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No left turns?

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Despite some muted anxiety from conservatives and loud opposition from liberals, Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit seems headed for confirmation to the U.S. Supreme Court in the next several months. President Donald Trump's second pick for the high court, Kavanaugh, 53, would succeed Kavanaugh's former boss—swing-vote Justice Anthony Kennedy—for whom he clerked.

Kavanaugh's confirmation would shift the court rightward, maybe for many years, but the big question for social conservatives is how he would rule in the area of abortion. Journalists can only poke at tea leaves, because Kavanaugh has never explicitly said he would overturn *Roe v. Wade*—though he has hinted that the court in its 1973 ruling created an “unenumerated right” (see sidebar).

Trump noticeably left Kavanaugh's name off his list of potential nominees during the presidential campaign, even though Supreme Court insiders considered him a top candidate. Kavanaugh's career in Washington and close ties to establishment Republicans like George W. Bush may explain Trump's omission. The White House added his name to the list last fall, and speculation simmered that Kennedy wanted Kavanaugh for the spot.

Now, with the selection drama behind him, Kavanaugh—the most experienced appellate judge on Trump's short list—has almost unanimous support from movement conservatives. Endorsements flowed from leaders of the Susan B. Anthony List, Concerned Women for America, Americans United for Life, the March for Life, the Heritage Foundation, and the Cato Institute.

Some of the most prominent conservative legal beagles, the Ethics and Public Policy Center's Ed Whelan (former clerk to Justice Antonin Scalia) and Judicial Crisis Network's Carrie Severino (former clerk to Justice Clarence Thomas), also backed his nomination.

Conservative opposition has been minimal. The American Family Association initially opposed Kavanaugh, citing uncertainty about how he would rule on abortion and religious freedom, but then quickly rescinded its statement.

The change in position, according to AFA, came as a result of hearing a “passionate defense of Judge Kavanaugh by many we consider to be friends in the pro-life movement.” The group settled on declaring Kavanaugh to be a “four-star” nominee instead of five.

“At this time, we have no plans to fight President Trump on this nomination. He has appointed a lot of good federal judges already and we look forward to many more,” the revised AFA statement read. “We hope that our concerns prove to be unfounded.”

Kim Colby, counsel for Christian Legal Society, has spent her career writing and filing briefs at the U.S. Supreme Court, mostly on religious freedom cases. She’s also spent a career watching the Supreme Court nomination and confirmation process, and noticed the shift in the conservative legal world over the last two decades.

President George H.W. Bush's nomination of Justice David Souter in 1990 was a surprise to conservatives. Colby recalled that the White House told conservatives to “trust us.” Souter ended up voting with liberals on the court.

Since then, the conservative institutional checks that developed in response to Souter have given Colby more confidence. This go-round, Trump’s list, chiefly released to reassure voters, also helped to give time for vetting.

“Groups that care have had fair notice to do their due diligence,” said Colby, preventing an “a Hatfield-McCoy feud.”

Those conservative checks resulted in President George W. Bush rescinding one of his Supreme Court nominees, Harriet Miers. *The New York Times* reported that Kavanaugh, working in the Bush White House at the time, was one of the advisers fighting Miers’ nomination. Kavanaugh instead argued for conservative Justice Samuel Alito, whom Bush eventually nominated.

The East Room in the White House during Trump’s primetime announcement put that conservative legal establishment on display. Before announcing Kavanaugh, Trump publicly recognized the Heritage Foundation’s Ed Meese, attorney general under President Ronald Reagan. Also sitting in the front row was the Federalist Society’s Leonard Leo, who has been the point man on Trump’s Supreme Court picks (and who is also Catholic). The Federalist Society exists to promote conservative legal minds in the mold of Justice Antonin Scalia.

Those elite judge selectors would probably face opposition to their picks without the support of other respected conservatives outside of the process. Colby sees Whelan and Severino as additional canaries in the coal mine. If either of them has a problem with a nominee, the rest of the conservative legal world listens.

“We’ve got several, I don’t know, guardians in place now,” said Colby.

Colby liked all of the top three candidates: Judge Amy Coney Barrett, Judge Raymond Kethledge, and Kavanaugh. But she especially liked Kavanaugh’s 12-year record on a court. Barrett, a favorite of social conservatives, is new to being a judge, and Colby contended that she “needs to develop a record of judicial decisions.”

Barrett, at only 46 years old, is “so promising,” said Colby, who expects to see her on future Supreme Court short lists. Princeton Law professor Robert George said the same: He expects Barrett to be a future pick.

WHO IS KAVANAUGH? A churchgoing Catholic, Kavanaugh grew up attending the Catholic parish where Chief Justice John Roberts now attends. He calls another conservative Catholic on the court, Scalia, “a hero and a role model,” and like Scalia, he is an originalist in his judicial philosophy.

