate Trump’s promise that *Roe* would be overturned “automatically” if he was elected and was able to appoint justices).

¹² Mr. Trump’s opponent made assurances as well—that she would only appoint justices who would uphold that decision. *See, e.g.*, Tessa Berenson, *Watch Clinton Describe Her Ideal Supreme Court Justice*, TIME, Mar. 10, 2016, <http://time.com/4253569/hillary-clinton-supreme-court-nominee-debate/> (“I would look for people who believe that *Roe v. Wade* is settled law[.]”).

¹³ 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>.

¹⁴ *See* Sharon LaFraniere, *Paul Manafort, Trump’s Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES, Aug. 21, 2018, <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>.

to violating federal campaign finance law—admitting under oath to illegal actions he says he committed at the direction then-candidate Trump.¹⁵ According to election law experts, this latter admission may well implicate the President in conduct that would constitute a felony.¹⁶

In the face of these ongoing investigations, the President and his new counsel have made statements indicating the President’s belief that he is above the law. Specifically, they have suggested the President can unilaterally end the Mueller investigation,¹⁷ refuse to comply with federal court subpoenas,¹⁸ pardon those found guilty¹⁹ and even conduct the investigations himself.²⁰ This confluence of events creates an uncomfortable backdrop to Judge Kavanaugh’s nomination. If Judge Kavanaugh is confirmed, the President’s authority to take the actions he and his counsel have threatened or have already committed would likely be determined by a Supreme Court in which Judge Kavanaugh cements an ultra-conservative majority likely to defer to even the most extreme executive authority.

Finally, there is the matter of the incomplete records from Judge Kavanaugh’s public service that have been furnished to the Senate Judiciary Committee. Our analysis in this report is based on our review of Judge Kavanaugh’s judicial record,

¹⁵ *Id.*

¹⁶ Richard L. Hasen, *Michael Cohen’s Guilty Plea Directly Implicates Donald Trump in a Felony*, SLATE, Aug. 21, 2018, https://slate.com/news-and-politics/2018/08/michael-cohens-guilty-plea-directly-implicates-donald-trump-in-a-felony.html?wpsrc=sh_all_dt_tw_ru (“If Cohen’s story is corroborated, Trump has committed a crime, one that does not depend upon proof of Russian collusion or obstruction.”).

¹⁷ See Kadhim Shubber, *Trump Believes He Has Power to Fire Mueller, Says White House*, FIN. TIMES Apr. 10, 2018, <https://www.ft.com/content/5e0678e0-3d02-11e8-b9f9-de94fa33a81e>.

¹⁸ See Mark Landler & Noah Weiland, *Giuliani Says Trump Would Not Have to Comply with Mueller Subpoena*, N.Y. TIMES, May 6, 2018, <https://www.nytimes.com/2018/05/06/us/politics/giuliani-says-trump-would-not-have-to-comply-with-mueller-subpoena.html>.

¹⁹ Robert Costa, Josh Dawsey, & Ashley Parker, *Trump Fixates on Pardons, Could Soon Give Reprieve to 63-Year-Old Woman After Meeting with Kim Kardashian*, WASH. POST, June 5, 2018, https://www.washingtonpost.com/politics/trump-fixates-on-pardons-could-soon-give-reprieve-to-63-year-old-woman-after-meeting-with-kim-kardashian/2018/06/05/37ac6cb6-683d-11e8-bbc5-dc9f3634fa0a_story.html?noredirect=on&utm_term=.4e4ce14b392f (recounting White House official’s description of the President as “obsessed” with pardons and quoting Newt Gingrich’s interpretation of the President’s actions as “a signal that [the President is] in an all-out war with Mueller and people should know [he] is willing to issue pardons”); John Wagner, *Trump Says He Has ‘Absolute Right’ to Pardon Himself of Federal Crimes but Denies Any Wrongdoing*, WASH. POST, June 4, 2018, https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.3874eba9df3a.

²⁰ See Felicia Sonmez, *Trump Says About Russia Probe: ‘I Could Run It If I Want.’* WASH. POST, Aug. 20, 2018, https://www.washingtonpost.com/politics/trump-says-about-russia-probe-i-could-run-it-if-i-want/2018/08/20/500aeacc-a4d2-11e8-97ce-c9042272f07_story.html?noredirect=on&utm_term=.8ffa39eb7587.

encompassing over 300 written opinions, focusing on constitutional and statutory issues with clear relevance to the clients that LDF represents. We have also examined his votes in relevant cases in which other judges authored the decision, and his legal record from his work in private practice, as well as his publications and speeches, personal background, and work outside of the law.

Despite the voluminous materials we have reviewed, our analysis is necessarily incomplete because the public has had access to only a fraction of the records produced during the time that Judge Kavanaugh served as Staff Secretary to President George W. Bush—a job which Judge Kavanaugh described as the position he found “most instructive” to him in his role as a judge. The Ranking Member of the Committee, Senator Dianne Feinstein requested all of the records from this period of Judge Kavanaugh’s service.²¹ However, as of the time of this writing, they have not been produced, nor is it expected that they will be produced before the confirmation hearing set to commence on September 4, 2018.

