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## Section 2: Trump and the Court

Institute of Bill of Rights Law at the William & Mary Law School

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## II. Trump and the Court

### IN THIS SECTION:

“BRETT KAVANAUGH, A WASHINGTON VETERAN, IS TRUMP’S SECOND PICK FOR THE SUPREME COURT”	
David Savage.....	45
“TRUMP PICKS BRETT KAVANAUGH FOR SUPREME COURT”	
Eric Bradner, Joan Biskupic, and Jeremy Diamond.....	50
“WHITE HOUSE COUNTS ON KAVANAUGH IN BATTLE AGAINST ‘ADMINISTRATIVE STATE’”	
Robert Barnes and Steven Mufson.....	54
“SEEKING A SUCCESSOR TO JUSTICE KENNEDY’S COMPLEX LEGACY”	
Douglas W. Kmiec .....	59
“IN INFLUENCE IF NOT IN TITLE, THIS HAS BEEN THE KENNEDY COURT”	
Adam Liptak.....	62
“A LIBERAL’S CASE FOR BRETT KAVANAUGH”	
Akhil Reed Amar .....	65
“TRUMP PICKED KAVANAUGH. HOW WILL HE CHANGE THE SUPREME COURT?”	
Politico Magazine.....	67
“BRETT KAVANAUGH IS DEVOTED TO THE PRESIDENCY”	
Garrett Epps.....	77
“CHIEF JUSTICE ROBERTS MOVES TO MAN IN THE MIDDLE ON THE SUPREME COURT”	
Brett Kendall .....	80
“CHIEF JUSTICE JOHN ROBERTS IS NOW THE SUPREME COURT’S SWING VOTE”	
Christopher Ingraham.....	83
“CHIEF JUSTICE ROBERTS WILL BE THE ‘SWING’ VOTE”	
Jonathan Nash .....	85

“WITH KENNEDY GONE, ROBERTS WILL BE THE SUPREME COURT’S SWING VOTE”

Julie Hirschfeld Davis ..... 87

# “Brett Kavanaugh, a Washington veteran, is Trump’s second pick for the Supreme Court”

*LA Times*

David Savage

July 9, 2018

In choosing Judge Brett M. Kavanaugh for the Supreme Court, President Trump went with a well-credentialed Washington insider who compiled a long record as a reliable conservative and won the respect of White House lawyers and the outside groups that advise them.

They are confident that, if confirmed by the Senate, he will move the high court to the right on abortion, gun rights, affirmative action, religious liberty and environmental protection, among other issues.

During the White House ceremony in which Trump named him, Kavanaugh declared that his “judicial philosophy is straightforward. A judge must be independent and must interpret the law, not make the law. A judge must interpret statutes as written. And a judge must interpret the Constitution as written, informed by history and tradition and precedent.”

But his court record and status as a Beltway insider could also pose problems as the 53-year-old judge on the U.S. Court of Appeals for the District of Columbia Circuit seeks to move a few blocks up Capitol Hill to replace

Justice Anthony M. Kennedy, for whom he worked as a law clerk from 1993 to 1994.

Critics said beneath that rhetoric is a highly conservative, partisan lawyer. Kavanaugh's extensive record in Washington will provide the opposition with ammunition. In the late 1990s, Kavanaugh played a lead role in the aggressive investigation of President Clinton led by independent counsel Kenneth W. Starr. He was an author of the Starr Report, which urged the House to impeach the president for lying about a sexual affair with White House intern Monica Lewinsky.

Senate Democrats are sure to press Kavanaugh to explain his views on investigating and impeaching a president based on allegations of lies and a cover-up, something that could prove uncomfortable for Trump given the investigation underway by special counsel Robert S. Mueller III.

A graduate of Yale College and Yale Law School, Kavanaugh — the only one of Trump’s four finalists with an Ivy League degree — will be in good company on a court where all the current justices have gone to law school at Harvard or Yale. Last year, Trump said he was drawn to his first

appointee, Justice Neil M. Gorsuch, because he had degrees from Columbia, Harvard and Oxford.

Some conservative activists in recent days had begun a campaign against Kavanaugh, complaining about his past ties to the George W. Bush administration and previous rulings that were not hard-line enough for their taste. Many preferred one of the candidates who had worked outside of Washington, despite their less sterling resumes. The other finalists, also federal appeals court judges, were Amy Coney Barrett of Indiana, Thomas Hardiman of Pennsylvania and Raymond Kethledge of Michigan.

But lawyers who have worked with Kavanaugh are confident he will be boldly conservative.

“Brett Kavanaugh is courageous, tough and defiant. He will never, ever go wobbly,” said Justin Walker, a University of Louisville law professor who worked as a law clerk for both Kavanaugh and Justice Kennedy. “I predict that he would be a rock-solid conservative in the Alito-Thomas mold,” he said, referring to Justices Samuel A. Alito Jr. and Clarence Thomas.

The announcement comes just 12 days after Kennedy, 81 — the court’s influential swing vote for decades — said he would step down, opening the door for a Republican president to appoint a more reliable conservative who could shift the court to the right for a generation or more and potentially overturn or limit the landmark abortion ruling *Roe vs. Wade*.

Trump and the Republican-controlled Senate are wasting no time, just in case Democrats take over the chamber in the midterm election. They are also hoping that completing Trump’s second high court appointment will energize GOP voters in November.

Trump had been teasing about his choice for days, urging supporters to tune in Monday night and building suspense by suggesting he would wait until the final hours to decide. The big reveal, as they say in the reality-television industry, came during a prime-time announcement in the East Room of the White House, surrounded by high-profile Republicans and Kavanaugh’s wife and two daughters.

“This incredibly qualified nominee deserves a swift confirmation and robust bipartisan support,” Trump told the gathering.

Kavanaugh used much of his remarks to emphasize the support he has received throughout his life from women, including his mother, wife, daughters, mostly female law clerks and even Elena Kagan, a President Obama appointee to the Supreme Court, who as Harvard Law School dean once hired Kavanaugh.

The nod to women will probably provide a talking point in his favor for female Republican senators who aren’t anxious to break with Trump, even though they have concerns about how the nominee might rule on abortion and health issues.

Several of the senators thought to hold key votes on the confirmation, including Sens.

Susan Collins (R-Maine), Lisa Murkowski (R-Alaska) and Heidi Heitkamp (D- N.D.), declined White House invitations to attend the announcement.

In a statement Monday night, Collins praised Kavanaugh's "impressive credentials and extensive experience." Another possible swing vote, Sen. Joe Manchin III (D- W.Va.), said he remained concern about how Kavanaugh would vote on preserving key provisions of the Affordable Care Act.

"I'm very interested in his position on protecting West Virginians with preexisting conditions," Manchin said.

With only a 51-seat Senate majority, Republicans cannot afford to lose a single vote, assuming all Democrats vote no and the ailing Sen. John McCain (R-Ariz.) remains in his home state battling cancer.

Both sides moved quickly to begin the battle over Kavanaugh's confirmation. Within minutes of the announcement, the Democratic National Committee released a video declaring Kavanaugh an extremist who would have the power to overturn Roe vs. Wade and gut the Affordable Care Act.

On the Republican side, conservative groups had already reserved time for television ads in states whose Democratic senators might be vulnerable.

"Judge Kavanaugh has consistently proven to be a conservative ideologue instead of a mainstream jurist," said Sen. Kamala Harris (D-Calif.).

Sen. Dianne Feinstein (D-Calif.) called him a "partisan political operative," and Senate Democratic leader Charles E. Schumer of New York promised to "oppose Judge Kavanaugh's nomination with everything I have."

Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa) called Kavanaugh "one of the most qualified Supreme Court nominees to come before the Senate." Former President George W. Bush also offered his endorsement.

The Supreme Court selection is yet another staid Washington ritual transformed by Trump, who learned the narrative power of reality TV while hosting NBC's "The Apprentice." Trump staged a similar event early last year when he nominated Gorsuch to replace deceased Justice Antonin Scalia, whose seat opened during Obama's final year in office but was kept vacant by a GOP-controlled Senate that refused to consider Obama's nominee.

Trump has delighted in choosing judges, an issue that unites conservative groups, including some that have been skeptical of either his personal behavior or his policy positions.

Kavanaugh's long record in Washington will give Senate Democrats plenty of material to press at his confirmation hearing.

During Starr's investigation, Kavanaugh took on the task of reexamining the suicide of Vince Foster, a deputy White House counsel and close friend of Bill and Hillary Clinton

who had come under fierce attack in the conservative media.

Years later Kavanaugh changed his mind about his role in the Starr investigation and said presidential investigations were harmful to the country.

In December 2000, with the presidential race between Al Gore and George W. Bush undecided, Kavanaugh joined the Republican legal team that won the fight to stop the ballot recount in Florida.

Kavanaugh took a post in the White House counsel's office under President Bush and later served as his staff secretary. Bush nominated him to the U.S. Court of Appeals for the District of Columbia Circuit in 2003, but because of strong opposition from Democrats, he was not confirmed until 2006.

Since then, he has written about 300 opinions and compiled a solidly conservative record on a court that has a steady diet of dense regulatory disputes. Kavanaugh was skeptical of several of the Obama administration's environmental regulations, including efforts to limit greenhouse gases and hazardous air pollutants.

And he dissented in 2015 when the appeals court upheld a revised regulation under the Affordable Care Act involving contraceptives. Although religious employers did not have to provide or pay for the disputed contraceptives, they were required to file a form notifying the government that they were opting out. Dissenting in *Priests for Life vs. U.S. Department of Health and Human Services*,

Kavanaugh said that filing the form would make them complicit, and therefore would violate their rights to religious freedom.

Kavanaugh appears to support broader gun rights under the 2nd Amendment. In 2011, he filed a 52-page dissent when the appeals court, by a 2-1 vote, upheld a District of Columbia ordinance that prohibited semiautomatic rifles and magazines holding more than 10 rounds. The judges in the majority, both Republican appointees, noted that several large states, including California and New York, enforced similar laws.

But Kavanaugh said the ban on semiautomatic rifles was unconstitutional because the weapons are in common use in this country. "As one who was born here, grew up in this community in the late 1960s, 1970s and 1980s, and has lived and worked in this area almost all of his life, I am acutely aware of the gun, drug and gang violence that has plagued all of us.... But our task is to apply the Constitution and the

precedents of the Supreme Court, regardless of whether the result is one we agree with as a matter of first principles or policy," he wrote.

Since the Supreme Court in 2008 established a 2nd Amendment right for individuals to have a gun at home, the justices have refused to hear a 2nd Amendment challenge to state laws or local ordinances that restrict the sale of semiautomatic weapons.

