



Paul faces tough privacy decision on Kavanaugh

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Sen. Rand Paul (R-Ky.) is raising concerns about Supreme Court nominee Brett Kavanaugh's record on privacy issues and could face a tough decision about whether to support him.

No Republicans have come out against Kavanaugh's confirmation, which conservatives believe would give them five solid votes on the court.

But Paul has stopped short of praising Kavanaugh in public, and has declined to answer reporters' questions about the nominee.

Paul released a statement immediately after President Trump nominated Kavanaugh, pledging to review his record and keep an "open mind."

Paul would face enormous pressure to vote to confirm Kavanaugh if the vote in the Senate is close. Republicans have just a 50-49 majority given Sen. John McCain's (R-Ariz.) long absence, but they are hopeful of winning over several centrist Democrats.

The Kentucky libertarian is a champion of the Fourth Amendment, which has established the constitutional right to privacy, and thinks Kavanaugh has a weak record on that issue, according to GOP sources.

Colleagues say Paul is concerned about two rulings Kavanaugh made as a judge on the D.C. Circuit Court of Appeals that favored broad government power to track its citizens.

Senate Republican Whip John Cornyn (Texas) told Kavanaugh during a meeting Wednesday that he should be prepared to address such concerns from Paul and Sen. Mike Lee (R-Utah), a member of the Judiciary Committee.

"I did tell him those were important to a number of our members," Cornyn said. "He said he's happy to engage with members who have concern about surveillance and the like."

"I identified that as one of the issues that he should anticipate there will be questions about," he added.

Sen. Ron Wyden (D-Ore.), who has teamed up with Paul in the past to block the expansion of mass-surveillance authority, is criticizing Kavanaugh as having shown “again and again that he will side with Big Brother and big business ahead of the liberty of individual Americans.”

Before Trump nominated Kavanaugh, Senate Majority Leader Mitch McConnell (R-Ky.) advised that other Supreme Court nominees would be easier to confirm because of the judge’s lengthy paper trail and potential opposition from Paul, according to the New York Times.

GOP colleagues, however, think it’s unlikely that if Paul is the pivotal vote, he would block Kavanaugh’s confirmation.

“Remember Rand Paul ended up voting for Pompeo after all that drama,” said one Republican senator. Paul had objections to Secretary of State Mike Pompeo but ultimately voted to confirm him.

“I think you have to take anything he says with a grain of salt,” the GOP senator said.

Paul is not a member of the Judiciary Committee and won’t have an opportunity to grill Kavanaugh in public. He will get to question the nominee privately over his views on the Fourth Amendment when they meet before a floor vote.

It’s possible, if a number of Democrats come out in support of Kavanaugh, that it could give Paul more room to decide to vote against him.

Cornyn said Wednesday that he hoped at least three Democrats — and maybe more — would vote for Kavanaugh.

Sergio Gor, Paul’s spokesman, said the senator “continues to have an open mind” and has “requested various information.”

Proponents of individual privacy are zeroing in on two of Kavanaugh’s rulings on the D.C. Circuit.

In *Klayman v. Obama*, Kavanaugh asserted the “government’s metadata program is entirely consistent with the Fourth Amendment.”

He argued the Fourth Amendment does not bar all searches and seizures, only ones that can be deemed “unreasonable.”

“The government’s metadata collection program readily qualifies as reasonable under the Supreme Court’s case law,” he wrote, adding that the Bill of Rights allows governmental searches “without individualized suspicion when the government demonstrates a sufficient ‘special need.’”

That ruling is going to be a tough pill for Paul, who has long claimed that the government’s collection of metadata to find suspected terrorists is an overreach of constitutional authority and an infringement on personal liberty.

Paul challenged the reauthorization of the Patriot Act in 2015, by filibustering for more than 10 hours.

He argued to colleagues on the floor that the bulk collection of metadata is a violation of the Fourth Amendment.

“The reason we should worry about whether or not a warrant is individualized is we’ve had some tragic times in our history. During World War II, we didn’t individualize the arrest of Japanese Americans,” he argued. “We indiscriminately rounded up all of the Japanese and incarcerated them.”

In *Klayman v. Obama*, a case that became before the D.C. Circuit later that year, Kavanaugh wrote that sometimes the special needs of law enforcement “outweighs the intrusion on individual liberty.”

He argued that “the government’s program for bulk collection of telephony metadata serves as a critically important special need — preventing terrorist attacks on the United States.”

Trevor Burrus, a research fellow specializing in constitutional studies at the Cato Institute, said Kavanaugh “has not been terribly good on the Fourth Amendment in general” and pointed to the nominee’s ruling in *Klayman*.

Kavanaugh’s other controversial ruling according to privacy advocates came in *United States v. Jones*, a case about the constitutionality of police attaching a GPS tracking device to the vehicle of a suspected drug dealer that made its way to the Supreme Court.

When the case came before the D.C. Circuit, Kavanaugh argued that it would be permissible for the police to track a car with a GPS device because it would travel on public roads and therefore had no reasonable expectation of privacy.

He wrote that “it is well established” that what a person knowingly exposes to the public is not a subject of Fourth Amendment protections.”

Privacy proponents argue that Kavanaugh’s views on digital privacy and the Fourth Amendment are out of step with the Supreme Court’s ruling last month in *Carpenter v. United States*.

A 5-to-4 majority of the court ruled in June that the government needs a warrant to collect location data of cellphone users from wireless carriers.

"Judge Kavanaugh’s past approaches to net neutrality and defense of the NSA’s illegal collection of Americans’ call records, which was based on a justification that the Supreme Court has rightly questioned in *Carpenter*, are concerning,” said Corynne McSherry, the legal director of the Electronic Frontier Foundation, which advocates for digital privacy rights.