



Some Preliminary Thoughts on the Kavanaugh Nomination

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The Trump administration has been disturbingly abnormal in many ways. But the president's nomination of Judge Brett Kavanaugh to the Supreme Court is as conventional as such selections are ever likely to get. Kavanaugh is a well-liked and widely respected jurist - and a pillar of the conservative legal establishment. I like many of his decisions, and am far more critical of others. But it's hard to argue that any of his views are outside the current legal mainstream.

Jonathan Adler provides an excellent overview of Kavanaugh's record [here](#). See also [this thorough analysis](#) by Edith Roberts of SCOTUSblog.

As Jonathan points out, Kavanaugh has an extensive paper trail of judicial opinions and law review articles, among other materials. I am a fan of [his criticism of Chevron deference](#) (for much the same reasons [as in the case of Justice Gorsuch's views on the subject](#)), his support of a broad view of freedom of speech, and his opinions on freedom of religion and Second Amendment rights. On the other hand, I am concerned about his opinions advocating a broad view of executive power over national security (broad judicial deference in this area is [highly problematic](#)), and his championing of the theory of the "unitary executive," which holds that nearly all executive power should be concentrated in the hands of the president. For reasons I summarized [here](#), I think this approach is inappropriate when it comes to situations where the executive wields power far beyond that granted to the federal government under the original meaning of the Constitution. However, it's hard for me to criticize Kavanaugh too much for holding a view on this issue similar to the one I myself held until just a few years ago.

Some conservative and libertarian critics have focused on Kavanaugh's opinions in two prominent Obamacare cases, [Seven-Sky v. Holder](#), and [Sissel v. Department of Health and Human Services](#). While I have reservations about both rulings, on balance I don't find them all that problematic. In *Seven-Sky*, Kavanaugh did *not* conclude that the Obamacare individual health insurance mandate was a tax, or create a "road map" for Chief Justice John Roberts' ruling to that effect. Rather, he merely concluded that the mandate penalty "must be assessed and collected in the same manner as taxes" and therefore subject to the Anti-Injunction Act, which bars challenges to taxes (and, according to Judge Kavanaugh, "assessable penalties" collected in

the same manner as taxes) until they have actually been assessed and paid. Later in the opinion, Kavanaugh does describe how Congress could potentially restructure the mandate to make it qualify as a tax. But that is very different from ruling that it already is a tax, or could be reinterpreted as such by judges (as Chief Justice Roberts ultimately did when the issue got to the Supreme Court).

Agree or disagree, this was not an opinion concluding that the mandate was a tax, and did not uphold it on the merits. It says little about Judge Kavanaugh's ultimate views about the mandate, or about constitutional limits on federal power more generally.

In *Sissel*, Kavanaugh rejected a challenge to the mandate (which, by this time, had been reinterpreted as a tax by Chief Justice John Roberts' opinion in NFIB v. Sebelius), which argued that it violated the Origination Clause of the Constitution, which requires "bills for raising revenue" to be initiated in the House of Representatives. I think the Origination Clause lawsuit had merit. But I also do not believe that Kavanaugh's opinion in this case tells us much about his broader views about federalism or separation of powers. The Origination Clause is a provision that allocates legislative power between the House and the Senate, not one that pits the legislature against the executive or the federal government against the states. It is also a Clause that serves little useful purpose, since senators can almost always get allies in the House to introduce any bill that is likely to pass both houses. This approach was not followed in the case of the Affordable Care Act, because the Democrats suddenly lost their filibuster-proof majority in the Senate, and - in any event - few imagined at the time that the ACA's fate would eventually hinge on the argument that mandate is a tax.

I will have more to say about the Kavanaugh nomination in a forthcoming *Politico* symposium on the subject. As soon as it is up, I will add a link to it in this post.

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