



Report of People For the American Way
in Opposition to the Confirmation of
Brett M. Kavanaugh to the United States
Court of Appeals for the D.C. Circuit

People For the American Way
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Introduction

President Bush's nomination of Starr Report co-author Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit has created significant controversy. The *New York Times* has termed the nomination part of the Administration's "further effort to remake the federal courts in its own ideological image."¹ The *Washington Post* commented that the nomination would "only inflame further the politics of confirmation to one of the country's highest-quality courts."²

In fact, the D.C. Circuit has not only seen many high quality jurists appointed to it, but it is also widely recognized for its uniquely important role in reviewing federal agency action. Congress has given the court exclusive jurisdiction to review some agency conduct, such as important Federal Communications Commission and environmental matters, and the D.C. Circuit is often the last word on federal agency actions, since the Supreme Court reviews so few lower court decisions.

Kavanaugh's relative inexperience and record, however, including his extraordinary dedication to partisan priorities, make him a particularly inappropriate choice for this critically important court. A 1990 graduate of Yale Law School, Mr. Kavanaugh's legal resume is thin at best. When asked in the Senate Judiciary Committee's questionnaire to state the number of cases he has tried to verdict or judgement, he replied "[n]one, as I have not been a trial lawyer."³ In the same questionnaire, when asked to name his ten most significant litigated matters, Kavanaugh was apparently hard pressed to fill out the list, citing a number of cases in which he made no courtroom appearance at all and only submitted briefs, including two cases in which he authored only the friend-of-the-court brief of someone who was not even a party to the litigation. Kavanaugh is not a prolific legal scholar either, with only two law journal publications to his credit.⁴

This stands in marked contrast to the D.C. Circuit judges previously appointed by presidents of both parties. Of the 22 judges appointed to the D.C. Circuit since the Nixon administration, only one – Kenneth Starr – had less legal experience at the time of his appointment than Kavanaugh. A number had previously been judges, high-ranking

¹ Editorial, More Conservatives for the Courts, *New York Times*, July 29, 2003.

² Editorial, Fueling the Fire, *Washington Post*, Aug. 1, 2003.

³ Answers to Senate Judiciary Committee Question 17(c)(4).

⁴ *Id.* at Questions 18, 12. One of his law journal publications is a student note arguing that defendants must be present at, and allowed to offer a rebuttal during, *Batson* hearings (hearings held to determine whether the prosecution improperly removed members from the jury pool because of their race). Brett Kavanaugh, Defense Presence and Participation: A Procedural Minimum for *Batson v. Kentucky* Hearings, 99 *Yale L.J.* 187, Oct. 1989. The other publication is an article examining the Independent Counsel law. Brett Kavanaugh, The President and the Independent Counsel, 86 *Geo. L.J.* 2133, July 1998. Other than judicial clerkships and work for Kenneth Starr and the Bush White House, Kavanaugh's questionnaire states that his experience consists of one year at the Solicitor General's Office and approximately four years at the law firm of Kirkland & Ellis. Answers to Senate Judiciary Questions 6, 17.

Justice Department attorneys, and distinguished professors. Kavanaugh's resume simply pales by comparison.

Furthermore, most of Kavanaugh's relatively brief legal career has consisted largely of partisan political activities that militate strongly against his confirmation to the D.C. Circuit. In particular, Kavanaugh has spent most of his legal career in Kenneth Starr's Office of the Independent Counsel or in the Office of the White House Counsel in the current Bush Administration where he helped direct the Administration's effort to pack the courts with extreme right-wing nominees. Kavanaugh was responsible for drafting Starr's articles of impeachment against President Clinton, which were widely criticized as "strain[ing] credulity"⁵ and being based on "shaky allegations,"⁶ and later defended even the most questionable conduct by Starr. In the White House Counsel's Office, Kavanaugh has had major responsibility for selecting and "marshalling the fleet"⁷ of far-right appellate judicial nominees by the Bush Administration, and for seeking to expand unilateral presidential privilege and secrecy, despite his contrary efforts under Kenneth Starr to defeat such claims of privilege. Indeed, a presidential order that reportedly resulted from Kavanaugh's efforts on behalf of the Bush Administration was described by one prominent historian as "a victory for secrecy in government" that was "so total that it would make Nixon jealous in his grave."⁸

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation.⁹ Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law" and an "open mind to decision-making," but also a "commitment to protecting the rights of ordinary Americans" and a "record of commitment to the progress made on civil rights, women's rights, and individual liberties."¹⁰ Based on these criteria, as discussed below, Kavanaugh's confirmation to a lifetime position on the critical Court of Appeals for the D.C. Circuit should be rejected.

Choosing Judicial Nominees

⁵ Glenn R. Simpson, Starr's Report Makes Powerful Case – but for what?, *Wall Street Journal*, Sept. 14, 1998 (hereinafter Simpson).

⁶ Stephen Hedges and Ken Armstrong, Starr's Case Unique and Hardly Airtight, *Chicago Tribune*, Sept. 13, 1998 (hereinafter Hedges).