Kavanaugh's long record as a judge has left him open to attack from the right as well as the left.

In 2011, when Obama’s healthcare law was under assault, Kavanaugh dissented when a D.C. Circuit Court panel upheld the law, but only on procedural grounds. He cited the Tax Injunction Act, which said judges should not decide suits challenging a tax provision until the plaintiff has first paid the tax. His view, if upheld, would have delayed a constitutional challenge to the law, and some on the right faulted him for not simply declaring the law unconstitutional.

Late last year, Kavanaugh was in the middle of a fast-moving dispute over whether a pregnant 17-year-old who was held by immigration authorities could leave to see a doctor and obtain an abortion. The Trump administration refused her request and said it did not have to “facilitate” an abortion. After the ACLU sued on her behalf, a federal district judge in Washington ruled she had a right to leave and obtain the abortion. Kavanaugh disagreed and gave the

government 10 more days to find a sponsor for the young woman.

But the full appeals court took up the case and reinstated the ruling of the district judge. In dissent, Kavanaugh faulted the majority for creating “a new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand.”

His stand nonetheless has drawn some criticism in conservative circles because he did not join a separate dissent by Judge Karen LeCraft Henderson. She contended that immigrants in the country illegally had no constitutional rights.

Kavanaugh was one of the last additions to a list of potential GOP nominees, updated last year to 25 names from the initial 11, that was assembled and vetted by the Federalist Society and the Heritage Foundation, outside conservative groups with tremendous influence in the Trump White House.



## “Trump Picks Brett Kavanaugh for Supreme Court”

*CNN*

Eric Bradner, Joan Biskupic, and Jeremy Diamond

July 9, 2018

President Donald Trump has nominated Brett Kavanaugh to join the US Supreme Court, setting the stage for a dramatic confirmation battle over a stalwart conservative who could shape the direction of the court for decades to come.

If confirmed, Kavanaugh would replace a frequent swing vote on the bench, retiring Justice Anthony Kennedy, who often sided with his liberal colleagues on issues such as abortion, affirmative action and LGBT rights.

Kavanaugh, 53, is a judge on the US Court of Appeals for the DC Circuit and Yale Law School graduate who previously served in both Bush administrations. He also worked on independent counsel Ken Starr's investigation of President Bill Clinton.

"What matters is not a judge's political views, but whether they can set aside those views to do what the law and the Constitution require. I am pleased to say I have found without doubt such a person," Trump said as he announced Kavanaugh's nomination at the White House Monday evening.

Trump called Kavanaugh "one of the finest and sharpest legal minds of our time," saying he is "considered a judge's judge and a true thought leader among his peers."

"Judge Kavanaugh has impeccable credentials, unsurpassed qualifications and a proven commitment to equal justice under the law," Trump said.

Kavanaugh will begin meeting with senators on Tuesday.

He has never expressed outright opposition to the 1973 *Roe v. Wade* decision, which made abortion legal nationwide, and similarly has no record on gay rights and same-sex marriage, but he will face tough questions from Democrats on both issues. Kavanaugh has also suggested that presidents be shielded from civil and criminal litigation until they leave office, an issue that could be front and center as Trump faces the investigations by special counsel Robert Mueller and potential civil challenges.

If confirmed by the Senate, I will keep an open mind in every case," Kavanaugh said Monday at the White House.

### **GOP hoping for quick confirmation**

The nomination is Trump's second to the nation's highest court, a rare presidential privilege that could seal a key part of Trump's legacy less than two years into his first term.

Trump last week spoke with seven candidates, all drawn from a shortlist compiled by the conservative Federalist Society, about the Supreme Court. The nomination also comes just before the President leaves for a critical trip to Britain, a NATO summit in Belgium and a meeting with Russian President Vladimir Putin.

The White House is hoping the Senate moves quickly to confirm Kavanaugh before the midterm elections in November threaten to unfurl the narrow Republican majority in the chamber and nix the precious leverage the GOP holds over some red state Democrats up for reelection in 2018.

Trump's legislative affairs director Marc Short told reporters Monday night that the White House expects a confirmation vote before October 1, when the new Supreme Court term begins.

Democrats are warning that Trump's nominee would jeopardize some of progressives' most important policy priorities in recent decades -- including rulings that legalized abortion and same-sex marriage, as well as former President Barack Obama's health care law.

Republicans hold 51 seats in the Senate, though Arizona Sen. John McCain has been absent as he battles brain cancer. Trump's nominee can win confirmation with only Republican votes, but attention will quickly shift to two moderate GOP senators, Maine's Susan Collins and Alaska's Lisa Murkowski, who are supportive of abortion rights.

Trump also hopes to pressure several Democrats into voting to confirm his nominee. Three Democrats up for re-election in states Trump won by double digits in 2016 -- Indiana Sen. Joe Donnelly, West Virginia Sen. Joe Manchin and North Dakota Sen. Heidi Heitkamp -- voted "yes" on the confirmation of his first Supreme Court nominee, Neil Gorsuch.

Senate Majority Leader Mitch McConnell, R-Kentucky, who once held a court seat open for nearly a year before the 2016 election to keep President Barack Obama from filling it, lambasted Democrats for announcing their opposition before Trump had decided on a nominee.

"Justice Kennedy's resignation letter barely arrived in the President's hands before several Democratic colleagues began declaring their blanket opposition to anyone at all -- anyone -- that the President might name," McConnell said Monday.

The sharply negative Democratic responses to Kavanaugh's nomination indicated a pitched battle over his confirmation is coming this fall.

Senate Minority Leader Chuck Schumer said in a statement that by selecting Kavanaugh,

Trump "has put reproductive rights and freedoms and health care protections for millions of Americans on the judicial chopping block."

"This nomination could alter the balance of the court in favor of powerful special interests and against working families for a generation, and would take away labor, civil, and human rights from millions of Americans. We cannot let that happen," the New York Democrat said.

### **Red-state Democrats keep their distance**

Trump had invited four Democrats from deep-red states -- likely the four best chances the White House has of attracting Democratic votes for Kavanaugh -- to Monday night's announcement.

But Alabama's Sen. Doug Jones, Indiana's Sen. Joe Donnelly, North Dakota's Sen. Heidi Heitkamp and West Virginia's Sen. Joe Manchin all declined the invitations.

Donnelly, Heitkamp and Manchin are up for re-election this fall, three of the five Democrats, along with Missouri's Sen. Claire McCaskill and Montana's Sen. Jon Tester, up for re-election in states Trump won by double digits in 2016.

Most of those Democrats issued tepid statements saying they will review Kavanaugh's record, without commenting on whether they will vote for or against his confirmation -- a position that breaks with their party's progressive flank, which is demanding an all-out battle, but also doesn't promise Trump any Democratic votes.

Donnelly said he would "carefully review and consider the record and qualifications." Tester said he looks forward to meeting Kavanaugh and called on senators in both parties to "put politics aside and do what's best for this nation."

Moderate Republicans also held their fire. Collins said she is waiting for Kavanaugh's confirmation hearing before the Senate Judiciary Committee, and to meet the nominee in her office.

"I will conduct a careful, thorough vetting of the President's nominee to the Supreme Court, as I have done with the five previous Supreme Court Justices whom I have considered," she said in a statement.

### **Veteran of DC**

Kavanaugh is a classic Washington insider with a deep conservative legal record.

He worked in the George H.W. Bush and George W. Bush administrations, serving the younger president when he was torn among finalists for a Supreme Court seat in 2005.

He also spent 12 years on the US Court of Appeals for the District of Columbia Circuit, where his record would place him to Kennedy's right and more in ideological sync with Justice Samuel Alito, who has been a reliable conservative vote on the court.

Last October, Kavanaugh dissented when the full DC Circuit prevented the Trump administration from blocking a pregnant teenage migrant at the southern border from obtaining an abortion. Kavanaugh stressed

that the "government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion."

George W. Bush praised Trump's selection of Kavanaugh in a statement, calling his selection an "outstanding decision."

"Brett is a brilliant jurist who has faithfully applied the Constitution and laws throughout his 12 years on the D.C. Circuit. He is a fine husband, father, and friend -- and a man of the highest integrity," Bush said. "He will

make a superb justice of the Supreme Court of the United States."

At the White House, Kavanaugh described his mother as influential in his legal path. After teaching high school history, she went to law school, became a prosecutor and later a state court judge during his youth, and he said he thinks of her as the real "Judge Kavanaugh."

"Her trademark line was, 'Use your common sense -- what rings true, what rings false.' That's good advice for a juror and for a son," he said.

## “White House counts on Kavanaugh in battle against ‘administrative state’”

The Washington Post

Robert Barnes and Steven Mufson

August 12, 2018

The White House did not mince words when it introduced Judge Brett M. Kavanaugh to business and industry leaders on the occasion of his nomination to the Supreme Court this summer.

“Judge Kavanaugh has overruled federal agency action 75 times,” the administration said in a one-page unsigned memo touting what it considered the highlights of Kavanaugh’s 12 years as a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

“Judge Kavanaugh protects American businesses from illegal job-killing regulation,” the memo said. “Judge Kavanaugh helped kill President Obama’s most destructive new environmental rules.”

Hot-button social issues such as abortion and race have so far dominated the debate about Kavanaugh’s nomination, but there is no more important issue to the Trump administration than bringing to heel the federal agencies and regulatory entities that,

in Kavanaugh’s words, form “a headless fourth branch of the U.S. Government.”

“The ever-growing, unaccountable administrative state is a direct threat to individual liberty,” White House Counsel Donald McGahn said in a speech to the conservative Federalist Society in the fall. He has said the Trump administration’s efforts to strike down government regulations will be meaningless without judges who will “stand strong.”

As he told another conservative group, “There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin.”

Kavanaugh, 53, for years has been an influential judicial voice questioning the administrative state, with a string of opinions that would sharply limit the power of federal agencies, including the Nuclear Regulatory Commission, the Labor Department’s Occupational Safety and Health Administration and the Environmental

Protection Agency. The decisions concern a long list of topics — mortgage abuse, greenhouse gases, even protecting employees from killer whales.

His nomination concerns some who say the agencies' rulemaking powers protect the public.

“This is the end of the regulatory state as we know it,” said Rena Steinzor, a University of Maryland law professor who specializes in administrative law. “If he goes up there, they will never find a regulation they find acceptable. And they're going to be making the policy.”

Kavanaugh's confirmation, for instance, could call into question the Supreme Court's 5-to-4 ruling in *Massachusetts v. EPA*; in 2007, the court said greenhouse gases blamed for global warming could be regulated under the Clean Air Act. The justice he would replace, Anthony M. Kennedy, joined the court's liberals to form the slim majority.