According to the National Archives, it “processed and released roughly 70,000 pages of documents relating to Chief Justice John Roberts and 170,000 pages relating to Justice Elena Kagan[,]” and, by contrast, there are “the equivalent of several million pages of paper and email records related to Judge Kavanaugh in the holdings of the George W. Bush Presidential Library and Museum and in the National Archives.”²²

Moreover, in a rebuff to tradition in the Senate, the current Chair of the Senate Judiciary Committee, Senator Chuck Grassley, has requested from the National Archives only a fraction of the full materials from Judge Kavanaugh’s service as a presidential Staff Secretary. In response to Senator Grassley’s request, on August 2, 2018, the National Archives informed Senator Grassley that even the limited materials he sought could not fully be furnished to the Committee before the end of October.²³ Despite receiving this clear indication from the National Archives, eight days later Senator Grassley announced that the hearings for Judge Kavanaugh would

²¹ See Letter from Ranking Member Dianne Feinstein & Other Democratic Members of the Jud. Comm. to Brigadier Gen. Patrick X. Mordente, Director, George W. Bush Pres. Library & Museum, at 1, July 31, 2018, https://www.feinstein.senate.gov/public/_cache/files/c/f/cf09bc38-c37e-40ae-95f4-859ea4d1d1ee/8CA1FC58A79BEDD4B6E6FB6426E1A6FF.7-31-18-all-judiciary-dems-to-nara-requesting-kavanaugh-documents.pdf.

²² See *National Archives Works to Release Records Related to Judge Kavanaugh*, NAT’L ARCHIVES, Aug. 15, 2018, <https://www.archives.gov/news/articles/archives-staff-release-records-related-to-judge-kavanaugh>.

²³ 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>.

commence on September 4, more than a month before the documents Senator Grassley sought could be furnished to the Committee.²⁴

Senator Grassley then took the unusual step of assigning blanket “Committee Confidential” status to the vast majority of the documents that were received by the Committee. This designation means that those documents cannot be shared with the public even if used by the members of the Committee in public confirmation hearings.²⁵ On August 10, 2018, Ranking Member Dianne Feinstein sent a letter to the Chairman outlining the highly unusual and disturbing nature of this action by the Committee Chair.²⁶ Nonetheless, there has been no change in the blanket Committee Confidential designation.²⁷

To be clear, of the “several million” pages of documents held by the National Archives that may be relevant to Judge Kavanaugh’s service in the Administration of President George W. Bush, Chairman Grassley has requested only approximately 900,000 pages.²⁸ As of August 24, 2018, only slightly over 400,000 pages have been furnished to the Committee, and just over 200,000 are available for public review.²⁹ This leaves critical swaths of Judge Kavanaugh’s record unexamined.

Thus, our review, and that of the Senate Judiciary Committee, is limited to the truncated record made available to the public. This troubling lack of transparency has compromised the constitutionally sanctioned confirmation process that the Senate Judiciary Committee has set for September 4–7, 2018, despite the deeply

²⁴ See Press Release, S. Comm. on the Judiciary, Grassley: Kavanaugh Hearings to Begin September 4 (Aug. 10, 2018), <https://www.judiciary.senate.gov/press/rep/releases/grassley-kavanaugh-hearings-to-begin-september-4>.

²⁵ See Letter from Sen. Sheldon Whitehouse to Jud. Comm. Chairman Charles E. Grassley, at 1 (Aug. 20, 2018), <https://www.whitehouse.senate.gov/imo/media/doc/Letter%20to%20Grassley%20on%20Committee%20Confidential%20Documents.pdf>.

²⁶ See Letter from Ranking Member Dianne Feinstein to Jud. Comm. Chairman Charles E. Grassley, at 1–2 (Aug. 10, 2018) (publicly available at, e.g., Sen Dianne Feinstein (@SenFeinstein), TWITTER (Aug. 10, 2018)).

²⁷ See Letter from Ranking Member Dianne Feinstein, and Senators Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie Hirono, Cory A. Booker, and Kamala D. Harris, to Senator Charles E. Grassley, Chairman, Committee on the Judiciary to Jud. Comm. Chairman Charles E. Grassley, at 1–4 (Aug. 28, 2018), https://www.feinstein.senate.gov/public/_cache/files/4/1/41748a5c-8069-4f4f-b938-c36b8a071628/5896693BA3D621868590005E18910237.feinstein-to-grassley-on-kavanaugh-process.pdf.

²⁸ See *National Archives Works to Release Records*, *supra* note 22.

²⁹ See Press Release, S. Comm. on the Judiciary, Historic Transparency: Volume of Kavanaugh’s Public Exec Branch Material Tops Levels of Past SCOTUS Nominees (Aug. 24, 2018), <https://www.judiciary.senate.gov/press/rep/releases/historic-transparency-volume-of-kavannahs-public-exec-branch-material-tops-levels-of-past-scotus-nominees>.

fraught circumstances surrounding the President, Judge Kavanaugh, and the confirmation process.

Thus, even before considering the opinions he has authored, the speeches he has given, and his full legal record, the following is true: Judge Kavanaugh's nomination is tainted by the influence of reactionary groups in his selection by the President and by the President's assertion that his nominees will target and overturn settled Supreme Court precedent. A woefully inadequate document production is thwarting the Senate's "advice and consent" function and the ability of the American public to determine whether they want their Senators to support this nominee. And perhaps most significantly, the President's credibility has been sapped by the ongoing investigations that raise questions about the legitimacy of his occupancy of the Oval Office and the vast powers it confers, such as the nomination of Supreme Court Justices.

This highly unusual and critical context powerfully bears on our assessment of Judge Kavanaugh's nomination. In specific areas, such as Judge Kavanaugh's views on expansive executive authority, the link between context and judicial outlook is clear. However, independent of the contested context of Judge Kavanaugh's nomination, the conclusions set forth below represent our considered analysis of the impact Judge Kavanaugh would have on civil rights and racial justice if he were confirmed to the United States Supreme Court.