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Brett Kavanaugh: A Win for Immigration Hawks, A Dilemma for Civil Libertarians

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Trump's nominee likely has the Senate votes, but his ties to the Bush White House raise concerns.

After over a week's worth of television-ready drama befitting a reality show that culminated with the White House releasing a literal teaser trailer, Donald Trump took to the podium in the East Room on Monday and soberly announced the nomination of Brett Kavanaugh to the Supreme Court. Eschewing his customary blood red tie (favoring instead a more understated periwinkle), Trump, almost anticlimactically, declared: "There is no one in America more qualified for this position."

The president, after much purported hemming and hawing, thus settled on the judicial candidate who perhaps best threads the political needle: impressive, confirmable, acceptable to his Breitbart base, deeply respected by the conservative political establishment in Washington, and popular enough among the American right's remaining libertarians.

National Review and the Cato Institute both roundly praised the nomination.

A source close to Trump world and familiar with the process told me confidently on Sunday that the decision had been made for Kavanaugh and the president was merely drawing out the process to preserve suspense. If so, that effort at theater included the White House declining to deny serious reports on Monday that Thomas Hardiman, not Kavanaugh, was about to get the nod.

In the end, though, Trump selected the candidate favored by his White House counsel, Don McGahn, as well as, a source tells me, the immigration hardliner Stephen Miller. Trump's relationship with McGahn has been forged in the fire of the Mueller investigation; his win on Kavanaugh suggests he trusts McGahn deeply. It also shows that Miller, who has worked for Trump since early 2016, isn't going anywhere.

Trump passed on Hardiman, who, although backed by conservatives like Rick Santorum, had decidedly the most moderate judicial record of any of the major candidates. His selection, though potentially helpful in Hardiman's important home state of Pennsylvania, would have underwhelmed Trump's base nationally.

Even more cataclysmic for the president politically would have been the selection of Raymond Kethledge. Indeed, after briefly bobbing up as the favorite last week, the mild-mannered Michigan judge saw his chances savaged over the weekend by an awesome, seemingly coordinated attack from Breitbart, conservative commentator Ann Coulter, and other immigration hawks. Breitbart dubbed him “#AmnestyRay,” and speculation mounted that Coulter, one of the few Twitter accounts that @RealDonaldTrump follows, had actually direct messaged the president on Kavanaugh’s behalf and against Kethledge. Fair or not, Trump would have risked a redux of the Harriet Miers fiasco President Bush suffered had he selected Kethledge.

It’s clear: immigration hawks scored a broad victory on Monday—they got their choice candidate.

Stephen K. Bannon, the former White House chief strategist, told me earlier that Kavanaugh was his favorite candidate; Kavanaugh’s selection is the latest development in the ongoing rapprochement between him and the president. As I reported [last week in TAC](#), a memo circulating around conservative activists and lawyers, reaching as far as the White House, called Kavanaugh the “America First” choice and argued: “The evidence demonstrates quite strongly that on the question of immigration, Judge Brett Kavanaugh is the candidate who will best reflect the proper understanding of the law as well as the priorities of the Trump Administration.”

Trump, of course, since descending the escalator in his eponymous tower three years ago, has staked his political fortunes on that issue more than any other. He will now ride or die with it again, circling the wagons with Kavanaugh, despite the nominee’s not inconsiderable drawbacks.

Though potentially poisonous with his base, Hardiman or Kethledge would have been more assured nomination fights with many swing senators; Majority Leader Mitch McConnell told the White House as much, but to no avail. Kavanaugh has over a decade’s worth of opinions on the nation’s unofficially second-highest court (the D.C. Circuit) and tenures in the Bush White House and with the special counsel Ken Starr. In Supreme Court fights, qualifications can also be Achilles’ heels.

Kavanaugh’s nomination for his last job was moderately contentious—he secured less than 60 votes in 2006. Footage, widely available online, of Charles Schumer, flanked by his then-counsel Preet Bharara (later the most prominent U.S. attorney in the country and now a “#Resistance” leader), grilling Kavanaugh on the Clinton impeachment and *Roe v. Wade* is a fascinating watch. This time around, Schumer is minority leader and Kavanaugh stands poised to tilt the Supreme Court to the right for a generation.

The swing senators are Republicans Susan Collins of Maine, Lisa Murkowski of Alaska, and Rand Paul of Kentucky, as well as red state Democrats Joe Manchin of West Virginia, Claire McCaskill of Missouri, Jon Tester of Montana, and Joe Donnelly of Indiana. Keep an eye on Republican John Kennedy of Louisiana, as well; he’s a real independent. In an interview with Kate Bolduan of CNN, he recently indicated he was no automatic yes for the White House.

Problematic for Kavanaugh, especially with Paul, are his views on government surveillance.

In 2015, the D.C. Circuit declined to rehear a case, *Klayman v. Obama*, where advocates raised the issue of warrantless, bulk metadata collection by the National Security Agency, which they said constituted a violation of basic Fourth Amendment protections.

Kavanaugh went out of his way to defend the judgment, releasing a concurring statement with the decision. While conceding that the Supreme Court held final sway “in our system of absolute vertical *stare decisis*,” Kavanaugh rather preposterously suggested the judiciary had no role to play in this matter of core constitutional concern. “To be sure, sincere and passionate concerns have been raised about the Government’s program,” he wrote. “Those policy arguments may be addressed by Congress and the Executive. Those institutions possess authority to scale back or put more checks on this program.” The executive should monitor the executive, in other words.

Kavanaugh reasoned:

Even if the bulk collection of telephony metadata constitutes a search... the Fourth Amendment does not bar all searches and seizures. It bars only unreasonable searches and seizures. ...The Fourth Amendment allows governmental searches and seizures without individualized suspicion when the Government demonstrates a sufficient “special need”—that is, a need beyond the normal need for law enforcement—that outweighs the intrusion on individual liberty.

Amy Coney Barrett lacked Kavanaugh’s surveillance record, as well as his associations with the Bush White House. But that’s only because she lacks much of a record at all. And on the heels of a mediocre interview with the president, a source familiar with the matter told me that Barrett’s nomination was shelved for a potential later date.

And as reported Tuesday morning by [Axios](#), Trump isn’t worried about the whip count on Kavanaugh, telling detractors privately: “He’s got the votes.”

He likely does.