The ruling opened a new front for EPA regulation, but Kavanaugh has routinely ruled against the agency's efforts.

“EPA's well-intentioned policy objectives with respect to climate change do not on their own authorize the agency to regulate. The agency must have statutory authority for the regulations it wants to issue,” Kavanaugh wrote in a recent opinion about manufacturers using hydrofluorocarbons, potent greenhouse gases known as HFCs.

He added that “Congress's failure to enact general climate change legislation does not license an agency to take matters into its own

hands, even to solve a pressing policy issue such as climate change.”

Julia Stein, a UCLA law professor who specializes in environmental law, wrote in an analysis that Kavanaugh's rulings would limit the agency's efforts in the face of congressional gridlock.

“In a world where comprehensive climate change legislation appears to be a long way off, a Justice Kavanaugh would likely present a hurdle to future agency attempts to regulate climate change within the existing statutory framework,” she wrote.

Kavanaugh has participated in more than 300 opinions, about a third of them dealing with the scope of regulatory agencies.

The judge's supporters say he rules for agencies when he finds they are exercising power specifically granted by Congress, but only after a thorough examination.

“Kavanaugh takes the underlying questions about the legitimacy of any agency's actions very seriously,” said Jonathan H. Adler, director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law. “His response has been to enforce the rules pretty strictly.”

His positions often take issue with the role of independent agencies — from the late 1800s in regulating railroads through the 2009 financial reforms — established with the purpose of protecting the public from more powerful individuals and corporations. Over time, these agencies often adapt to deal with new problems in their areas not specifically

mentioned by Congress when they were created.

In one case, he ruled in favor of SeaWorld, which had been fined \$75,000 by OSHA after a killer whale dismembered and drowned a trainer in front of hundreds of visitors. OSHA said SeaWorld knew from earlier incidents that the whale was highly dangerous.

A majority of the three-judge appeals court panel backed OSHA. But Kavanaugh dissented, calling OSHA's action "arbitrary and capricious" because regulating the safety of killer-whale shows is no different from regulating the safety of tackling in football or speeding in auto racing or punching in boxing.

He wrote that the Labor Department "lacks authority to regulate the normal activities of participants in sports events or entertainment shows."

In *PHH v. Consumer Financial Protection Bureau*, Kavanaugh's colleagues on the circuit court overturned his decision that the agency lacked authority because its sole director was not subject to dismissal by the president.

"This is a case about executive power and individual liberty," he wrote, siding with PHH, a mortgage lender that challenged the CFPB after it fined the company \$109 million.

"Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to

the constitutional system of separation of powers and checks and balances."

The majority in the case said that "PHH makes no secret of its wholesale attack on independent agencies — whether collectively or individually led — that, if accepted, would broadly transform modern government."

It is often in dissent that Kavanaugh has moved the law. Asked by the Senate Judiciary Committee to list his 10 most significant opinions, four of the top five were cases in which Kavanaugh disagreed with his colleagues on the D.C. Circuit but was later supported by the Supreme Court.

At the top of the list was a case in which he dissented when a panel of his court upheld the constitutionality of the Public Company Accounting Oversight Board.

"In my view," Kavanaugh told the senators in his questionnaire, "a key feature of the board's structure — that its members were removable only 'for cause' by the Securities and Exchange Commission, whose members were removable only 'for cause' by the President — unconstitutionally limited the President's Article II authority to supervise the Executive Branch."

The Supreme Court's conservatives, in a 5-to-4 vote, agreed with Kavanaugh.

Kavanaugh also argued against the ability of agencies created in an earlier era to regulate modern business. In a case regarding net neutrality, he wrote that the Federal Communications Commission lacked the authority to regulate without explicit instructions from Congress.

“Congress has debated net neutrality for many years, but Congress has never enacted net neutrality legislation or clearly authorized the FCC to impose common-carrier obligations on Internet service providers,” Kavanaugh wrote. “The lack of clear congressional authorization matters.”

Kavanaugh is especially concerned with the “major rules doctrine.” Congressional authorization would be needed for any regulation of vast economic or political significance — a major rule.

Ian Fein, a lawyer with the Natural Resources Defense Council, said the doctrine would “turn parts of administrative law on its head and strip agencies of power they currently have under numerous statutes to deal with problems that arise in different areas.”

Fein said: “Congress passes laws that establish agencies that deal with new problems that arise. Under Kavanaugh, agencies would not be able to use existing power. They would have to go to Congress to enact new laws.”

Kavanaugh’s opinions have drawn opposition from groups not normally outspoken on judicial appointments. The NRDC has announced that it opposes Kavanaugh’s nomination; its only prior public opposition to a Supreme Court nominee was to Justice Samuel A. Alito Jr.

Other environmentalist groups are also alarmed. They point to a case called *EME Homer City Generation, L.P. v. EPA*. Kavanaugh wrote a majority opinion saying that the EPA could not regulate pollution from one state that was afflicting other states

downwind — even if the state spewing emissions was harming the health of those downwind.

“It undercuts environmental protection to such an extent that it hearkens back to pre-EPA powers when we had tragedies like Love Canal and 1969 burning of the Cuyahoga River,” said Pat Gallagher, director of the environmental law program at the Sierra Club. “Kavanaugh’s speeches, opinions and writings all indicate antipathy toward strong regulatory powers like EPA needs to do its job.”

It is also the one instance in which the Supreme Court reversed a Kavanaugh decision, ruling 6 to 2 for the EPA.

Another reason Kavanaugh has upset environmentalists: In some cases, he made it tougher for independent groups such as the NRDC to file suits to protect the public interest and health. In *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, Kavanaugh’s 2007 majority ruling questioned Public Citizen’s standing based on increased risk of future harm.

“Kavanaugh questioned whether the courthouse door should ever be opened to plaintiffs suing based on increased risk of harm created by the action they’re challenging,” Fein, the NRDC lawyer, said in an interview. “That would have a dramatic impact on citizens but also organizations like NRDC that bring lawsuits to try to protect the public health and welfare. It is deeply troubling.”

Adler said his review of Kavanaugh’s decisions shows him to be “evenhanded,”



using the same evaluation of agency actions whether they could be characterized as liberal or conservative.

The judge in some cases has upheld EPA regulations and in at least one case found that environmental groups had the legal standing to intervene in a case, Adler said.

Others, such as Washington lawyer Eric Citron, who analyzed Kavanaugh's record

for [Scotusblog.com](https://www.scotusblog.com), found the judge to be a "reflexive" friend of business.

"Those who worry that Kavanaugh's judicial philosophy will stand as a barrier to government regulation of big businesses — including when it comes to policies like net neutrality — are right to feel that way," he wrote. "Conversely, those who celebrate that philosophy as tending to make the market and the country a freer place will find a like-minded champion on the Supreme Court."

## “Seeking a successor to Justice Kennedy’s complex legacy”

*The Hill*

Douglas W. Kmiec

July 10, 2018

This being an election year, Justice Anthony Kennedy’s retirement came as a surprise. Was the timing simply observance of the unstated rule that a justice tries to resign when his political party is incumbent, or did it represent — like the reputation of Justice Kennedy himself — that the electoral question could go either way?

The Supreme Court’s 2017-2018 term involved everything from whether a baker with religious objection could be required to cater same-sex weddings, to the legitimacy of presidential limits on migratory and refugee travel, to the collectability of so-called agency fees from nonmembers of public-employee unions. As disparate as these may seem, each case asked the court to resolve the tension between individual liberty and governmental power. Justice Kennedy was in the majority in each.

As Kennedy wrote at the time of his confirmation, “one can conclude that certain essential, or fundamental, rights should exist

in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.”

When the courtly southern gentleman, Lewis Powell, resigned from the court in 1987, President Ronald Reagan did not immediately turn to Kennedy to fill the vacancy. Reagan’s first choice was Robert Bork, with whom Kennedy shared much by way of conservative ideology but with a crucial difference. Bork, by nature, exuded an almost categorical — some would say arrogant — rejection of any judicial role in the articulation and defense of unenumerated or implied rights. Kennedy left open the possibility of judicial intervention, suggesting a zone of liberty, a zone of protection, where the individual can tell the government “beyond this line you may not go.”

This may seem a subtle difference, but it was over that boundary that Bork was rejected and Kennedy confirmed, 97 to 0.

Over his tenure, Kennedy favored the conservative outcome well over 90 percent of the time. On the Rehnquist Court in the 1980s and '90s, he often shared the midpoint with Justice Sandra Day O'Connor. The hot topics of those days implicated issues of race, religion and abortion. Kennedy would be more reluctant than O'Connor to extend the use of race beyond provable past discrimination, was more accommodating than O'Connor to public interaction with faith-based organizations, and with O'Connor (and Justice David Souter) reconstructed, but did not overrule, the abortion right found in *Roe v. Wade*.

O'Connor tended toward the pragmatic or fact-specific while Kennedy repeatedly stressed an overarching limit on governmental power: Yes, the defense of human rights can be left to the political process but not where that process is a manifestation of hostility.

Thus, Kennedy's recent concurrence upholding President Trump's travel ban reasoned that "governmental action may be subject to judicial review to determine whether or not it is 'inexplicable by anything but animus.'" State legislation that denied civil rights protection on the basis of sexual orientation had no rational basis, said Kennedy, and it would be a short distance from that to his conclusion that the Constitution precludes limiting marriage to a man and a woman.

The Supreme Court with a Kennedy successor will now need to more clearly identify the due process and equal protection nature of his rulings.

In matters of race, Justice Kennedy was not prepared to embrace Chief Justice Roberts' notion that, to get beyond the troubling use of race, one must stop using it in decision-making. Instead, while rejecting the generalized reliance upon race to bring diversity to the law school at Michigan, Kennedy for a court majority allowed the University of Texas to seemingly satisfy constitutional concerns by promising, vaguely, not to rely upon race indefinitely and consciously monitoring admission practices to ensure that race remained a modest, individualized consideration.

Reagan and Bush supporters indulged the idea that an appointment or two on the Supreme Court would lead to the overruling of *Roe*; Justice Kennedy would disappoint on that prospect. Waxing philosophic, he posited that moral reality was subject to self-definition and, thus, abortion was different than the taking of other human life. Nevertheless, he moderated the impact of *Roe* by joining with Justices O'Connor and Souter to put abortion off-limits unless such limitations created an "undue burden." He persuaded his colleagues to sustain limitations on a particularly gruesome form of abortion and, in his final week, concurred in the invalidation of a California statute mandating that entities not offering abortion be coerced to inform patients of the availability of abortion elsewhere.