Kavanaugh is husband to Ashley Kavanaugh, whom he met while working in the George W. Bush White House. Their first date was Sept. 10, 2001, and Kavanaugh recalled that the next morning they were both sprinting out of the White House as a Secret Service agent yelled that there was an inbound plane.

The Kavanaughs have two daughters. He coaches girls’ basketball at his daughters’ Catholic school, and volunteers with Catholic Charities. According to his financial disclosures, Kavanaugh is middle class by comparison with other justices, reporting between \$15,000 and \$65,000 in assets.

The court’s newest justice, Neil Gorsuch, by contrast, reported between \$3.6 million and \$10.5 million in assets. The White House said that Kavanaugh—a lifelong baseball fan—had some credit card debt, since paid off, from buying season tickets to the Washington Nationals.

Kavanaugh has an extensive judicial record, which shows that he favored the religious challengers to the HHS contraceptive and abortifacient mandate, and that he did not find the government had to facilitate an abortion for a minor in immigration detention. In a recent oral argument over the D.C. Metro banning a Catholic Christmas ad, Kavanaugh called Metro’s actions “pure discrimination.”

One speech that Kavanaugh gave last year at the American Enterprise Institute, praising Chief Justice William Rehnquist’s legacy, had many revealing moments despite its careful wording. He spoke favorably about Rehnquist’s legacy of “ensuring that religious schools and religious institutions could participate as equals in society.” He said without Rehnquist, “we never would have seen last term’s 7-2 decision in *Trinity Lutheran*,” a major ruling that determined religious groups are eligible for public aid.

At AEI he also talked about Rehnquist’s opinion in *Washington v. Glucksberg* that rejected a constitutional right to assisted suicide. Kavanaugh described that case as a contrast to cases (including *Roe*) of the 1970s: the “free wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.”

“The *Glucksberg* case stands to this day as an important precedent,” Kavanaugh said, “limiting the court’s role in the realm of social policy and helping to ensure that the court operates more as a court of law and less as an institution of social policy.”

WHAT ABOUT ROE?

Edward Mechmann, attorney and the director of public policy for the New York Archdiocese, said pro-life advocates thinking that five conservatives means an overturn of *Roe* is “wishful thinking,” at least in the near future.

"The pro-life lawyers who pay attention to what's going on in the Supreme Court ... realize how hard this is," Mechmann said. "The slowness and the difficulties of the process are hard for people to accept."

But Mechmann foresees in the next few years the court hearing a significant abortion case, likely having to do with one of the bans on abortion after 20 weeks. That case would have a good chance of pro-life success, in his view.

Overturning *Roe*—which theoretically would send the abortion issue back to states—is not a simple matter. When the court grants a case, it agrees to answer certain questions. So one issue is the trickiness of getting the right case to the court, along with the right questions the court will consider. Chief Justice John Roberts likes finding the narrowest way to decide an issue, in order to avoid ruling on underlying constitutional questions.

Other complications: The court would need five votes. Even if there would appear to be a reliable conservative majority on the court, only Justice Clarence Thomas has explicitly said that there is no constitutional right to abortion. Justice Neil Gorsuch and Roberts in their confirmation hearings both described *Roe* as “settled law,” which Mechmann said was “a term of art” but “pretty strong language.”

"It's not like you have four justices who are ... waiting with bated breath to overturn [*Roe*]," he said, contrasting the conservative justices with the four liberal justices who were clearly “waiting” to legalize same-sex marriage.

The conservative justices might not reverse such a long-standing precedent in part because of their conservatism. Roberts, for one, has made clear his aversion to overturning precedent, though he might be establishing that reputation in order to make an exception to overturn the court's obvious overreach in *Roe*.

It's possible the justices would instead try to curtail the court's abortion jurisprudence, for example limiting the Supreme Court doctrine prohibiting an “undue burden” on a woman's ability to obtain an abortion.

The four liberal justices have made clear they would not even relax the undue burden standard. In the 2016 case *Whole Woman's Health v. Hellerstedt*, they with Kennedy's vote struck down a Texas law regulating abortion centers as an “undue burden.”

When President Donald Trump was campaigning, he said the justices he would select would “automatically” reverse *Roe*. The Federalist Society's Leonard Leo, point man for Trump's judicial selections, walked the statement back.

"There are lots of follow-on regulations to abortion involving partial-birth abortion, fetal pain, and other issues that the court hasn't fully resolved,” Leo said on the *Bloomberg Law* radio show in 2016. "When he talks about *Roe v. Wade*, that's probably the way he's thinking about it."