⁷ Neil A. Lewis, Bush Selects Two for Bench, Adding Fuel to Senate Fire, *New York Times*, July 26, 2003 (hereinafter Lewis).

⁸ Carl M. Cannon, For the Record, *National Journal*, Jan. 12, 2002 (hereinafter Cannon) (quoting Hugh Graham). Kavanaugh was also a regional coordinator for Lawyers for Bush / Cheney in 2000, went to Florida after the 2000 election for Bush / Cheney "to participate in legal activities related to the recount, "and has been an active member of the Federalist Society." Answers to Senate Judiciary Committee Questions II6, 6, 9, 10.

⁹ See Law Professors' Letter of July 13, 2001 (available from People For the American Way).

¹⁰ *Id.*

Kavanaugh has been “deeply involved”¹¹ in one of the most controversial undertakings of the current Administration: the selection of the president’s judicial nominees. This is, in Kavanaugh’s words, “one of [the president’s] most important responsibilities.”¹² As Associate Counsel to the President from 2001 – 2003, Kavanaugh served directly under White House Counsel Alberto Gonzalez as his “main deputy on the subject” of judicial nominees.¹³ This position earned Kavanaugh membership in the Administration’s critical Judicial Selection Committee, a joint enterprise between White House staff and the Justice Department’s Office of Legal Policy, chaired by Gonzalez, which has been responsible for the selection of judicial nominees.¹⁴ Kavanaugh has thus played a key role in Administration efforts at “remaking the judiciary” to “place on the bench those who share the president’s judicial philosophy.”¹⁵

Kavanaugh has reportedly “been responsible for marshaling the fleet of largely conservative judicial nominees the president has sent to the Senate,”¹⁶ and a look at the candidates Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy and interest in seeing the American judiciary remade in a right-wing “ideological image.” According to several accounts, Kavanaugh personally “coordinated” the Administration’s nominations of Priscilla Owen to the Fifth Circuit and Miguel Estrada to the D.C. Circuit.¹⁷ Priscilla Owen’s nomination continues to be blocked because her record as a far right judicial activist is so extreme that even White House Counsel Alberto Gonzalez once accused her and her dissenting colleagues of committing “an unconscionable act of judicial activism.”¹⁸ Widely termed a “stealth candidate,” Estrada’s nomination was withdrawn after an extended filibuster.¹⁹

One of the most controversial aspects of the Estrada confirmation battle, which directly contributed to the failure of the nomination, was Estrada’s persistent refusal to answer questions concerning his jurisprudential views or philosophy. Because Estrada had a limited “paper trail” and the Department of Justice refused to release any legal memoranda he wrote while serving in the Department, a particularly important way for Senators to learn important information about his jurisprudential views was by directly

¹¹ Sheldon Goldman, W. Bush Remaking the Judiciary: Like Father Like Son?, *Judicature* at p. 284, May-June, 2003 (hereinafter Goldman).

¹² *Id.*

¹³ Jeffrey Toobin, Advice and Dissent, *The New Yorker*, May 26, 2003 (Kavanaugh was the “main deputy” to Alberto Gonzalez who “control[s]” the nomination process in the Bush White House). In July 2003, Kavanaugh left the White House Counsel’s office and became Assistant to the President and Staff Secretary.

¹⁴ Goldman

¹⁵ *Id.* at 782.

¹⁶ Lewis.

¹⁷ Dana Milbank, Whitewater Lawyer Turns Proponent of Presidential Power, *Washington Post*, Oct. 15, 2002 (hereinafter “Milbank”); Jack Newfield, More Bad Judges, *The Nation*, Jan. 26, 2004 (hereinafter Newfield) (Kavanaugh “coordinated” the Estrada and Owen nominations).

¹⁸ See People For the American Way, Why the Senate Judiciary Committee Was Right to Reject the Confirmation of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit, Jan. 23, 2003.

¹⁹ Dana Bash, Judicial Nominee Estrada Withdraws His Name, CNN, Sept. 4, 2003, available at <http://www.cnn.com/2003/LAW/09/04/estrada.judgeship/index.html>; Jonathan Groner, Estrada – Just One Vote Away?, *Legal Times*, Sept. 30, 2002 (hereinafter Groner).

questioning Estrada during his Senate Judiciary Committee hearing. Estrada's refusal to answer a number of their questions made it impossible for committee members to learn enough about Estrada to responsibly carry out their constitutionally mandated duty to give "advice and consent" to the President's judicial nominees. Disturbingly, one report indicates that Estrada refused to answer these questions at the direct advice of the Administration,²⁰ suggesting a deliberate effort to subvert the Senate's co-equal role in the nomination process. Given Kavanaugh's apparent "coordination" of the Estrada nomination, this issue raises further troubling concerns about Kavanaugh's actions.

