

# F E M I N I S T S FIGHT BACK

## The Supreme Court: What's at Stake

On July 9, 2018, President Trump nominated Brett Kavanaugh to fill retiring Justice Anthony Kennedy's seat on the U.S. Supreme Court. With this nomination, President Trump could shift the balance of the Court and dramatically undermine civil and human rights for generations.

Considered a moderate, Justice Kennedy provided the determining vote on a number of key Supreme Court decisions concerning abortion rights, LGBTQ equality, and affirmative action. But Brett Kavanaugh is no moderate.

Far from "draining the swamp," with Kavanaugh's nomination, Trump has brought the swamp to the Supreme Court. Kavanaugh was selected from a list of 25 jurists who were handpicked by the Federalist Society, a far-right organization dedicated to stacking the federal judiciary with judges who will rule in line with their values, from defending corporate interests to ending legal abortion.

That means Kavanaugh meets Trump's litmus test of being a judge who would overturn *Roe v. Wade* and gut the Affordable Care Act.

Kavanaugh spent the formative years of his career as a right-wing operative. In fact, after serving in President George W. Bush's White House, participating in the Florida recount as part of the Bush-Cheney 2000 legal team, and being involved in the Ken Starr investigation, Kavanaugh was considered such a partisan that it took 3 years for his nomination to the DC Circuit Court of Appeals to be approved by the Senate. He is a Washington insider, an elite conservative with political connections.

During his time on the bench, Kavanaugh has shown allegiance to the wealthy and the powerful. In case after case, Kavanaugh has ruled against working people, the environment, and individuals seeking to assert their rights. His nomination is a gift to corporations, far-right interest groups, and corrupt politicians, not to the American public.

## Roe at Risk

President Trump has consistently indicated that he would only appoint Supreme Court justices who would overturn *Roe v. Wade*, and Kavanaugh's record both on and off the bench clearly demonstrates that he passes the test.

Just last year, Kavanaugh gave a speech at the conservative American Enterprise Institute in which he praised former Chief Justice William Rehnquist for “stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition,” but noted that Rehnquist had been unsuccessful in curtailing these rights in *Roe*. Other unenumerated rights, of course, include the right to use contraception as well as the right to marriage equality.

In his only abortion case, Kavanaugh issued a decision blocking a 17-year old unaccompanied immigrant minor being held in a shelter from obtaining an abortion. Jane Doe, who had been abused by her parents in her home country, had already obtained a court order that allowed her to consent to the abortion on her own. Nonetheless, the government refused to permit her to attend any abortion-related appointments. Kavanaugh would have continued to delay Jane Doe's abortion under the pretense that she needed a sponsor, forcing her into her second trimester. Days later, the full D.C. Circuit reversed Kavanaugh's decision. In his dissent, Kavanaugh claimed that the court had created a right “to obtain immediate abortion on demand,” ignoring that Jane Doe had to jump through numerous hoops to access abortion and that the government had unnecessarily delayed the procedure for weeks.

As a judge on the Court of Appeals, Kavanaugh is bound by *Roe*, even though he tried to undermine its promise. If he is confirmed as a Supreme Court justice, Kavanaugh would not be bound; he could provide the 5th vote to overturn *Roe*. His record of rubber-stamping abortion restrictions and barriers is a dark sign as states wage lawsuits to institute everything from 8 week bans to outlawing a common abortion procedure performed after 11 weeks.

Even if *Roe* is not reversed outright, a Trump Court, with Kavanaugh on the bench, could allow so many abortion restrictions that *Roe* would be essentially gutted. By redefining what constitutes an “undue burden” for women seeking abortion care, states may once again be able to criminalize abortion, ban the procedure earlier and earlier in pregnancy, or make abortion impossible to obtain lawfully.

## ACA and Access to Healthcare

During the campaign, Trump promised that he would repeal the Affordable Care Act (ACA) and criticized Chief Justice John Roberts for not striking down the law.

