

# Kavanaugh for the Court; Trump's second nominee will be an intellectual leader on the bench.

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## FULL TEXT

President Trump kept everyone guessing to the end about his Supreme Court selection Monday, but in nominating Brett Kavanaugh he also kept his promise to select a Justice "who will faithfully interpret the Constitution as written." Judge Kavanaugh has an exemplary record that suggests he will help to restore the Supreme Court to its proper, more modest role in American politics and society.

Mr. Trump stressed the 53-year-old Judge Kavanaugh's legal credentials Monday evening, and well he should. In 12 years on the D.C. Circuit Court of Appeals, he has written more than 300 opinions that span nearly every significant constitutional issue including the separation of powers and federalism. The Supreme Court has adopted the logic of 11 of his opinions in whole or part. He has the experience and intellect to be a leader on the Court, not merely a predictable vote on this or that issue.

In particular, Judge Kavanaugh is among a younger generation of judges who base their rulings on the text of the Constitution and Congressional statute. This method comes through clearly in many opinions, including a case (*Heller v. D.C.*) in which he rejected a balancing test for gun laws and said the Second Amendment requires an originalist historical inquiry.

Judge Kavanaugh has also been a leader on the appellate courts in challenging the Chevron doctrine of judicial deference to regulators. In *U.S. Telecom Assn. v. FCC* (2017) he concluded that the Obama Administration's net neutrality rules flouted telecom law. He's also held that regulators must consider the costs of their decisions (*White Stallion Energy v. EPA*).

His sterling dissents in *Free Enterprise Fund v. PCAOB* (2008) and *PHH Corp. v. CFPB* (2018) held that limits on the President's ability to remove executive officers except "for cause" are unconstitutional. The Supreme Court adopted his dissent in *Free Enterprise Fund*.

Judge Kavanaugh has also demonstrated judicial modesty on foreign policy by upholding the executive's collection of metadata and use of military commissions to prosecute enemy combatants. Democrats should note that Judge Kavanaugh has consistently demonstrated deference to the President's core powers regardless of the White House occupant.

Judge Kavanaugh's First Amendment jurisprudence also reflects a deep respect for the free exercise of religion and speech. In *Priests for Life v. HHS*, he concluded the Obama Administration's rule requiring religious organizations to file forms facilitating contraception by third parties substantially burdened their exercise of religion since they had to act contrary to their sincere beliefs. He also extended speech rights to nonprofits' political expenditures (*Emily's List v. FEC*), which teed up the Supreme Court's landmark *SpeechNow* and *Citizens United* rulings.

Given that this is the polarized America of 2018, Judge Kavanaugh's confirmation will inevitably be a political brawl. Democrats can't defeat his nomination alone, so they will deploy every tactic to frighten two or more Republicans to oppose him.

This will include demanding millions of documents from Mr. Kavanaugh's tenure on the staff of special counsel

Ken Starr in the 1990s. But Judiciary Chairman Chuck Grassley should resist this gambit as irrelevant to Judge Kavanaugh's duties on the Court. We trust Republicans understand that if they don't hold together to confirm Judge Kavanaugh, they will deserve to lose their majority in November. If they do stay united, they may persuade a couple of Democrats to vote to confirm him as well.

Democrats will also claim that a new conservative 5-4 majority will mean the rollback of American rights from abortion to voting. Don't believe it.

The change we expect would be a Court that returned to the role it played before the 1960s when the Justices became an engine of progressive policy. The American left is distraught because it fears losing the Court as its preferred legislature. A conservative Court won't overturn liberal precedents willy-nilly. But we hope it will be inclined to let most political questions be settled where they should be in a democracy--by the political branches. This still preserves for the Court a large role in protecting fundamental rights and the structure of the separation of powers that is a bulwark against tyranny. The Court has become far too embroiled in politics, which has undermined public faith in the law and Constitution.

We firmly believe that liberals have much less to fear from a conservative majority than they imagine. A genuinely conservative Court might even help progressives by liberating them to focus once again on the core task of self-government--persuading their fellow Americans through elections, not judicial fiat.

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