Kavanaugh also publicly praised Estrada and Owen, along with the rest of Bush's first eleven picks for the courts of appeals, as being what the President "was looking for. A group of nominees, in terms of their excellence, which they all shared, and their integrity, which they all shared, and support, which is huge, which they all shared. It was a diverse group, a well qualified group, a bi-partisan group. It was an incredibly credentialed group."²¹ While the group Kavanaugh described included some of the administration's most controversial nominees to date, such as Priscila Owen, Miguel Estrada, Terrence Boyle, Dennis Shedd, and Jeffrey Sutton, few would argue that many exemplified exactly what the President "was looking for": lawyers or judges with extreme right-wing records who would assist the Administration in seeking to "remake the federal courts in its own ideological image." Owen and Estrada were such troublesome nominees that they earned the distinction of being among the six nominees – out of a total of 179 considered by the Senate thus far – to be blocked on the Senate floor by filibuster. Boyle's record on civil rights and other issues is so troubling that one of his home state senators, John Edwards, has refused to return his "blue slip," which has effectively brought his nomination to a halt for the present.²² That three of the first eleven candidates were so extreme that they have been unable to be approved by the Senate seems to indeed confirm that they were what the Administration "was looking for."

Of the initial nominees that were approved by the Senate, many received a great deal of opposition during their confirmation process. Several have already written opinions that seek to limit civil rights and constitutional liberties and implement dangerous "federalist" philosophies. For example, Dennis Shedd and Michael McConnell have used their positions to seek to overturn National Labor Relations Board rulings against anti-union discrimination and unfair labor practices by employers.²³ Edith Brown Clement joined dissents arguing that the Hobbs Act (an important federal criminal law prohibiting robbery and extortion affecting interstate commerce) should be severely limited on "federalism" grounds²⁴ and supporting the unlawful firing of a public school

²⁰ Groner.

²¹ Goldman at 296.

²² See Letter of Senator John Edwards to Senate Judiciary Chairman Hatch, March 31, 2002; Kevin Begos, *Dole, Edwards at Odds Over Judicial Nominee*, *Winston-Salem Journal*, May 10, 2003.

²³ *National Labor Relations Board v. Transpersonnel, Inc.*, 349 F.3d 175, 2003 U.S. App. LEXIS 23133 (4th Cir. 2003) (Shedd wrote the majority opinion); *National Labor Relations Board v. Interstate Builders, Inc.*, 2003 U.S. App. LEXIS 24153 (10th Cir. 2003) (J., McConnell, dissenting in part).

²⁴ *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc), cert. denied, 124 S.Ct. 1749 (2003).

teacher who was dismissed without the required hearing.²⁵ Jeffrey Sutton authored a dissent that sought to severely cut back federal arson law due to federalism concerns.²⁶ One John Roberts dissent questioned the constitutionality of the Endangered Species Act.²⁷ Kavanaugh's praise of such nominees, as well as his hand in selecting them, calls into serious question his own legal philosophy.²⁸

A number of other Bush Administration nominees selected during Kavanaugh's tenure as Associate Counsel to the President have also come from "the far right of the political spectrum."²⁹ Many, who like Kavanaugh, Sutton, and Clement, have been Federalist Society members, have had their sights set on limiting federal power, weakening the Commerce Clause, and severely limiting congressional authority, even to the point of literally rolling back the New Deal.³⁰ These adherents to Federalist Society ideals, such as William Pryor and Carolyn Kuhl, have been among the most right-wing people nominated by the Administration to serve in any capacity.

Just as troubling as the legal and ideological views of Bush Administration candidates is a report that suggests the White House officials involved in judicial selection have imposed a rigorous anti-reproductive choice litmus test on potential judicial nominees. Last year, the *Philadelphia Daily News* reported that Republican Senators Arlen Specter and Rick Santorum had requested that the Administration nominate a western Pennsylvania woman to fill a vacancy on the Third Circuit Court of Appeals left by the passing of a female jurist. They recommended four women they believed were qualified for the job, but all were rejected. The *Daily News* reported that all but one of the women were rejected because they were not "sufficiently conservative or pro-life."³¹ One source was quoted as saying, "[n]o western [Pennsylvania] woman could be found that was acceptable to the White House."³² Instead, the nomination was given to Pennsylvania Attorney General Mike Fisher, who unsuccessfully ran for

²⁵ *Coggin v. Longview Independent School District*, 337 F.3d 459 (5th Cir. 2003) (en banc), *cert. denied*, 124 S.Ct. 579 (2003).

²⁶ *United States v. Laton*, 2003 U.S. App. LEXIS 24770 (6th Cir. 2003) (Sutton, J., dissenting).

²⁷ *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting).

²⁸ Bush nominees who have written and joined disturbing opinions and dissents are not limited to this first group of eleven. To learn more about the records of the new Bush judges that Kavanaugh helped select, see People For the American Way Foundation, [Confirmed Judges, Confirmed Fears](#), Jan. 23, 2004, available at www.pfaw.org.

²⁹ David Margolick, [Bush's Court Advantage](#), *Vanity Fair*, Dec. 2003, at 146 (hereinafter Margolick).