In a 2015 tweet, Trump wrote “If I win the presidency, my judicial appointments will do the right thing unlike Bush’s appointee John Roberts on ObamaCare.”

Kavanaugh may be just that appointee. In two separate cases at the D.C. Circuit, Kavanaugh’s colleagues upheld the constitutionality of the ACA, but Kavanaugh refused, suggesting that he could very well meet Trump’s ACA litmus test. Kavanaugh has already sought to undermine key provisions in the ACA in 2015 when he argued that employers -- especially religiously affiliated ones -- have a right to deny birth control insurance coverage to their employees.

Kavanaugh’s position on the ACA matters. Right now, there is a case, filed by Texas and 19 other states, challenging the constitutionality of the ACA. In particular, the case is challenging protections for people with pre-existing conditions. The Trump Administration, which filed a brief in the case, has taken the position that the ACA is unconstitutional, and the case is making its way through the federal courts.

In a country where being a woman is seen as a pre-existing condition, Kavanaugh’s vote against the ACA would leave countless women uninsured. Overturning the ACA would also leave the LGBTQ community vulnerable to insurance discrimination and jeopardize treatment coverage for transgender individuals, people suffering from substance use disorder, as well as people living with HIV and other serious health conditions.

## Unchecked Presidential Power

These are unusual times. The President of the United States is the subject of a special investigation into Russia’s interference in the 2016 election. That investigation has so far led to the criminal indictment of at least four top aides associated with the Trump campaign, and at least three have pleaded guilty, including Michael Flynn, the former national security adviser, and Rick Gates, the former deputy campaign chairman.

No one is above the law, except maybe the President if Kavanaugh is confirmed. Kavanaugh has previously written that presidents should not be subject to civil lawsuits or criminal investigations while in office. Perhaps unsurprisingly, Kavanaugh has also suggested that *U.S. v. Nixon* -- the Supreme Court case that forced President Nixon to turn over the Watergate tapes -- was wrongly decided. In a 1998 article, Kavanaugh also

wrote that a sitting president should have “absolute discretion” about whether and when to appoint a special counsel.

Kavanaugh’s record raises huge red flags. As the Mueller investigation, as well as the New York state investigation, closes in around Trump, the Supreme Court will be required to weigh in on a number of important, never-before answered questions regarding the president’s culpability: Can the President fire the special counsel? Can a sitting U.S. President be called to testify in a criminal case? Does the President have the legal authority to pardon himself? Kavanaugh has already told us what direction he leans in.

If appointed to the Supreme Court, Kavanaugh could likely deconstruct the system of checks and balances to create an unaccountable executive branch. Kavanaugh has argued that the president has absolutely no obligation to enforce a law passed by Congress (such as the ACA), even if the courts have determined it to be constitutional.

## **Money Before People**

Kavanaugh’s record shows a career of putting corporations, the powerful, and the mega wealthy over the interests of regular people.

- Kavanaugh has tried to make it more difficult for federal employees to pursue claims of racial discrimination and retaliation in federal court. In one case, he would have blocked an African-American woman fired from her job from even having her case heard in court, and in another, he would have prevented an African-American FBI agent from pursuing a retaliation claim. In both cases, Kavanaugh was in the minority.
- Kavanaugh has consistently ruled against workers in workplace safety cases and in union disputes.
- Kavanaugh has argued that undocumented workers do not have the right to unionize because of their immigration status, regardless of unsafe and inhumane working conditions
- Kavanaugh has repeatedly sided with corporations and polluters, and ruled against protections for clean air and clean water, endangering the health and lives of millions.
- Kavanaugh would have played into the hands of the NRA by striking down a common sense gun law that banned assault weapons and high-capacity magazines in Washington, DC. The law was upheld as constitutional, but in dissent, Kavanaugh claimed that there was no meaningful distinction between handguns and assault weapons.