Who might succeed him? By constitutional design, impartial judges are chosen from among political partisans. Given today's stark political divisions, he almost certainly understood that his retirement would subject the Supreme Court to what passes for discourse in a midterm election.

At a minimum, Democratic partisans are likely to closely scrutinize the Federalist Society list on which President Trump found Neil Gorsuch; are the remaining listed candidates in the moderate, Kennedy mold? Moreover, it will not be lost on Democrats that whoever is appointed by President Trump may well rule on the president himself, given the special counsel investigation.

Names already are circulating. Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit, Judge Diane Sykes of the Seventh Circuit, and former judge and constitutional religion-clause expert Michael McConnell received shortlist attention in the past and are likely to again. Amy Coney Barrett, new to the Seventh Circuit, presents

a Souter-like opportunity to appoint someone with a short paper trail; Margaret Ryan of the armed services' Court of Appeals provides the historic opportunity to nominate the first female Marine.

The discussion will be intense, as it should be. As Justice Kennedy wrote in one of his last concurrences, "history ... shows how relentless authoritarian regimes are in their attempts to stifle free speech ... Freedom of speech secures freedom of thought and belief."

And lest the point be obscure, Justice Kennedy expressly conditioned his acceptance of the facial validity of the travel ban with these words: "It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."

## “In Influence if Not in Title, This Has Been the Kennedy Court”

*New York Times*

Adam Liptak

June 27, 2018

Justice Anthony M. Kennedy has served for more than 30 years under two chief justices: William H. Rehnquist and John G. Roberts Jr. Courts are by tradition named for the chief justice. Since 2005, it has been the Roberts court.

But if influence were the deciding factor, it would be more accurate to speak of the period since 1988 as the Kennedy court.

Justice Kennedy has occupied a place at the court’s ideological center for his entire tenure, though he shared the middle ground with Justice Sandra Day O’Connor for most of his first two decades. On her retirement in 2006, his vote became the undisputed crucial one in most of the court’s closely divided cases.

There have been about 51 decisions in which Justice Kennedy joined a liberal majority in a closely divided case, while Chief Justice Roberts dissented. All of those precedents could be in jeopardy, said Lee Epstein, a law

professor and political scientist at Washington University in St. Louis.

To be sure, Justice Kennedy often voted with the court’s conservatives. He wrote the majority opinion in *Citizens United*, which allowed unlimited campaign spending by corporations and unions, and he joined the majority in *Bush v. Gore*, which handed the 2000 presidential election to George W. Bush. Justice Kennedy also voted with the court’s conservatives in cases on the Second Amendment and voting rights.

Not infrequently, though, he joined the court’s liberal wing in important cases on contested social issues, including liberal decisions on gay rights, abortion, affirmative action and the death penalty. A court containing two Trump appointees could chip away at those rulings.

Mr. Trump has vowed, for instance, to appoint justices committed to overruling *Roe v. Wade*, the 1973 decision that established a constitutional right to abortion. That would

not happen overnight if another Trump appointee joined the court, but aggressive restrictions on access to abortion would very likely be sustained.

The vote count in the court's most recent abortion case is telling. In 2016, when the court was short-handed after the death of Justice Antonin Scalia, Justice Kennedy joined the court's four-member liberal wing to strike down a restrictive Texas abortion law. That ruling would almost certainly have come out differently from a court without Justice Kennedy and with two Trump appointees.

The right to same-sex marriage seems more secure, and Mr. Trump has said he considers the issue settled. But a court including a second Trump appointee would be quite unlikely to expand gay rights and would instead be receptive to arguments from religious groups that object to same-sex marriage.

According to a court spokeswoman, Justice Kennedy told his colleagues on Wednesday of his decision to step down, effective July 31.

"It has been the greatest honor and privilege to serve our nation in the federal judiciary for 43 years, 30 of those years on the Supreme Court," Justice Kennedy said in a statement.

In a letter to Mr. Trump, Justice Kennedy, 81, expressed "profound gratitude for having had the privilege to seek in each case how best to know, interpret and defend the Constitution and the laws that must always conform to its mandates and promises."

That language — earnest, flowery, a little mystical — was characteristic of his judicial writing, which was not to everyone's taste.

Justice Kennedy's opinions were studded with vague and soaring language.

"At the heart of liberty," he said in a 1992 decision upholding the constitutional right to abortion, "is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life."

Phrases like that infuriated his critics, notably Justice Scalia. In a 2003 dissent, Justice Scalia mocked "its famed sweet-mystery-of-life passage," calling it "the passage that ate the rule of law."

Justice Kennedy's final opinions on the court had a valedictory quality. He wrote an inconclusive decision in a clash between a baker and a gay couple, and he joined a pair of decisions ducking the question of whether the Constitution prohibits partisan gerrymandering.

Justice Kennedy valued civility and dignity, and the Trump years seemed to take a toll. In Tuesday's decision upholding Mr. Trump's travel ban, he seemed to chide the president for incivility even as he said the courts could do nothing to force him to behave with the decorum Justice Kennedy prized.

"There are numerous instances in which the statements and actions of government officials are not subject to judicial scrutiny or intervention," he wrote. "That does not mean those officials are free to disregard the

Constitution and the rights it proclaims and protects.”

“The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the judiciary can correct or even comment upon what those officials say or do,” he wrote. “Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.”

A new Trump appointee would almost certainly vote with the court’s most conservative members, thrusting Chief Justice Roberts into the court’s ideological center. The chief justice has drifted slightly to the left in recent years, but aside from two votes sustaining President Barack Obama’s health care law, it is hard to point to a major decision in which he disappointed political conservatives.

“Should Roberts become the median, the court could move well to the right, taking its place as the most conservative court in modern history,” Professor Epstein said.

In the Supreme Court term that just concluded, Chief Justice Roberts already seemed to be moving to the court’s center, voting with the majority in divided cases

more often than any other justice. The term yielded an extraordinary run of conservative rulings, including blockbusters upholding Mr. Trump’s travel ban and dealing a sharp blow to public unions.

“This term gave us a preview of what the Supreme Court would be like if Chief Justice Roberts were to become the swing vote,” said Leah Litman, a law professor at the University of California, Irvine. “Progressives will lose, and they will lose a lot, except in a few criminal cases.”

Legal experts struggled to recall a recent example of a chief justice who was also the swing justice.

Justice Kennedy himself did not like to be called the swing justice. “The cases swing,” he said in 2015 at Harvard Law School. “I don’t.”

That was correct. His jurisprudence contained an idiosyncratic mix of commitments, but they were fixed and strong, and they yielded vigorous opinions, very often speaking for the majority.

“Every day you’re not in the majority you think is a dark day,” he told C-Span in 2009. By that standard, Justice Kennedy had very few dark days.

## “A Liberal’s Case for Brett Kavanaugh”

*New York Times*

Akhil Reed Amar

July 9, 2018

The nomination of Judge Brett Kavanaugh to be the next Supreme Court justice is President Trump’s finest hour, his classiest move. Last week the president promised to select “someone with impeccable credentials, great intellect, unbiased judgment, and deep reverence for the laws and Constitution of the United States.” In picking Judge Kavanaugh, he has done just that.

In 2016, I strongly supported Hillary Clinton for president as well as President Barack Obama’s nominee for the Supreme Court, Judge Merrick Garland. But today, with the exception of the current justices and Judge Garland, it is hard to name anyone with judicial credentials as strong as those of Judge Kavanaugh. He sits on the United States Court of Appeals for the District of Columbia Circuit (the most influential circuit court) and commands wide and deep respect among scholars, lawyers and jurists.

Judge Kavanaugh, who is 53, has already helped decide hundreds of cases concerning a broad range of difficult issues. Good appellate judges faithfully follow the Supreme Court; great ones influence and help steer it. Several of Judge Kavanaugh’s most important ideas and arguments — such as his powerful defense of presidential authority to oversee federal bureaucrats and his

skepticism about newfangled attacks on the property rights of criminal defendants — have found their way into Supreme Court opinions.

Except for Judge Garland, no one has sent more of his law clerks to clerk for the justices of the Supreme Court than Judge Kavanaugh has. And his clerks have clerked for justices across the ideological spectrum.

Most judges are not scholars or even serious readers of scholarship. Judge Kavanaugh, by contrast, has taught courses at leading law schools and published notable law review articles. More important, he is an avid consumer of legal scholarship. He reads and learns. And he reads scholars from across the political spectrum. (Disclosure: I was one of Judge Kavanaugh’s professors when he was a student at Yale Law School.)

This studiousness is especially important for a jurist like Judge Kavanaugh, who prioritizes the Constitution’s original meaning. A judge who seeks merely to follow precedent can simply read previous judicial opinions. But an “originalist” judge — who also cares about what the Constitution meant when its words were ratified in 1788 or when amendments were



enacted — cannot do all the historical and conceptual legwork on his or her own.

Judge Kavanaugh seems to appreciate this fact, whereas Justice Antonin Scalia, a fellow originalist, did not read enough history and was especially weak on the history of the Reconstruction amendments and the 20th-century amendments.

A great judge also admits and learns from past mistakes. Here, too, Judge Kavanaugh has already shown flashes of greatness, admirably confessing that some of the views he held 20 years ago as a young lawyer — including his crabbed understandings of the presidency when he was working for the Whitewater independent counsel, Kenneth Starr — were erroneous.

Although Democrats are still fuming about Judge Garland's failed nomination, the hard truth is that they control neither the presidency nor the Senate; they have limited options. Still, they could try to sour the hearings by attacking Judge Kavanaugh and looking to complicate the proceedings whenever possible.

This would be a mistake. Judge Kavanaugh is, again, a superb nominee. So I propose that the Democrats offer the following compromise: Each Senate Democrat will pledge either to vote yes for Judge Kavanaugh's confirmation — or, if voting no, to first publicly name at least two clearly better candidates whom a Republican president might realistically have nominated instead (not an easy task). In exchange for this act of good will, Democrats will insist

that Judge Kavanaugh answer all fair questions at his confirmation hearing.

Fair questions would include inquiries not just about Judge Kavanaugh's past writings and activities but also about how he believes various past notable judicial cases (such as *Roe v. Wade*) should have been decided — and even about what his current legal views are on any issue, general or specific.

Everyone would have to understand that in honestly answering, Judge Kavanaugh would not be making a pledge — a pledge would be a violation of judicial independence. In the future, he would of course be free to change his mind if confronted with new arguments or new facts, or even if he merely comes to see a matter differently with the weight of judgment on his shoulders. But honest discussions of one's current legal views are entirely proper, and without them confirmation hearings are largely pointless.

