

# Commentary

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## The Kavanaugh Conspiracy

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Generally speaking, the Trump era has been defined by two contrasting phenomena: Republican disunity leading to occasional episodes of tactical incompetence, and Democratic discipline and reconstruction. When it comes to judicial appointments, however, the parties trade their roles. From non-governmental organizations, to media figures, to Congress and the White House, the right has been united, strategic, and remarkably effective at nominating and confirming originalist judges to federal court appointments. Democrats, meanwhile, have been tactically maladroit, schismatic, and irrational. Owing to their lack of foresight, Democrats are now stripped of the minority privileges that would allow them to effectively oppose Donald Trump's overqualified nominee to the Supreme Court, Brett Kavanaugh. Thus, in their impotence, they are left with one option: radicalize their voters.

Since Kavanaugh's nomination was announced, Democrats have preached a variety of implausible doomsday scenarios. The strategy, MoveOn.org's Washington Director Ben Wikler told the Associated Press, was to terrify Democratic voters with three messages. "The essential message is Roe," he said. "The secondary message for most folks is ACA and health care. . . . The third messaging plank is, 'choose your own adventure.'" Democrats have already plowed through messages one and two with an abandon that suggests these cookie-cutter attacks on any and all conservative justices were not sticking to a nominee as conventional and well-liked as Kavanaugh. And so, by breaking the glass around message three, the Democratic Party has chosen to slither through the left's most fetid fever swamps.

The latest line of attack goes something like this: Donald Trump selected Kavanaugh not because he served for over a decade on the District of Columbia Court of Appeals, has a long record of conservative jurisprudence, and is well-liked and occasionally cited by the Supreme Court's current justices, for whom many of his former clerks now work. No, he was picked because he is most likely to shield Donald Trump from the legal consequences that might arise from Robert Mueller's special counsel probe.

The support for this bizarre claim is found in a 2009 article Kavanaugh wrote for the Minnesota Law Review in which he said that presidents should be protected from indictments while serving in office because "a president who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as president." He added that the prosecution of a president could undermine the separation of powers in the Constitution. And, after all, the

nation's founding charter already provides Congress with a remedy for "dastardly" presidential behavior in the form of impeachment. His article concluded with a recommendation that Congress, not the judiciary, take measures to ensure that a sitting president is properly protected from prosecution. These sentiments comport with a 1998 article Kavanaugh wrote for the Georgetown Law Review in which he said it is "debatable" as to whether a president can be indicted, and Congress should clarify that debate in law.

This perfectly reasonable opinion is not only consistent with what the Department of Justice's Office of Legal Counsel under Bill Clinton concluded about a sitting president's immunity, but it also captures Kavanaugh's belief in the limits of judicial power. But perhaps because Democrats do not share Kavanaugh's apprehension about executing political imperatives from the bench, they have decided that his Obama-era recommendation amounts to a desire to shield Donald Trump from the law.

"Why did the president stick with Kavanaugh?" Senate Majority Leader Chuck Schumer asked. "Because he's worried that Mr. Mueller will go to the court and ask that the president be subpoenaed." Senator Ed Markey, too, said that it is "not a coincidence" that Kavanaugh was nominated to the Supreme Court given his views on a presidential indictment. Senator Cory Booker concurred. "That should raise enormous red flags," he wrote. The Democratic Party's newest star, self-described Democratic Socialist Alexandria Ocasio-Cortez, claimed that Kavanaugh's views on indictment represent "an automatic disqualification" for appointment to the high court.

The activist left's media ecosystem has taken its cue. "Kavanaugh was the right pick if Trump's top priority was protecting himself from criminal investigation," wrote Vox.com's Ezra Klein. "He can, and he will, shield Trump from grand jury subpoenas, civil suits, and any/all other investigations," the University of New Hampshire Professor Seth Abramson declared. And so on.

These adulated expressions of anxiety don't dwell much on the scenarios that would lead to a clash between the president and the Supreme Court over Mueller's work because those scenarios do not satisfy the left's conspiracy theorists. There's an outside chance that the Court could take up an appeal from Trump's former campaign chairman Paul Manafort if he is convicted on charges of tax and bank fraud, among other offenses. The Court might have to weigh in on whether the president can decline a subpoena or a request for a deposition by the Mueller probe, but this is not untrodden ground. Some have even dredged up a theory promulgated by the likes of Roger Stone that the Supreme Court can be goaded into ordering the dissolution of the special counsel's office.

In reality, Kavanaugh's writings suggest that Democratic trepidation is entirely misplaced, not that any Democrats will be delighted by the good news. George Mason University law professor and Cato Institute scholar Ilya Somin noted that Kavanaugh seems pretty clearly to be saying that "the Constitution by itself doesn't bar" investigations into the president. "He does not say it is unconstitutional for the president to either be charged with a crime while he's still in office," Somin added, "or to be investigated for a civil offense." Of course, congressional Democrats know perfectly well that Kavanaugh's argument is an argument about policy, not law. And the number of fair-minded observers calling Democrats out on their opportunism and hypocrisy is approaching critical mass.

And so, the Democrats' latest choose-your-own-adventure is set to lead readers into another dead-end. But the fevered fantasies that compelled Democrats along on this wild speculation are the same ones that compelled the party to filibuster Neil Gorsuch, even though everyone knew it would result in the end of the judicial filibuster and the predicament in which Democrats now find themselves. The party is cultivating a fanatical base, but it is sacrificing sanity in the process. That's a tradeoff Democrats will one day soon regret.