³⁰ See e.g. People For the American Way, [Report of People For the American Way In Opposition to the Confirmation of William H. Pryor to the United States Court of Appeals for the Eleventh Circuit](#), June 10, 2003 at 4 – 11; People For the American Way, [Report of People For the American Way in Opposition to the Confirmation of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit](#), March 31, 2003. See also, People For the American Way Foundation, [The Federalist Society: From Obscurity to Power](#), Aug. 2001 (updated Jan. 2003), at 17 – 22. See also, *Id.* at 33 (reporting that of the first eleven Bush appellate court nominees, six were Federalist Society members).

³¹ Gar Joseph, [Ball in Fisher's Court to Replace Judge; PA. Senators Want a Woman After White House Says It Couldn't Find One](#), *Philadelphia Daily News*, Apr. 11, 2003. The fourth woman was reportedly unacceptable because "the Republicans didn't want to lose her as a candidate for the state Supreme Court [that] year." *Id.*

³² *Id.*

governor on an anti-choice platform the year before.³³ In fact, one Pennsylvania newspaper specifically criticized the fact that “the abortion issue was put forth by the Bush Administration as the sole litmus test” leading to Fisher’s nomination.³⁴ Such a frightening anti-choice litmus test for judicial nominees recalls the Reagan and Bush I administrations, when potential nominees – and even their colleagues – were vigorously interrogated about their abortion views as a prerequisite for earning a nomination to the federal bench.³⁵ As one of the top White House officials working on judicial nominations, serious questions are presented about Kavanaugh’s role in the reported revival of this deplorable practice.

Another dangerous tactic used by some in seeking to promote the President’s judicial nominees was the theft by several Republican staffers of over 4,000 files containing confidential internal memos authored by Democratic Judiciary staff over the last two years in a scandal popularly known as “memogate.”³⁶ Remarkably, many right-wing advocates have been so unapologetic for the unethical, and likely illegal, theft that they have criticized Judiciary Committee Chairman Orrin Hatch for authorizing an investigation of the tampering.³⁷ The result of that investigation was a report by Senate Sergeant-at-Arms William Pickle that strongly suggested wrongdoing by the Senate aides and was referred to the Justice Department for possible criminal investigation and prosecution.³⁸ It remains unclear how widely the memos were circulated, though it is certainly possible that Kavanaugh, as one of the top White House officials involved in the nomination process during the period in question, would have been privy to the improperly obtained information. The Senate Judiciary Committee should fully question Kavanaugh on this subject. In any event, Kavanaugh’s key role in the Administration’s judicial nominations efforts raises serious concerns about his own nomination.

“A Starr Protégé”

³³ Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 1); Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 3), both available at <http://www.pacatholic.org/election%20archive/primary%202002.pdf> (visited 3/02/04). Fisher received the nomination despite the fact he had just had a \$220,000 civil rights judgement entered against him for violating the civil rights of employees under his control (*Micewski v. Fisher*, No. 3:00-CV-0521 (M.D.Pa. Feb. 12, 2003) (special verdict judgment)).

³⁴ Editorial, Fisher as an Appeals Judge: Attorney General has done a yeoman job, but selection shouldn’t be based mainly on his abortion position, *Harrisburg Patriot News*, April 30, 2003.

³⁵ Transcript of “All Things Considered” broadcast, National Public Radio report, Aug. 28, 1985 (“One female [prospective Reagan nominee] . . . said she was asked repeatedly how she would rule on an abortion case if it came before her. Another . . . said her fellow judges were called by Justice Department officials and asked for her views on abortion.” See also People For the American Way, Assault on Liberty, (1992) at p. 6, available from People For the American Way.

³⁶ Helen Dewar, GOP Aides Implicated in Memo Downloads, *Washington Post*, March 5, 2004. Some memos were also taken from Senator Hatch’s computer files.

³⁷ *Id.*

³⁸ Dori Meinert, Theft of Democrats’ Computer Memos Referred to Justice Department, Copley News Service, March 11, 2004.

One of the most significant chapters in Kavanaugh's brief legal career has been the five years he spent as part of Kenneth Starr's Office of Independent Counsel, participating in several investigations concerning the conduct of President Clinton. Frequently described as a "Starr protégé,"³⁹ Kavanaugh began his stint in the Special Prosecutor's office by heading up the investigation into White House Deputy Counsel Vince Foster's suicide.⁴⁰ As the Whitewater investigation appeared to be winding down, Kavanaugh returned to private practice for a brief period, but then re-joined Starr's office when the Monica Lewinsky scandal broke. Reflecting on why Kavanaugh chose to return to the Special Prosecutor's office at that point, one lawyer close to the case reportedly noted "[t]hat was slime time. He wanted to be there for the kill."⁴¹

Of course, the Special Prosecutor's investigation culminated with the release of the Starr Report, of which Kavanaugh was a co-author.⁴² The report consisted of two parts: the narrative, which offered what journalists called "an exhaustive chronology of Clinton's sexual escapades,"⁴³ and the grounds for impeachment, which outlined the 11 specific counts that the Special Prosecutor believed justified impeaching the President for "high crimes and misdemeanors." Kavanaugh was one of the two authors of the grounds for impeachment.⁴⁴