The compromise I'm proposing would depart from recent confirmation practice. But the current confirmation process is badly broken, alternating between rubber stamps and witch hunts. My proposal would enable each constitutional actor to once again play its proper constitutional role: The Senate could become a venue for serious constitutional conversation, and the nominee could demonstrate his or her consummate legal skill. And equally important: Judge Kavanaugh could be confirmed with the ninetysomething Senate votes he deserves, rather than the fiftysomething votes he is likely to get.

# “Trump Picked Kavanaugh. How Will He Change the Supreme Court?”

*Politico*

Politico Magazine

July 9, 2018

In the end, President Donald Trump made the expected choice: Brett Kavanaugh, a conservative jurist who has served on the U.S. Court of Appeals for the D.C. Circuit since 2006. Kavanaugh, a former clerk to the retiring Anthony Kennedy, has a sterling reputation in conservative legal circles, and a record to match.

In his remarks announcing his pick, Trump suggested he had chosen Kavanaugh for his originalist conception of the law -- a philosophy more in keeping with the late Antonin Scalia than with the more activist Kennedy. “What matters is not a judge’s political views but whether they can set aside those views to do what the law and the Constitution require,” the president said. Kavanaugh reinforced that idea in his own comments, remarking, “A judge must be independent and must interpret the law, not make the law.”

But how will Kavanaugh rule once he’s actually on the bench? We asked top legal thinkers to evaluate his record -- and tell us how he might change America’s highest court.

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## **‘The Court will be transformed into a blatantly partisan institution’**

*Geoffrey R. Stone is Edward H. Levi distinguished professor of law at the University of Chicago.*

Political conservatives have been working for this moment for the past 50 years – since the election of Richard Nixon. For half a century, they have sought to take control of the Supreme Court. The problem for them, however, is that as they made ever more progress in achieving their objective, the concept of “conservative” jurisprudence grew ever more radical. Nixon’s appointment of conservative justices like Warren Burger, Harry Blackmun and Lewis Powell brought about a significant move in the Court to the right. But then political conservatives concluded that this wasn’t conservative enough. Instead of embracing justices who were committed to judicial restraint, they increasingly sought justices who were committed to conservative judicial activism – to justices who would hold unconstitutional laws regulating campaign finance, laws restricting guns, laws guaranteeing voting rights for minorities, laws authorizing affirmative action and laws restricting

commercial and corporate speech. Although boldly tossing around terms like originalism, judicial restraint and “calling balls and strikes,” in fact these justices – at least in the most controversial and important constitutional decisions – almost without exception reached results that were consistent with – and dictated by – raw conservative political ideology.

Sometimes, though, the conservatives failed in their appointments, and some Republican-appointed justices – such as John Paul Stevens, Sandra Day O’Connor, David Souter and Anthony Kennedy – insisted on judicial independence and refused to toe the party line. This has no doubt been frustrating. But if Brett Kavanaugh’s nomination is confirmed, these arch-conservatives, led by the Federalist Society, will finally achieve victory. The Supreme Court – largely because of the unconscionable refusal of Senate Republicans to confirm President Obama’s nomination of D.C. Circuit Court of Appeals Chief Judge Merrick Garland – will have won the day. Across the entire spectrum of critical constitutional issues – ranging from abortion to gay rights to affirmative action to gerrymandering to campaign finance to the regulation of guns and beyond – they will now hold a majority. This is a stunning victory for partisan judicial decision making, and a stunning defeat for the integrity and credibility of our Supreme Court, which will now be transformed into a blatantly partisan institution.

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**‘A turning point for constitutional interpretation’**

*Elizabeth Price Foley is professor of Law at Florida International University College of Law.*

Judge Brett Kavanaugh’s nomination to the Supreme Court is likely a turning point for constitutional interpretation. His commitment to textualism and originalism will help the Court restore power to the political branches and consequently, the American people. Unlike activist judges who believe “law is politics” and feel empowered to impose their subjective preferences on the country, judges such as Kavanaugh believe strongly that law is the end product of politics, not a continuation thereof, and the judiciary’s duty is to enforce the laws (including the Constitution) as written. With Kavanaugh’s addition, the Supreme Court will enter a new era, defined by its commitment to textualism and originalism, which should help de-politicize law by cabining judicial power and moving policy debates back to the political branches where they belong. Expect Justice Kavanaugh to be an outspoken leader of this new generation of Supreme Court originalists and textualists, whose hallmark will be a strong defense of enumerated rights, meaningful enforcement of the Constitution’s separation of powers, and a healthy skepticism of judicial deference to the administrative state.

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**Whatever happens with Kavanaugh, the process is terribly broken’**

*John Culhane is H. Albert Young fellow in constitutional law and co-director of the*

*Family Health Law and Policy Institute at Delaware Law School (Widener University).*

It began before he was even nominated to fill Justice Anthony Kennedy's Supreme Court seat, and now the microscopic focus on Brett Kavanaugh will reach even higher resolution. There are several solid pieces that explain his positions on a host of issues, and we can expect these views – as well as his role in several high-profile matters (most famously including the Ken Starr investigation of President Bill Clinton, and the *Bush v. Gore* debacle) – to lead to much questioning and hand-wringing from the Senate in the weeks to come. When the din subsides, his confirmation looks likely. The only thing that might sink it would be some dramatic, 11th-hour revelation. That's highly unlikely, given that the conservative Federalist Society has thoroughly screened all possible nominees before passing them along to the White House, in a process that White House Counsel Don McGahn infelicitously described as "in-sourced."

Whatever happens with Kavanaugh, the process is terribly broken. The number of appointments a president gets to make depends on when sitting justices decide to retire, or when they die – as did Justice Scalia, in 2016. Life tenure means appointments are few, as many justices serve for decades on end. The stakes are therefore so high that it's no surprise Senate Majority Leader Mitch McConnell cheated by refusing to even consider Merrick Garland, President Barack Obama's nominee, as a replacement for Scalia.

An Obama justice would have pushed the court to the left; this Trump appointee will drive it to the right, quite dramatically. And to get there, we have to live through yet another Kabuki spectacle of the confirmation hearing, during which Kavanaugh will follow the proud tradition of revealing nothing of substance about his views despite desperate efforts from Democrats on the Senate Judiciary Committee to make him crack. (In his case, agnosticism will be hard to pull off, since he has such a long tenure as a federal appellate judge, but he'll manage.)

It's time to move to long, fixed terms for Supreme Court Justices. If they were appointed to something like a 12-term (and then would cycle down to the lower federal courts, if they so chose), the replacement process would attain some regularity, and each president would have a predictable number of replacements to name. What we have now is nuts.

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### **'Please, my liberal friends, calm down'**

*Michael W. McConnell is Richard and Frances Mallery professor at Stanford Law School, director, Stanford Constitutional Law Center and senior fellow, Hoover Institution.*

President Trump did the least Trump-like thing. He chose a solid, broadly respected, experienced jurist to replace Justice Anthony Kennedy on the Supreme Court: Brett Kavanaugh, a 12-year veteran of the second most important court in the land. Trump avoided the temptation to spit in the eye of the establishment or throw red meat to his

base. (The right-wing base, indeed, has been grumbling that Kavanaugh is not exciting and radical enough.)

That does not mean the Democratic opposition will refrain from hyperventilating. For some reason, when Democratic presidents place liberal Democratic justices on the Court, Republicans remain calm. They may oppose. They may even oppose when they should not. But the four horses of the apocalypse are kept in the barn, out of sight. The nominees even get a substantial number of Republican votes. Merrick Garland aside, Obama's two nominees both got 67 votes. But when Republican presidents nominate conservative justices no less qualified, sane, and moderate, the left throws a fit. It matters not who the nominee is.

Please, my liberal friends, calm down.

Abortion is not in danger. *Roe v. Wade* is an intellectual mess and the practice of abortion is anything but "safe, legal and rare," as President Bill Clinton wanted it to be. But the Supreme Court as an institution is slow to change and extremely slow to admit its mistakes. I may be a poor vote-counter, but it is hard for me to count five votes for overruling *Roe*. At most, the Court will continue the path of the past two decades of permitting reasonable regulation but protecting the core of the right to an abortion. And even if I am wrong about that, remember that a reversal of *Roe* means nothing more than a return to the democratic process. If abortion is as valued as right at Democratic activists claim that it is, there is no need to protect it from the voters. Moreover,

technology is quickly making abortion almost impossible to prohibit.

Same-sex marriage is in even less danger. Again, *Obergefell* was not the best-reasoned of decisions, but there is zero appetite on the right to reverse it. At most, individuals and religious groups opposed to the practice will be protected from being coerced to lend their support or approval. That should have been the law all along.

*Citizens United* is probably here to stay. But this is not because of replacing Kennedy with Kavanaugh. Kennedy wrote *Citizens United*.

Moreover, it is nonsense to claim the Kavanaugh appointment will "shift the ideology of the Supreme Court for decades to come." It shifts one seat. If Justice Clarence Thomas were to leave the bench – heaven forbid – under Trump's replacement as president, we could easily see the most liberal Court since the days of Lyndon Johnson.

The balance of the Court is never set in stone. Over the past two terms, Justices Stephen Breyer and Elena Kagan have more frequently broken from their more leftward colleagues to forge a more moderate path, often in conjunction with Chief Justice John Roberts. Temperamentally and jurisprudentially, Kavanaugh is more like to be part of this invigorated middle than to swing toward the extremes. It would be a good thing for the country if the Court moved in a less polarized direction.

Like generals fighting the last war, Supreme Court nomination activists make the mistake of looking backward. Kavanaugh will likely serve on the Court for 20 or 30 years. The big

issues of the Kavanaugh Court will not be abortion or same-sex marriage, but the difficult issues of liberty and democracy raised by the administrative state. These questions will not break down on right-left lines. Nor is criminal justice the partisan issue it was back in Nixon's day. Kavanaugh has almost no record on criminal justice issues, because his court has very little criminal jurisdiction, but as the late Justice Antonin Scalia showed, textualist conservative justices are often the friends of due process protections for criminal defendants.

Liberal activist groups are not likely to love any Republican nominee, but they should be happy to have a nominee who sticks to the law and values judicial restraint rather than one who might pursue a substantive agenda not disciplined by text, history and precedent. They could do a lot worse than Brett Kavanaugh.

Liberals should do the un-anti-Trumpian thing: oppose the nominee if they must, but keep calm, stay civil and talk about the law.

