



A Champion of Constitutional Safeguards

David B. Rivkin Jr. and Andrew M. Grossman

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Brett Kavanaugh has a fine record as a judge. Senate Democrats will give him their worst anyway.

Days before President Trump announced his choice of Judge Brett Kavanaugh for the Supreme Court, Senate Democrats had vowed to oppose any nominee. Backed by an activist-fueled propaganda machine, they now will unleash relentless personal attacks—on Judge Kavanaugh’s Catholic faith, his “elitist” Yale degrees, his service in the George W. Bush administration.

As with the attacks last year on Justice Neil Gorsuch, they should be unavailing. Over Judge Kavanaugh’s 12 years on the U.S. Circuit Court of Appeals for the District of Columbia, he has developed an impressive record as a legal thinker and a champion of the Constitution’s structural safeguards against overweening government.

Typical is a 2008 dissent in which Judge Kavanaugh concluded that the Public Company Accounting Oversight Board was unconstitutionally structured because it improperly insulated the agency from political accountability. The opinion was a tour de force of historical exposition and originalist methodology—that is, interpreting the Constitution’s text as it was originally understood. The Supreme Court ultimately agreed, adopting the reasoning of Judge Kavanaugh’s dissent.

Yet he is equally wary of unbridled executive authority, as a 2013 case shows. When the Nuclear Regulatory Commission declined to proceed with licensing the proposed waste repository at Yucca Mountain, Nev., which the agency appeared to oppose on policy grounds, he wrote: “The President may not decline to follow a statutory mandate or prohibition simply because of policy objections.”

In articles and speeches as well as formal opinions, Judge Kavanaugh has been a leading critic of Chevron deference, the courts' practice of giving agencies free rein to interpret their own statutory authority. In a 2016 law-review article, he wrote that *Chevron* encourages the executive branch "to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints," cutting Congress out of the picture. "The American rule of law, as I see it, depends on neutral, impartial judges who say what the law is."

On that score, Judge Kavanaugh rivals the late Justice Antonin Scalia in his ability to make sense of Congress's often knotty statutory constructions. Judge Kavanaugh considers textualism to be an important restraint on judges that prevents them from imposing *their* policy preferences. As he put it in that 2016 article: "When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power."

That's why the Democrats' formulaic charges of partisanship won't stick. In case after case, Judge Kavanaugh sided with the Obama administration in the war on terror. He turned away a constitutional challenge to ObamaCare on jurisdictional grounds, while writing that the government's defenses of the law were "unprecedented" and without "principled limit."

Across three successive administrations, Judge Kavanaugh has frequently ruled against the government. According to Jennifer Mascott of Scalia Law School, he "has written 40 opinions finding agency action to be unlawful and joined majority opinions reversing agency action in at least 35 additional cases." That's a muscular record on a court often criticized for deference to government.

Democrats may make an issue of a 1998 academic article in which Judge Kavanaugh—who early in his career worked in the Office of Independent Counsel during the Clinton administration—questioned whether the Constitution permits criminal prosecution of a sitting president. He didn't actually reach a conclusion on the question, but the Justice Department's Office of Legal Counsel did, holding that a sitting president cannot be indicted. Since that opinion is binding on special counsel Robert Mueller, there's no prospect the issue will reach the Supreme Court.

Democrats will also roll out culture-war issues like abortion and same-sex marriage. There is nothing in Judge Kavanaugh's judicial or scholarly record to indicate how he would vote on any of those issues. Only one sitting justice, Clarence Thomas, has said he favors overturning *Roe v. Wade*, so the status quo on abortion seems likely to prevail for some time. As for same-sex marriage, there appears to be little appetite on the court to revisit it, and even less reason to believe that a case doing so is likely to arise, given its rapid public acceptance.

At any rate, it would be improper for Judge Kavanaugh to answer senators' questions about how he would vote on any particular issue. Since Justice Ruth Bader Ginsburg's appointment in 1993, her "Ginsburg Rule"—"no hints, no forecasts, no previews"—has stood. Judges do not decide abstract issues but concrete cases with specific facts, arguments, and governing law. Judges have a duty to decide cases as they arise, without prejudgment. Like Justice Ginsburg, Judge Kavanaugh can and should be questioned on his record. And a fine record it is.

Messrs. Rivkin and Grossman practice appellate and constitutional law in Washington. Mr. Rivkin served at the Justice Department and the White House Counsel's Office. Mr. Grossman is an adjunct scholar at the Cato Institute.