The eleven specific counts Kavanaugh outlined against the President included five allegations of perjury, five allegations of obstruction of justice, and one allegation that Clinton's actions were "inconsistent [with his] . . . constitutional duty to faithfully execute the laws."⁴⁵ Even conservative commentators and legal scholars were largely unimpressed by Kavanaugh's work. The *Wall Street Journal* noted that a number of former prosecutors and legal scholars found the case against the President to "strain credulity" and to be based on "suppositional reasoning."⁴⁶ The *Chicago Tribune* described Kavanaugh's tortured arguments as "[u]nique and [h]ardly [a]irtight" and reported that many experts accused the report of "using explicit descriptions of sexual acts to paper over shaky allegations."⁴⁷ For example, Kavanaugh's assertion that Clinton could be convicted of obstruction of justice because he lied to friends who later repeated his stories to the grand jury was "a real stretch," according to Miami lawyer Neal Sonnett, who noted it was a "theory that I've never seen or heard of in the criminal law."⁴⁸ Even the strongest parts of Kavanaugh's argument were weaker than many believed would be necessary to win a conviction. Richard Phelan, the Chicago attorney who led the investigation concerning House Speaker Jim Wright in the late 1980s, noted

³⁹ See Susan Schmidt and Dan Morgan, Starr: Witnessing for the Prosecution, *Washington Post*, Nov. 19, 1998; Michael Lind, All the President's Messes, *New York Times*, July 11, 1999; David W. Chen and Neil A. Lewis, Testing of a President: The Authors, *New York Times*, Sept. 12, 1998 (hereinafter Chen).

⁴⁰ Margolick at p. 162.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Ronald Brownstein, For Clinton Foes, Morality Clouds Political Storm Over Starr Report, *Los Angeles Times*, Sept. 14, 1998 (hereinafter Brownstein).

⁴⁴ Questionnaire at Question 17(b)(1); Chen.

⁴⁵ Hedges.

⁴⁶ Simpson.

⁴⁷ Hedges.

⁴⁸ *Id.*

that while the case that Clinton had lied under oath was relatively strong, perjury was rarely successful as a stand-alone charge, and was usually tacked onto a more weighty fraud or drug indictment. “If you prosecuted every guy who lied in a deposition about something,” Phelan noted, “we’d have half the people in this country locked up.”⁴⁹ Many members of Congress on both sides of the aisle were equally unimpressed. Senator Specter said he believed many senators would vote that the allegations in the report were “not proved” if they were given that option.⁵⁰ The fact that Kavanaugh’s most significant legal accomplishment to date was a listing of dubious legal charges -- bolstered by evidence many still believe was only brought to light to embarrass the President -- raises serious questions about his work as a lawyer as well as his willingness to twist legal theory to suit his political ends.

While Kavanaugh has taken pains to point out that he did not personally have a hand in authoring the even more controversial narrative section of the Starr Report,⁵¹ he has nonetheless fully defended Starr’s conduct as Special Prosecutor. Rarely missing an opportunity to praise Starr, Kavanaugh authored a series of op-eds in the fall and summer of 1999 fiercely defending his mentor and his actions in the face of growing criticism.⁵² Kavanaugh wrote that “Starr [] conducted thorough and fair investigations . . . ; exercised discretion where appropriate and firmness where necessary; . . . and displayed honor and determination in the face of relentless political attacks.”⁵³ Kavanaugh repeatedly lauded Starr as a man of “extraordinary accomplishment and integrity,” even calling him “an American hero.”⁵⁴ In one instance, Kavanaugh sent a letter to the editor of the *New York Times* specifically to rebut an article that had mistakenly claimed Kavanaugh had found certain of Starr’s tactics inappropriate.⁵⁵ In another letter, Kavanaugh praised Starr’s “honor” and insisted that “Judge Starr has consistently performed with the highest skill and integrity and [I] . . . feel sick about the abuse he has suffered.”⁵⁶

Most Americans will recall that Starr’s tactics included not only releasing “an exhaustive chronology of Clinton’s sexual escapades”⁵⁷ despite the fact that most legal experts found it “difficult to see the legal purpose of such disclosures,”⁵⁸ but also a wide array of questionable acts which were highly offensive to Clinton supporters and foes alike. Monica Lewinsky was reportedly taken to a hotel room and interrogated for 12

⁴⁹ *Id.*

⁵⁰ CNN, Three GOP Moderates Will Vote Against Conviction, Feb. 10, 1999, available at cnn.com.

⁵¹ Questionnaire Answer 17(b)(1) (Kavanaugh notes that the report is “a matter of some continuing controversy” and states that he was only involved in writing the grounds for impeachment).

⁵² Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999; Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999; Robert Bittman and Brett M. Kavanaugh, Op-Ed, Indictment of an Ex-President?, *Washington Post*, Aug. 31, 1999; Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.

⁵³ Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.

⁵⁴ *Id.* and Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.

⁵⁵ Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.

⁵⁶ Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999.

⁵⁷ Brownstein.