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**'He will likely work to reign in the vast power of federal agencies'**

*Eugene Kontorovich is professor at Northwestern University School of Law.*

Brett Kavanaugh is, like all the short list of potential nominees, a highly intelligent jurist with clear conservative leanings. That should not be news – he is the choice of a Republican president and a careful vetting process. What

distinguishes Kavanaugh is his long and distinguished service on the prestigious U.S. Court of Appeals for the D.C. Circuit, which has given him ample opportunity to reflect on questions of separation of powers and the vast power of federal agencies. He will likely work to reign in the vast power of federal agencies, which has hypertrophied to an extent that greatly undermines the Constitution's system of checks and balances. He will also likely be sympathetic to ensuring that states have their proper role as autonomous sovereign actors in significant policy areas. All of this transcends partisan politics. It should make Democrats happy if it happens while Donald Trump is president – liberals are rediscovering the charms of federalism in response to the administration's immigration and climate policies – and frustrate them if he is not.

Beyond that, the cottage industry of prognosticating how any particular nominee will decide particular issues says more about our society than about the nominees. It is fundamentally a symptom of the vast power the Court has claimed for itself. For example, how a court of appeals judge rules in a particular case is only vaguely connected to how he would rule as a Supreme Court justice. They are different jobs. The former have vastly more discretion; at the same time, they are under vastly more pressure from the media, politicians and so forth. Court of Appeals judges decide far more cases, and have no say over their docket – it is easy to particular find decisions to justify any particular view a out a judge. Nor does personal background have much to do with it – the Catholic Justice Anthony Kennedy

wrote the decision recognizing gay marriage, anathema to the Church.

Attempting to predict nominees' particular decisions in cases 10 years down the road is really a form of Kremlinology. The Supreme Court has massive power; each justice is, in the long run, perhaps as consequential as anyone but a president. Thus like pagans faced with fickle weather, or U.S. strategists faced with an inscrutable Soviet Union, we must construct stories to explain things that affect us greatly but over which we have very limited control. My read of the chicken entrails is that Judge Kavanaugh is too entrenched in the establishment to overrule *Roe v. Wade*, for example. But certainly that decision helps explain why the position he has been selected to fill is so godlike in its power.

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### **'An alarming day for democracy'**

*Michael Waldman is president of the Brennan Center for Justice at NYU School of Law and the author of The Second Amendment: A Biography and The Fight to Vote.*

Three quick thoughts come to mind.

First, it's an alarming day for the law of democracy. On this topic, the Roberts Court has been activist, relentless, and destructive. Take *Citizens United*. Or *Shelby County* (gutting the Voting Rights Act). Or this year's rulings on voter purges and racial gerrymandering. The Roberts Court even came within one vote – Kennedy's – of blocking citizen ballot measures to reform

redistricting. The Court may now rule on voting rights, partisan gerrymandering, campaign finance laws and the one-person-one-vote doctrine (conservative activists want only citizens counted for redistricting). Kavanaugh should be grilled on his stance toward America's wobbly democracy.

Second, expect a hard clash around presidential power. Kavanaugh helped write the Starr Report urging the impeachment of President Bill Clinton. He has denied drafting the salacious stuff. But its G-Rated sections insisted a president could be impeached for lying to the public and his staff. Later, the nominee suggested that Congress pass a law immunizing presidents from any criminal investigation while in office. Either position is problematic. The Court may be asked to rule on everything from whether the Mueller probe can enforce subpoenas to issues arising from the Stormy Daniels lawsuit to the Trump Foundation's fishy charitable expenditures. Think of a major ruling like *U.S. v. Nixon* four decades ago, ordering the president to produce his tapes. Senators should ask, in detail: Is a president above the law?

Finally, we'll get a depressing glimpse of the asymmetrical politics of judicial nominations. Conservatives long have organized around the Court and the Constitution, campaigned around it and voted about it. When the GOP blockaded Merrick Garland's nomination, Democrats barely said a word. For years, well-funded groups like the Judicial Crisis Network have mobilized to support Federalist Society-vetted nominees. Now, finally, progressives have begun to spend money and build organizational

muscle. But with the filibuster gone, and the elusive goal of a hard right Supreme Court in reach, it may all be too late.

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### **‘Will he be too much like John Roberts?’**

*Ilya Shapiro is senior fellow in constitutional studies at the Cato Institute.*

Donald Trump’s pick of Brett Kavanaugh to be the next Supreme Court justice shows that an unconventional president can play a conventional political game. Judge Kavanaugh would have been considered by a Ted Cruz or Marco Rubio administration — and that’s a good thing. It shows how serious constitutionalism has permeated the Republican Party regardless of who’s in the White House.

As Kavanaugh himself said: “A judge must be independent and must interpret the law, not make the law. A judge must interpret statutes as written. And a judge must interpret the Constitution as written, informed by history and tradition and precedent.” That all seems straightforward, but Kavanaugh has a long track record of holding government officials’ feet to the constitutional fire, pushing back on administrative agencies and enforcing the separation of powers.

He’s also a scholar and a teacher, and a wily political operator. It’s that last bit that makes his selection a bit of a surprise — particularly given Trump’s “drain the swamp” ethos and a Supreme Court list that originally didn’t have any “coastal elites.” That too is not necessarily a knock on Judge Kavanaugh, but a double-Yale D.C. lifer doesn’t have the

hardscrabble life story that might better resonate in the heartland (or put as much pressure on Red State Democratic senators).

The one issue of potential pause for originalists and textualists has nothing to do with Kavanaugh’s dedication to those interpretive theories, but rather to those extra-legal concerns that made him a quick frontrunner for this slot. Will he be too much like John Roberts, restrained and minimalist rather than letting the political chips fall where they may? I hope not; I hope instead that President Trump gave us the Gorsuch 2.0 that this country needs.

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### **‘Trump went with a known and reliable insider’**

*Orin S. Kerr is Frances R. and John J. Duggan distinguished professor at the University of Southern California Gould School of Law.*

Conservatives should be very happy with President Trump’s selection of Brett Kavanaugh. Judge Kavanaugh would be on any Republican president’s short list. He has been a prominent conservative judge on the D.C. Circuit, and he is well known and well liked among the conservative legal elite. He has also been a thought leader whose views get attention and respect among the current Supreme Court justices. Judge Kavanaugh is very conservative, and the Senate vote on his candidacy may have few if any votes to spare. But the story here is that President Trump went with a known and reliable insider whose nomination will thrill the conservative legal community.



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**'Their criticisms... are both generic and banal'**

*Richard A. Epstein is the Laurence A. Tisch Professor of Law, the New York University*

*School of Law, the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus, and Senior Lecturer, the University of Chicago Law School.*

In quieter and more sensible times, Donald Trump's nomination of Brett Kavanaugh would be greeted with widespread acclaim. Kavanaugh is a respected jurist and a serious intellectual whose years of service on the Court of Appeals for the District of Columbia has been marked by distinction. The only way to oppose a nominee of Kavanaugh's excellence is to insist that *any* nominee of Donald Trump, or indeed of any Republican president, is unfit for service on the United States Supreme Court.

Sadly, that is exactly the line that the Senate Democrats have decided to take in their instantaneous frontal assault on the Kavanaugh nomination. Their criticisms, some of which are gathered here, are both generic and banal.

Bernie Sanders denounces Kavanaugh because he "will be a rubber-stamp for an extreme, right-wing agenda pushed by corporations and billionaires." He made that same charge about every reform proposed by any Republican on any issue. But his ignorance about how financial markets and

Wall Street works is abject and total. He is surely correct that people who work on Wall Street command high salaries, but he has not the foggiest idea of what they do to make financial markets from credit cards to home mortgages work.

Kirsten Gillibrand is similarly indignant when she writes: "He can't be trusted to safeguard rights for women, workers or to end the flow of corporate money to campaigns." But there is not a glimmer of an argument as to which of these various claims should be accepted and which rejected. The jurisprudence of Senator Gillibrand is wholly result-oriented. Any claim by a group that she supports should be respected. Any disagreement is conclusive evidence that a party is unfit for a position on the Supreme Court. At no point has she ever seriously confronted arguments on the other side of any of these issues. Is there any preference for women in employment that she would reject? Is there any reason to assume that unions represent the interests of American workers or that they should be given monopoly power of critical labor markets? Or that corporate contributions to political campaigns should be regarded as a bad thing if union contributions are regarded as a moral imperative?

Not to be outdone, Elizabeth Warren writes: Kavanaugh is "hostile to health care for millions, opposed to the CFPB & corporate accountability, thinks Presidents like Trump are above the law – and conservatives are confident that he would overturn *Roe v. Wade*." In her view, the only fit nominees for the Supreme Court are those who embrace free health care for all, or who support the

undue concentration of power in the hands of the Consumer Fraud Protection Bureau whose excesses Judge Kavanaugh attacked in his thoughtful opinion in *PHH Corp. v. CFPT*. Yet why a champion of limited government like Kavanaugh should think that any President is above the law remains a complete mystery. *Roe* is of course a serious issue, both ways. I have no doubt that *Roe* was wrongly decided in 1973, and said so at the time. But with the passage of 45 years, and its wide acceptance by much of the American public make it far from clear that the decision should be overruled. One of the hardest questions of constitutional law is the extent to which the passage of time insulates earlier decisions from reversal. But Warren's dogmatic mind can never see two sides on any issue, so she comes off as uneducated, shrill and self-righteous.

The intellectual poverty of the case against Judge Kavanaugh made by these influential senators is powerful testimony as to why the Senate confirm him.

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The Trump administration has violated numerous norms and enacted a variety of dubious and cruel policies. But the president's nomination of judge Brett Kavanaugh to the Supreme Court is as normal as such decisions get. Not only is Kavanaugh a well-known, thoughtful and

widely respected jurist, he's the kind of nominee that could easily have been chosen by John Kasich or Marco Rubio. I applaud many aspects of Kavanaugh's jurisprudence and have reservations about others. But all are carefully reasoned, and well within mainstream legal thought.

On the plus side, Kavanaugh is a strong critic of the *Chevron* doctrine, which requires judicial deference to executive branch agencies' interpretations of federal law. This has obvious appeal to conservative and libertarian critics of the administrative state. But it should also commend itself to liberals who complain (with some justice) that Republican agency heads play fast and loose with the law. More fundamentally, a reduction in deference can help ensure that the dominant interpretation of the law does not change radically any time a new party takes control of the White House. Kavanaugh also has a strong record on freedom of speech, religious freedom and Second Amendment rights, all areas where modern government imperils liberty.

I am far less enthusiastic about Kavanaugh's support for broad executive power in the national security realm. History shows that excessive judicial deference in this field has led to serious abuses. I am also skeptical of Kavanaugh's advocacy of "unitary executive" theory—the idea that nearly all executive power must be concentrated in the hands of the president. This theory was sound in a period where the scope of executive power was confined to its comparatively narrow original bounds. But it is both dangerous and contrary to the original meaning to concentrate so much authority in

one person's hands in an era when the executive wields vastly greater power than was granted at the time of the Founding.

