

Brett Kavanaugh: A reliably reactionary jurist

By Ed Hightower
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When President Trump tapped Brett Kavanaugh for the Supreme Court vacancy created by the retirement of Justice Anthony Kennedy, he was choosing a long-time Republican party operative and judicial reactionary.

If approved by the Senate, which seems certain, Kavanaugh's addition to the high court would create a 5-4 ultra-right majority with far-reaching consequences. It is therefore important to understand Kavanaugh's political and judicial pedigree as clearly as possible.

Born into what he called the "vibrant Catholic community" of the Washington, D.C. area, Kavanaugh went to a Jesuit high school before taking undergraduate and law degrees at Yale. After law school he clerked for two federal appellate judges before securing a fellowship with the Solicitor General of the United States, Kenneth Starr, in the presidential administration of George H.W. Bush.

From Starr to *Bush v. Gore*

After the one-year fellowship, Kavanaugh clerked for the generally right-wing justice Anthony Kennedy at the Supreme Court (the same one he has been nominated to replace). Following this, he again served under his protégé, Starr, this time at the Office of Independent Counsel during the presidency of Bill Clinton. (The head of the Office of Independent Counsel, no longer in existence, was appointed by a panel of the US Court of Appeals for the District of Columbia, not by the president).

Bent on destabilizing the administration, Starr investigated Clinton's involvement in the failed Whitewater real estate venture, the suicide of Clinton's attorney and White House counsel Vince Foster, and most notoriously, the Monica Lewinsky sex scandal. All of these efforts represented escalating right-wing attempts to overturn the result of two presidential elections and remove Clinton from office.

Kavanaugh exhaustively investigated the death of Vince Foster before concluding, as all authorities had, that it was indeed a suicide. More significantly, Kavanaugh was the chief author of the infamous Starr report which concluded that Clinton had perjured himself and obstructed justice, and which resulted in his impeachment.

After working for Starr, Kavanaugh joined the

Republican-allied law firm of Kirkland and Ellis where he represented Cuban national Elian Gonzalez *pro bono* during the political stunt aimed at preventing the child from returning to his father in Cuba. He later was part of the legal team representing George W. Bush in the *Gore v. Bush* lawsuit to prevent a vote recount in Florida, in the judicial theft of the 2000 presidential election.

After proving himself a loyal Republican through not one, but two attempted *coups d'état*, Kavanaugh landed a White House job as staff secretary, where he met his future wife Ashley Estes, then-personal secretary to President Bush, in 2001. Kavanaugh worked as a deputy counsel drawing up lists of potential nominees for judicial positions, and ended up on the list himself.

He was nominated to the powerful Court of Appeals for the District of Columbia, which handles the lion's share of cases filed against the federal government. It serves as a springboard or proving ground for an appointment to the Supreme Court. After a contentious process lasting almost three years, Kavanaugh's appointment to the D.C. Circuit was confirmed in 2006.

A judicial friend of polluters

In that position, Kavanaugh proved himself a reliable enemy of governmental regulations of business activities. He showed particular contempt for the Environmental Protection Agency, ruling against air quality regulations and frequently lambasting the agency in his written opinions and dissents.

For example, in a 2012 dissenting opinion in *Coalition for Responsible Regulation v. EPA*, Kavanaugh found that the Environmental Protection Agency "exceeded its statutory authority" when it regulated greenhouse gas emissions because the molecules in question—carbon dioxide and methane—were not toxic enough to be considered "air pollutants" and because global warming was not properly considered a "health problem."

He clearly sympathized with corporate America's plight, noting that, "the U.S. Chamber of Commerce describes the EPA regulations at issue here as 'the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency.'"

In a 2014 opinion in *White Stallion Energy v. EPA*, Kavanaugh sounded the same note, writing:

“So it comes as a surprise in this case that EPA excluded any consideration of costs when deciding whether it is ‘appropriate’—the key statutory term—to impose significant new air quality regulations on the Nation’s electric utilities. In my view, it is unreasonable for EPA to exclude consideration of costs in determining whether it is ‘appropriate’ to impose significant new regulations on electric utilities. To be sure, EPA could conclude that the benefits outweigh the costs. But the problem here is that EPA did not even consider the costs. And the costs are huge, about \$9.6 billion a year—that’s billion with a b—by EPA’s own calculation.”

One might be surprised to learn that the regulations in question aimed in part to reduce mercury levels in American waterways and thereby reduce the frequency of birth defects.

Abortion rights

Concerning the right to abortion, Kavanaugh has tried to hold his cards close to his chest. In his 2006 senate confirmation hearing, he replied to a question about the *Roe v. Wade* decision by stating it was clear precedent, affirmed by subsequent cases, and that as a D.C. Court of Appeals judge, he would be bound by and follow that precedent. This of course means nothing to an aspiring Supreme Court justice, who would be poised to “revisit” *Roe v. Wade* and overturn it as part of a reactionary majority. This would

turn women’s reproductive health over to the states, encouraging endless right-wing attacks on this vital medical procedure.

More recently, Kavanaugh showed his true colors regarding abortion in the 2017 *Garzan v. Hargan* case. In his dissenting opinion, which opposed the right of a detained immigrant girl to obtain an abortion, the Supreme Court nominee preached, “the government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.” He continued, “the government may further those interests so long as it does not impose an undue burden on a woman seeking an abortion.”

One has to ask: if being imprisoned in a detention facility is not an undue burden to accessing a legal medical procedure, what is?

Instead, Kavanaugh ridiculed the majority opinion, calling it “based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in US government detention to obtain immediate abortion on demand.”

A supporter of executive supremacy

On question of executive power, Kavanaugh distinguishes himself as a partisan for the commander in chief. He penned an article in the *Minnesota Law Review* in 2009 arguing that a sitting president should not be distracted by civil lawsuits, criminal investigations or questioning by attorneys while in

office. The rationale is the well-worn path of national security, that is, a president forced to undergo depositions or questioning can’t lead the war on terror (now a great power war).

Kavanaugh suggests that impeachment by Congress is the only limitation to presidential conduct.

“Having seen first-hand how complex and difficult that job is, I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible. The country wants the President to be “one of us” who bears the same responsibilities of citizenship that all share. But I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office” he wrote.

This amounts to a euphemism for “the President is above the law.”

Based on his concurrence in *Meshal v. Higgenbotham* (2016) which dismissed a lawsuit by an American citizen claiming he had been kidnapped by US intelligence and then tortured at a “black site” in Kenya, one would expect Supreme Court justice Kavanaugh to shield the President from virtually any legal challenge.

This point may have motivated Donald Trump, an increasingly unpopular and isolated figure facing investigations of his own. The Kavanaugh nomination may also serve as an olive branch between the Trump administration and Republican establishment, particularly those layers around the Bush family.

Most importantly, Kavanaugh’s nomination, and with it, a reactionary majority on the Supreme Court will be prepared to sanction repression against an upsurge of the working class. Both the Democratic and Republican parties harbor this goal above all, a fact which will militate for Kavanaugh’s swift confirmation.

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