⁵⁸ *Id.*

hours while her requests to call her attorney were denied,⁵⁹ and her mother was forced to testify before the grand jury.⁶⁰ According to several reports, secret grand jury information was intentionally leaked by Starr's office in an effort to undermine the president.⁶¹ Innumerable public servants were subpoenaed and harassed – from the lowest staffers to the highest government officials – in what 14 Democratic members of the House Judiciary Committee described as “a means of preventing or intimidating them from criticizing [Starr] . . . [a method which is] clearly outrageous and may be prohibited by federal law.”⁶² Starr's tactics were so extreme as to alienate many, including Republicans. A number of prominent Republicans, including Senators Arlen Specter and John McCain, criticized Starr for being too aggressive in the course of his investigation.⁶³ Especially in light of such concerns, Kavanaugh's unqualified praise and endorsement of Starr and his tactics raises disturbing concerns about Kavanaugh's own legal judgment.

A Malleable View on Privilege

Kavanaugh's work as one of the architects of the Bush Administration judicial nominations effort and his willingness to align himself with Kenneth Starr are not the only examples of his devotion to right-wing political causes. Rather, his stunning willingness to twist and shift legal theories and philosophies to best serve partisan interests is highly disturbing as well. An examination of the roles Kavanaugh has played in the Clinton and Bush II Administrations demonstrates the point. During the Clinton Administration, as discussed above, Kavanaugh was a key figure in the office of Special Prosecutor Kenneth Starr and, before ascending to the role of Starr Report co-author, worked to gain unprecedented access to the records of the President of the United States. In his role in the Bush administration, however, Kavanaugh seems to have radically changed his views on presidential privilege and has worked diligently to ensure that the current President works with an unprecedented ability to keep presidential actions and records secret from Congress and the public. As summed up in the *Washington Post*, “within a few years, Kavanaugh's work has gone from being described as ‘a serious blow to the presidency,’ as Clinton lawyer Lloyd Cutter put it, to promoting an ‘imperial presidency,’ as Rep. Henry A. Waxman (D-Calif.) put it.”⁶⁴

As a member of Starr's Whitewater team, Kavanaugh was directly involved in a number of pivotal cases challenging long-held ideas of privilege and presidential privacy. Apparently intent on working to diminish presidential power and privilege, Kavanaugh played a key role in the following controversial cases:

⁵⁹ Michael Grunwald, Hardball at the Ritz Puts Starr on the Spot, *Washington Post*, Sept. 23, 1998.

⁶⁰ Dan Balz, Week 4: All Eyes on Grand Jury, Lewinski's Mother, *Washington Post*, Feb. 15, 1998.

⁶¹ Joe Conason, Starr Springs a Leak, *Salon*, Oct. 1998, available at http://www.salon.com/news/1998/10/cov_30newsc.html.

⁶² CNN, Clinton Aide Appears Before Grand Jury, Feb. 26, 1998, available at www.cnn.com/ALLPOLITICS/1998/02/26/lewinskiscandal/.

⁶³ Howard Kurtz, Starr Is Urged to Curtail Inquiry, *Washington Post*, Mar. 2, 1998; Dan Carney and Carrol J. Doherty, GOP Struggles to find Strategy to Deal with Starr Fallout, *CNN*, Mar. 14, 1998, available at cnn.com.

⁶⁴ Milbank.

- In Swidler v. Berlin,⁶⁵ Kavanaugh unsuccessfully argued for access to privileged communications between deceased Deputy White House Counsel Vince Foster and his attorney. The Supreme Court rejected Kavanaugh's arguments by a 6-3 vote, holding that attorney-client privilege does survive the death of the client. This disturbing challenge to well-established common law proves how far Kavanaugh and Starr were willing to go in pursuit of truly privileged information.
- In In Re: Bruce Lindsey,⁶⁶ Kavanaugh successfully argued that that the President does not enjoy attorney-client privileges in his relationship with White House attorneys, despite evidence that White House legal work and Clinton's private attorneys' legal work frequently intersected.⁶⁷
- In Rubin v. U.S.⁶⁸, Kavanaugh briefed the Special Prosecutor's position in an appeal of the D.C. Circuit's ruling that Secret Service agents could be forced to testify before grand juries concerning information they learned about the president while on the job. Kavanaugh advanced this point despite the very real danger that the ruling could cause future presidents to separate themselves from their protective detail during private or sensitive conversations – an act that would make the agents' jobs more difficult and put the president's life at risk. The Supreme Court denied certiorari, effectively upholding the appellate court's decision.⁶⁹

Kavanaugh's role in these critically important privilege cases might suggest that Kavanaugh believes strongly in the right to obtain information about the government and government leaders, particularly the president. Since President Bush took office, however, Kavanaugh seems to have had a startling change of heart: He now uses his position to argue in favor of privilege and presidential secrecy at least as vehemently as he once argued against it.