If the Senate should confirm any well-qualified nominee who is within the judicial "mainstream," then Kavanaugh's confirmation should be a no-brainer. But we do not live in a world where any such norm is followed. Merrick Garland was also highly qualified and mainstream, yet Senate

Republicans denied him a vote. Before that, most Democrats voted against the confirmation of Justice Samuel Alito, and most Republicans voted against Justices Elena Kagan and Sonia Sotomayor, even though all three had impressive credentials. Senators, therefore, have every right to oppose a highly qualified nominee if they object to his judicial philosophy. I look forward to a vigorous debate on that subject during the confirmation hearings.

## “Brett Kavanaugh is Devoted to the Presidency”

*The Atlantic*

Garrett Epps

July 9, 2018

Not since Warren Harding in 1921 nominated former President William Howard Taft to be chief justice has the country been presented with a high court nominee so completely shaped by the needs and mores of the executive branch as Brett Kavanaugh, unveiled Monday night as President Donald Trump’s nominee to replace Justice Anthony Kennedy.

Though Kavanaugh served as Kennedy’s law clerk during the October 1993 term, the contrast between the two men could hardly be more complete. Kennedy’s roots lay in his days of small-town private practice; he made his way to the bench from private practice, and, as a judge, he was conservative but independent. Kavanaugh has been the creature and servant of political power all his days. It would be the height of folly to expect that, having attained his lifetime’s ambition of a seat on the Supreme Court, he will become anything else.

A product of the District and its affluent Maryland suburbs, Kavanaugh attended Georgetown Prep with another D.C. princeling, Neil Gorsuch. He went on to Yale College and Yale Law School. He and Gorsuch served together as law clerks for

Kennedy; Kavanaugh worked for President George H.W. Bush’s Solicitor General, Kenneth Starr, then, after Bush left office, worked with then-Independent Counsel Starr investigating the Clinton White House. In 2001, Kavanaugh went to the White House himself to serve George W. Bush, first in his legal counsel’s office and then, for five years, as his staff secretary, ensuring a smooth flow of paper among the president and his aides. While in the White House, he married another Bush retainer, Ashley Estes, who had served for nearly a decade as Bush’s personal secretary. Bush originally named Kavanaugh to the Court of Appeals for the District of Columbia Circuit in 2003, though Democratic opposition delayed his confirmation until 2006.

Much will be made of the nominee’s deep religious faith and his many charitable works. He certainly appears to be a man of large intellect and sterling character. But this assiduous courtier’s brilliant career has seldom been even momentarily exposed to the world beyond the Washington Beltway, in which most Americans live with the decisions made inside it. Indeed, Kavanaugh’s strong Washington identity may have been the reason his name did not

appear on candidate Trump's initial short list of court picks before the 2016 election; Kavanaugh surfaced as a possible court pick only long after the voters had picked Trump to "drain the swamp."

After Kennedy announced his departure, some in conservative circles expressed unease with the idea of a Justice Kavanaugh. They noted that Kavanaugh temporized during the Affordable Care Act litigation, arguing that the challenge was premature; he refused to adopt the harshest possible anti-abortion position during *Hargan v. Garza*, a case testing whether a teenaged woman held in immigration detention could leave lockup to have an abortion. (Kavanaugh wrote that the woman was wrongly asserting "an immediate right to abortion on demand"—not that she had no right to choose abortion at all.) These quibbles are a textbook illustration of what Sigmund Freud once called "the narcissism of minor differences." There is no reason to believe that, on issues ranging from health care to consumer and labor rights to the Second Amendment, Kavanaugh's votes and opinions will be anything but reliably conservative—clothed at times, perhaps, in soothing rhetoric, but more consistent, and more conservative, than Kennedy's.

Kavanaugh seems most likely to make his mark are in two areas important to Washingtonians—executive authority and administrative law. As befits an executive creature, Kavanaugh's decisions incline toward the "unitary executive" view of presidential power, which holds that Congress cannot set up federal agencies that are not under the direction and control of the president. In administrative law, he argues

that federal judges should displace specialized agencies in setting regulatory policy. Under a current doctrine called *Chevron*, agencies interpret the statutes under which they operate. When those interpretations are challenged in court, federal judges ask whether the statute is "ambiguous"—capable of two or more readings. If so, the judges must ask whether the agency's interpretation is "reasonable"; if so, the courts "defer" to the agency's reading.

Kavanaugh rejects this approach; he argues that "judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way." Instead, he wrote in *Harvard Law Review*, "courts should seek the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons." Yet from what I can tell, that "best reading" is no more determinate than is "ambiguity"; indeed, it sounds to me a lot like "the judge's view of best policy."

One could imagine, of course, that Kavanaugh's experience pursuing wrongdoing in the Clinton White House might incline him to a jaundiced view of presidents generally, thus offering a hope that, on the bench, he will be independent of the president who appointed him. But in a 2009 article in *Minnesota Law Review*, Kavanaugh, by then a life-tenured judge, announced that the independent-counsel investigation in which he served had been a mistake after all: "[T]he nation certainly would have been better off if President Clinton could have focused on Osama Bin Laden without being distracted by the Paula

Jones sexual harassment case and its criminal-investigation offshoots.” He suggested instead that Congress should, by statute, simply provide that a sitting president could neither be sued, indicted, tried, investigated or even questioned by prosecutors while in office. Problem solved.

No doubt that position was agreeable to Trump and those around him.

## “Chief Justice Roberts Moves to Man in the Middle on the Supreme Court”

*Wall Street Journal*

Brett Kendall

July 2, 2018

Though John Roberts has been chief justice of the United States for 13 years, this fall’s term may see the true birth of the Roberts Court.

With the retirement of Justice Anthony Kennedy, Chief Justice Roberts will be the new man in the middle on the Supreme Court. He will have four steadfastly liberal justices on his left and likely four deeply conservative ones to his right, including a second justice appointed by President Donald Trump.

That new ideological math is expected to give the chief justice greater leverage to steer the direction of the court than at any time since the George W. Bush appointee joined it in 2005.

The chief is the sole justice whose role, by tradition, goes beyond casting votes and writing opinions and extends to serving as the custodian of the court’s role and reputation. Chief justices have often shown concern that the institution not depart too markedly from public sentiment or issue opinions that are strongly at odds with presidential or congressional actions.

That puts Chief Justice Roberts in a highly unusual position: a chief who also will be a swing vote.

University of Chicago law professor Aziz Huq said it has been 80 or 90 years since the chief justice was also the court’s median justice. “It creates some interesting questions, because

the chief justice is supposed to be institutionally minded,” he said. “We evaluate chief justices in terms of the performance of the court.”

Most notably, it raises the question of how often Chief Justice Roberts will choose to be the leader of the court’s newly dominant conservative wing versus seeking to craft a broader coalition of justices.

“For all sorts of reasons, Roberts is going to be central to whatever happens,” said William & Mary law professor Neal Devins. “Being the median justice and having the power as chief justice to assign opinions, you’re really running things.”

Chief Justice Roberts often has sought to be the voice of the court, especially on cases of particular gravity, such as last week’s ruling upholding Mr. Trump’s travel ban.

For the 2017-18 session, Chief Justice Roberts was in the majority in 93% of the court’s

rulings, according to data compiled by SCOTUSblog, surpassing Justice Kennedy for the top spot for the first time in years.

But the chief justice also has been spectator to a handful of the court's most notable decisions, cases in which Justice Kennedy spoke for the court after forging a majority with his liberal colleagues to recognize a constitutional right to same-sex marriage and to preserve affirmative action.

That is far less likely to happen now. Because he is more conservative than Justice Kennedy, Chief Justice Roberts is unlikely to be in play to the same degree, narrowing the liberals' options for coalition building.

Chief Justice Roberts has rarely joined with the liberals in 5-4 cases, though he did so famously in 2012 when that lineup upheld the Affordable Care Act, President Barack Obama's signature health-care law. That coalition also joined together in a cellphone privacy decision last month.

More often, the chief justice has joined with other conservatives to move the law distinctly to the right. He has been part of major decisions weakening campaign finance laws, public-sector unions and Jim Crow-era voting rights protections. His court has strengthened gun rights and issued a long string of rulings that have been favorable to corporations and employers.

The chief justice, however, also has shown an affinity in many circumstances for narrow, incremental rulings that pick up more votes, and legal observers say his strong sense of stewardship means he won't want the court to

be seen as a partisan body that decides all of the nation's big legal issues on 5-4 votes.

"Roberts is a pretty cabined and cautious opinion writer, and that might be due to him being chief," said Mr. Huq.

Chief Justice Roberts made his first public remarks since the Kennedy retirement on Friday, appearing at a regional legal conference for a question-and-answer session with a longtime federal appeals court judge, J. Harvie Wilkinson.

"I don't know of anybody who is more committed to the character and integrity of the courts and the institution," Judge Wilkinson said of Chief Justice Roberts. He noted that there have been only 17 chief justices in the nation's history, far fewer than presidents.

He asked Chief Justice Roberts whether he felt the weight of his office in ways that don't apply to his colleagues. "I think there is something to that, yes," the chief justice responded. "As the chief justice, I feel some obligation to be something of an honest broker among my colleagues. I don't necessarily go out of my way to pick fights."

There are some clear differences between Justice Kennedy and Chief Justice Roberts. The chief, for example, has been steadfast in opposition to racial preferences, and in oral arguments this past term he also sounded more dubious than Justice Kennedy about whether courts should referee cases alleging that politicians have gerrymandered districts in extreme ways for partisan gain.



More broadly, Chief Justice Roberts's tenure has shown him to be skeptical of litigants attempting to use the courts for policy gains that they have been unable to win in Congress. He dissented from a Kennedy ruling last month that overturned decades of legal precedent in giving states more power to require merchants to collect sales taxes on internet purchasers. The chief justice argued that if changes were needed, they should come from the legislative branch.

Legal analysts, however, said the differences between the two men didn't mean that the

chief justice would be eager to overturn precedents that Justice Kennedy helped set, including on politically charged issues like abortion and gay rights.

Mr. Devins of William & Mary said the new-look court with Chief Justice Roberts in control may limit the application of some of those precedents, but "I am not sure there are many cases where Kennedy cast the fifth vote for a liberal outcome that are vulnerable to formal overruling."

## “Chief Justice John Roberts is now the Supreme Court’s swing vote”

*The Washington Post*

Christopher Ingraham

June 27, 2018

The retirement of Supreme Court Justice Anthony M. Kennedy is all but certain to shift the ideology of the court to the right.