In one of his first acts in the Bush White House, Kavanaugh served as a leading force in the development of the controversial Executive Order #13233, which effectively eviscerated the Presidential Records Act (PRA).⁷⁰ President Carter signed the PRA in the aftermath of Watergate to clarify that presidential records belong to the public and cannot be destroyed or controlled by a president after he has left office. It dictated that most presidential records would be available through Freedom of Information Act requests five years after the end of a president's administration. Other documents, including those

⁶⁵ 524 U.S. 399 (1998).

⁶⁶ 158 F.3d 1263 (D.C. Cir. 1998) *cert. denied*, Office of the President v. Office of Independent Counsel, 525 U.S. 996 (1998).

⁶⁷ Previously, Kavanaugh had taken a similar position in *In Re: Grand Jury*, when he co-wrote a brief arguing that the First Lady did not enjoy attorney-client privileges in her relationship with White House counsel. 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).

⁶⁸ 525 U.S. 990 (1998), *denying cert. to* In Re: Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998).

⁶⁹ Following Rubin v. U.S., there have been several attempts to use legislation to create a secret service privilege, (including a bi-partisan attempt in 1998), but none have been successful thus far. See Herbert L. Abrams, The Contemporary Presidency: Presidential Safety, Prosecutorial Zeal, and Judicial Blunders: The Protective Function Privilege, *Presidential Studies Quarterly*, June 1, 2001. See also S. 1360, 106th Cong. (1999); S.22, 108th Cong. (2003).

⁷⁰ Milbank.

containing confidential advice a president received from his advisors, known as “P-5” documents, would not be available until 12 years after an administration’s end. At that time, the P-5 documents would be released unless the current or former president was able to successfully argue a “constitutionally based privilege” that would justify withholding the materials.⁷¹

President Ronald Reagan was to be the first president to have his P-5 documents released in January of 2001. Roughly 68,000 documents were to be available to scholars, researchers, and the general public for the first time. The Bush Administration was given 30 days notice to review the P-5 documents for information that could compromise national security before the documents would be released.⁷²

However, the Administration took action far beyond merely evaluating the sensitivity of the documents. After receiving a series of 90-day extensions, the White House finally responded in November of 2001 by issuing executive order #13233, reportedly written by Kavanaugh.⁷³ The controversial order gave both the sitting president *and* the former president or his designees the right to refuse the release of any P-5 document without cause and apparently in perpetuity.⁷⁴ Many speculated that the motivation behind the order was to protect Bush advisors, many of whom served under President Reagan, from embarrassing revelations about advice they gave the former president. A researcher’s only recourse would be to bring a lawsuit against the objecting president or presidents. This would be a daunting task for most academic researchers, who would not only be pitted against one, possibly two presidents, but also forced to retain counsel to file suit, even with limited funding.⁷⁵

Kavanaugh was given the task of defending the order before a group of presidential scholars invited to the White House shortly after the executive order was issued. He attempted to assure the group that the researchers would be “happy with the [new] procedures” once they were in place. On the contrary, the researchers raised serious concerns. Robert Spitzer, president of the Presidency Research Group of the American Political Science Association, noted that “Kavanaugh’s promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . [t]he situation continues to be deeply troubling.”⁷⁶ Hugh Graham, Reagan historian and professor emeritus at Vanderbilt University, was also troubled by Kavanaugh’s efforts. He described the executive order as being “a victory for secrecy in government” that is “so total that it would make Nixon jealous in his grave.”⁷⁷

Other examples of Kavanaugh’s sudden zeal for presidential secrecy abound. *The Nation* has reported that Kavanaugh was central to the White House’s efforts to keep notes from Vice President Dick Cheney’s energy task force meetings, which some

⁷¹ Cannon.

⁷² *Id.*

⁷³ Milbank.

⁷⁴ Cannon.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

speculate contain proof that the White House acted to aid Enron prior to its collapse, secret from the Senate Governmental Affairs Committee.⁷⁸ The White House cited an interest in preserving “the ability of the president and vice president to receive unvarnished advice” as the reason for concealing the documents.⁷⁹ Likewise, Kavanaugh reportedly played a key role in preventing congressional access to documents pertaining to presidential pardons.⁸⁰ The *Washington Post* said that the Administration’s claim of executive privilege over pardon documents, “represents a hard line the government has never taken” – namely that executive privilege extends beyond communications from presidential advisors in the White House to include “government papers he has never seen and officials he has never talked to, such as the sentencing judge in a particular case.”⁸¹ The *Post* noted that “[i]n the past, even pardon recommendations sent directly to the president from the Justice Department have been routinely made public by government archivists after several years.”⁸² The Bush Administration, by contrast, is even claiming privilege to keep secret pardon documents nearly 80 years old, asserting privilege over documents generated in considering the pardon of back-to-Africa movement leader Marcus Garvey, who was released from prison in 1927 after a fraud conviction.⁸³

Such unprecedented claims of executive privilege serve as a sharp contrast to the insatiable appetite for access to presidential records and information exhibited by Kavanaugh during the Clinton administration. They suggest a view of the law that seriously threatens government openness and is of particular concern for a nominee to the D.C. Circuit, which often considers such issues. In addition, Kavanaugh’s apparent willingness to shift his legal philosophy and twist legal theory so dramatically shows an enthusiasm for serving partisan political ends over the law that is extremely troubling for a nominee for a lifetime seat on the federal bench.

Religious Liberty and the Public Schools

Although Kavanaugh’s legal work (other than for Kenneth Starr and the Bush White House) is scant, the legal position he advocated in one case on religious liberty and church-state separation raises additional concerns. In 1999, Kavanaugh authored an *amicus* brief on behalf of members of Congress that was submitted to the Supreme Court in the case of *Santa Fe Independent School District v. Doe*.⁸⁴ In that case, the school district argued that its “student-led” prayers over the school loudspeaker at public school

⁷⁸ Newfield. John Nichols, Enron: What Dick Cheney Knew, *The Nation*, March 28, 2002.

⁷⁹ CNN, Cheney Defends Refusal to Hand Over Energy Task Force Notes, Jan. 27, 2002, available at <http://cnn.allpolitics.com>. The issue of whether Cheney will be allowed to keep all such documents secret from the public is to be partially addressed by the Supreme Court this spring. See Charles Lane, High Court Will Review Ruling on Cheney Task Force Records, *Washington Post*, Dec. 16, 2003. Kavanaugh’s Judiciary Committee hearing was scheduled on the same day as the Supreme Court oral argument in that case.

⁸⁰ Milbank.

⁸¹ George Lardner, Bush Seeks Secrecy for Pardon Discussions, *Washington Post*, Aug. 27, 2002.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Brief of *amicus curiae* Congressmen Steve Largent and J.C. Watts in *Santa Fe Independent School District v. Doe*, 199 U.S. Briefs 62, Dec. 30, 1999. (hereinafter “Santa Fe Brief”)

football games did not infringe on students' rights under the Establishment Clause of the First Amendment.

At issue in the case was a public school's policy of allowing the student body to elect a student representative each school year who would deliver an "invocation and/or message" over the school loudspeaker before football games.⁸⁵ In his brief, Kavanaugh argued that because the student body's chosen speaker was not specifically required to pray during the "invocation and/or message," any prayer offered by the speaker was essentially private religious speech, which is not only permissible under, but is also protected by, the First Amendment.⁸⁶ Kavanaugh claimed that the "sole question" raised in the case was "whether . . . the high school must actively prohibit that student speaker from invoking God's name, uttering religious words, or saying a prayer."⁸⁷ He further asserted that ruling against the school district in the case would force schools "to monitor and censor religious words."⁸⁸

In a 6-3 decision, the Court squarely rejected Kavanaugh's claim, finding that prayer was both "explicitly and implicitly"⁸⁹ encouraged by the policy which "involve[d] both perceived and actual endorsement of religion."⁹⁰ The Court noted that while the speaker was not explicitly required to pray, an "invocation" was the only type of message expressly endorsed by the school and prayer is the most obvious means of "solemnizing the event," one of the purposes of the invocation acknowledged by Kavanaugh's brief.⁹¹ Pointing out that its decision does nothing to inhibit truly voluntary religious practice, as Kavanaugh appeared to argue, the Court explained that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."⁹²

In sum, the Court wholly rejected Kavanaugh's arguments, finding that an invocation on school property, at school-sponsored events, "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer . . . is not properly characterized as 'private' speech."⁹³ The Court's clear and unequivocal opinion, and the fact that Kavanaugh failed to even properly frame the question before the Court in his brief, raises serious questions about both his legal philosophy and his skill as a lawyer. If given the opportunity to advocate these same views from the federal bench, the right of schoolchildren to be free from religious coercion and school-sponsored promotion of religion at school could be in jeopardy.

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 3 – 5.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* at 4.

⁸⁹ *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) at 301.

⁹⁰ *Id.* at 305.

⁹¹ *Id.* at 306 – 307.

⁹² *Id.* at 313.

⁹³ *Id.* at 310.

Conclusion

Brett Kavanaugh is an unsuitable candidate for a lifetime appointment to the D.C. Circuit bench, the second highest court in the nation. While Kavanaugh's scant legal resume does not reveal much about his legal skills, the highly charged partisan items that it does contain tell a great deal about his loyalties, ideology, and legal philosophy. Kavanaugh has eagerly allied himself with the highly questionable tactics of former Special Prosecutor Ken Starr. He has proven himself willing to change his view of the law to bend with the political winds. He has recently argued for extensive presidential and governmental secrecy and privilege that would severely undermine the rights of the public and Congress, particularly if implemented from a powerful lifetime position on the D.C. Circuit. Kavanaugh has played a key role in the Bush Administration's judicial nominations policy, and the judicial nominees that Kavanaugh had a hand in selecting and promoting have too often been extremists who would strip Congress of much of its power and remove the American people from much of Congress' protection. Throughout most of his career, Kavanaugh has shown a dedication to extreme right wing ideas that undermine the freedoms and liberties that most Americans cherish. A lifetime appointment to a powerful federal appellate court should not become a political reward for a highly partisan political warrior. The nomination of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit should be rejected.