As the court's swing vote, Kennedy is what political scientists call the “median justice.” Plot out the ideology of the court's nine members, and you'll find Kennedy smack in the middle with four conservatives on one side and four liberals on the other. The median justice wields considerable power on the court: On decisions that split neatly by ideology, you can't have a majority without the median justice.

Political scientists have used different methods to calculate judicial ideology over the years. One of the most widely used is the Martin-Quinn score, which, at the risk of greatly oversimplifying, tracks how often justices vote with each other in affirming or reversing lower-court cases.

The nice thing about this score is that it allows us to place each justice on an ideological scale, which in turn allows us to track the overall ideology of the Supreme Court over time, including the position of the crucial median justice. Here's what that looks like, going back to 1937.

The thick black line in the middle of the chart is the important one: the ideological position of the median justice. You can see that it doesn't stray too far from the zero line, particularly relative to the thin orange and blue lines denoting the court's most conservative and liberal members, respectively.

Let's focus on the right end of the chart, which brings us close to the present day. There's a thin yellow line there indicating the ideological position of Kennedy. You'll notice it perfectly tracks with the black median justice line.

Here comes the important part: In terms of ideology, the conservative justice closest to Kennedy is Chief Justice John G. Roberts Jr., according to the Quinn-Martin scores. President Trump is almost certainly going to nominate somebody to the right of Roberts. Trump's previous confirmed nominee, Justice Neil M. Gorsuch, for instance, is much closer to Justice Samuel A. Alito Jr. than he is to Roberts on the Quinn-Martin scale.

With Kennedy gone, and (presumably) a conservative to the right of him filling the vacancy, that means that Roberts becomes

the court's next median justice. As of the 2016 term, that would shift the ideological score of the median justice rightward, from Kennedy's  $-.362$  to Roberts'  $+.257$ , more than a half a total ideological point.

To put it in simpler terms, the chief justice is now the court's swing vote.

One important caveat is that scores haven't been calculated for the 2017-2018 term, which just wrapped up. There's also some

debate among political scientists over the best way to track Supreme Court ideology over time. One big knock against Martin-Quinn scores, for instance, is that they don't at all consider the substance of the cases considered.

But regardless, it's clear that as long as Trump nominates a conservative to the right of Roberts, the balance of ideological power on the court is about to undergo a considerable shift.

## “Chief Justice Roberts will be the ‘swing’ vote”

*The Hill*

Jonathan Nash

June 30, 2018

Chief Justice John Roberts may be the biggest beneficiary of Justice Anthony Kennedy’s retirement. Justice Kennedy has served as the “swing vote” on the Court for much of his tenure, and certainly since the retirement of Justice Sandra Day O’Connor last decade.

However, President Donald Trump will not be looking to appoint a “swing vote.” Indeed, if Justice Neil Gorsuch is any evidence, President Trump will try to appoint another reliable conservative.

Nonetheless, on a court of nine, there will always be some Justice whose beliefs place him or her in the middle among his or her colleagues. Therefore, assuming President Trump’s nominee will not be a swing vote, a sitting Justice will assume that role. It is likely that the new swing vote will be Chief Justice Roberts.

As political scientists and legal scholars have expounded, if we arrange the Justices’ beliefs on some one-dimensional scale — most would understand this as ranging from “more conservative” to “more liberal” — some Justice will lie in the middle.

This “median Justice” will predictably be the “swing Justice.” Justice Gorsuch’s voting

record confirms his reputation as ideological replacement for Justice Antonin Scalia, whose seat he took.

If President Trump now nominates someone ideologically similar to Justice Gorsuch, the new median Justice will hail from the Court’s existing ranks. Clearly, none of the four Justices appointed by Democrats will be the new median. Of the conservative bloc, Chief Justice Roberts is the obvious median.

Chief Justice Roberts has already sometimes shown himself to be the “swing vote” in some cases. He has occasionally voted with the liberal bloc to form a five-Justice majority where Justice Kennedy has voted with the three other Republican-appointed Justices. Indeed, some conservatives still have yet to forgive the Chief Justice (or President George W. Bush for having appointed him) for his vote to uphold the constitutionality of President Barack Obama’s health care statute.

Adding to the notion that Chief Justice Roberts will be the new “swing vote” is the fact that, in his role as Chief Justice, Chief Justice Roberts may feel some additional institutional pressure to vote sometimes with the putative minority bloc.

The Chief Justice may vote apart from their personal preferences in an effort to effectively shepherd the entire Court. Indeed, scholars have observed that Justices who have served on the Court before becoming Chief Justice change their voting patterns to some degree after becoming Chief Justice.

What would it mean for Chief Justice Roberts to become the Supreme Court swing vote? Chief Justice Roberts would represent the vote that in close, important cases controls the balance of power. For that reason, just as advocates often have framed their arguments with the goal of attracting the vote of Justice Kennedy, going forward advocates would instead try to appeal to Chief Justice Roberts.

This would increase (even beyond the high point at which it already finds itself) the influence of Chief Justice Roberts over the Court's jurisprudence. Beyond the power to cast the decisive vote in many cases, the fact is that the Chief Justice always enjoys the power to assign the responsibility of drafting the majority opinion when he is in the majority.

Thus, Chief Justice Roberts would in many cases both cast the decisive vote and then assign the opinion-writing responsibility to the Justice he'd prefer to write the opinion (including himself).

To some degree, the role of "swing vote" might be a burden to Chief Justice Roberts. To the extent that the Chief Justice actively votes with the liberal bloc more often — or perhaps even to the extent that the media portrays the Chief Justice as the swing vote— his standing among conservatives may fall further.

At the end of the day, the increased stature will probably outweigh any burden. Indeed, being Chief Justice means that John Roberts cannot aspire to any higher judicial post (other Justices can at least dream of being elevated to Chief Justice one day). The only persona interest he might seek to further is to further burnish his reputation as Chief Justice, and it seems that serving as "swing vote" would in the long run serve to highlight his reputation as a strong Chief.

## “With Kennedy Gone, Roberts Will Be the Supreme Court’s Swing Vote”

*New York Times*

Julie Hirschfeld Davis

June 28, 2018

The retirement of Justice Anthony M. Kennedy is likely to thrust Chief Justice John G. Roberts Jr. into the court’s ideological center, making him the deciding vote on abortion, gay rights and affirmative action cases alongside a newly solidified conservative majority.

For the past dozen years, Justice Kennedy has sat in the ideological middle of the polarized court, with four liberal justices to his left and four conservative ones to his right, according to scores based on their voting patterns. His retirement will almost certainly mean that position goes to Justice Roberts, potentially encouraging him to be more moderate.

The chief justice, a conservative nominated by Republican president George W. Bush, has drifted slightly to the left in recent years, drawing howls of protest from activists on the right who have complained that he has proved to be a disappointment. But other than two votes upholding the Affordable Care Act, Chief Justice Roberts, 63, has reliably sided with the court’s other conservatives.

With Justice Kennedy’s departure and the likelihood that President Trump will succeed in winning confirmation of a conservative successor, the question is whether Chief Justice Roberts — an incrementalist who is

passionate about preserving the institutional integrity of the court — will inch further toward the center.

“If Roberts stays right where he is now and he becomes the median, it could pull the court quite a bit to the right,” said Lee Epstein, a law professor and political scientist at Washington University in St. Louis. “He will prefer to try to form a coalition with the other conservatives, although he will occasionally side with the liberals.”

Justice Sandra Day O’Connor became more moderate when Justice William J. Brennan Jr. and Justice Thurgood Marshall left the court, said Michael C. Dorf, a Cornell Law School professor who clerked for Justice Kennedy, and Justice Kennedy likewise moved to the center when Justice O’Connor departed.

“It could manifest in compromise positions in his taking substantively more moderate stances on issues,” Mr. Dorf said. “He might want to go slowly before taking an abortion case or an affirmative action case, or a same-sex marriage case to potentially overturn Justice Kennedy’s handiwork.”

A 2015 study in *The Journal of Legal Studies*, and related data ranking the justices in ideological order, found that Chief Justice

Roberts voted in a conservative direction 58 percent of the time over the last decade, but leaned right when it mattered most. “He is a reliable conservative in the most closely contested cases but moderate when his vote cannot change the outcome,” the study said.

Mr. Dorf said that Chief Justice Roberts might act differently now that Justice Kennedy — often the deciding vote in those cases — was gone, much like congressional leaders spare their most vulnerable members of Congress from casting deciding votes on politically difficult issues.

But William Baude, a law professor at the University of Chicago who clerked for Justice Roberts, said there is no reason to believe that he will evolve with a newly constituted court.

“I don’t think he’s really changed — he’s been the same chief justice all along — and people who want someone who’s ideologically reliable are sometimes going to be disappointed by that,” Mr. Baude said. “People made fun of him for describing the role as an umpire calling balls and strikes, but I think that’s really the way he sees it.”

During the Supreme Court term that just ended, Justice Roberts voted with the majority in divided cases more often than any other justice.

The result was a set of deeply conservative rulings, including one upholding Mr. Trump’s travel ban and another dealing a sharp blow to public unions. But he is also regarded as an incrementalist who prefers a slow, step-by-step process for staking out a

position, shying away from big, bold precedent-shaking decisions.

“On a lot of major decisions, he already has been the swing vote, so it’s not an entirely new scenario,” said Carrie Severino, the chief counsel and policy director at the Judicial Crisis Network, a conservative legal group. “He is someone who would rather answer smaller questions.”

Ms. Severino said that makes Justice Roberts something of a “wild card” on the question of whether to overturn *Roe v. Wade*, the 1973 decision that established the constitutional right to an abortion. “I don’t think anyone knows what Chief Justice Roberts would do in those circumstances,” she said.

Yet he is also seen as someone who cares deeply for the court’s institutional reputation, and someone who would like to avoid rulings that make the Supreme Court appear to be just another partisan actor, with Republican-appointed justices voting in one direction and liberal justices unanimously on the other side on a politically charged issue.

David S. Cohen, a law professor at Drexel University, said some progressives hope that instinct might steer Chief Justice Roberts away from overturning *Roe*, or from invalidating same-sex marriage just a few years after it was decided because a Republican president was able to appoint two new justices.

“The best hope is to appeal to the chief’s sense of the court as a special, above-politics institution,” Mr. Cohen said in an email. “Overruling either of these cases in these

circumstances would make the court and its justices appear like petty politicians.”

On the other hand, he added, Chief Justice Roberts may see the allure of presiding over the court that succeeds in undoing precedents reviled by conservatives.

“After all, these justices don’t get to the point they are at in life without being political actors,” Mr. Cohen said, “and this may be his political goal.



