



### **Brett Kavanaugh**

Nominee for the U.S. Court of Appeals for the D.C. Circuit

#### **Brief Biography**

- Age 39. Born February 12, 1965.
- B.A. *cum laude*, Yale 1987.
- J.D., Yale 1990.
- Law Clerk for:
  - Walter Stapelton, Third Circuit, 1990-91.
  - Alex Kozinski, Ninth Circuit, 1991-92.
  - Anthony Kennedy, U.S. Supreme Court, 1993-94.
- Attorney in the Office of U.S. Solicitor General Kenneth Starr, 1992-93.
- Associate Counsel in the Office of Independent Counsel Kenneth Starr, 1994-97, 1998.
- Partner at Kirkland & Ellis, Washington, D.C., 1997-98 & 1999-2001.
- Associate White House Counsel 2001-03.
- Assistant to the President and Staff Secretary 2003-present.

President Bush's nomination of Brett Kavanaugh for a seat on the U.S. Court of Appeals for the D.C. Circuit exemplifies the White House's reliance on ideology over merit in selecting judicial nominees. Kavanaugh appears to have been chosen for a D.C. Circuit seat only because of his involvement in some of the most ideologically charged issues of his time. As an associate counsel in the office of Independent Counsel Kenneth Starr, Kavanaugh, among other responsibilities: (1) pursued unfounded allegations that Clinton White House deputy counsel Vince Foster was murdered rather than committing suicide, (2) worked on the Monica Lewinsky investigation, and (3) drafted the grounds for impeachment section of the Starr Report Congress.

Kavanaugh's views of executive privilege reveal his excessive partisanship. In the Independent Counsel's office, Kavanaugh was responsible for challenging the Clinton Administration's claims of privilege, testing the boundaries of executive and other privileges in order to gain more information for the Starr investigation. His actions as one of Starr's deputies alone compel the conclusion that he would be incapable of bringing the kind of fairness and independence to the bench that are essential to the equal dispensation of justice and to the long-term viability of our federal judiciary.

Since joining the Bush administration, however, Kavanaugh has become a zealous defender of executive privilege working to shield the White House from inquiries from the public, Congress and even historians wanting to see the papers of past presidents.

He has also been one of the White House's point people in the president's campaign to pack the courts with right-wing extremists. He has played a major role in choosing judicial nominees committed to turning back the clock on civil rights, women's rights, consumer and worker health and safety and environmental collection. The *New York Times* noted that the "reason [President Bush's judicial] nominees have met with resistance . . . is that many are far-right ideologues whose views offend most Americans. There is only one way to end the deadlock: compromise."<sup>1</sup> The White House, through Kavanaugh, has shown no interest in compromise, saying many times that the Senate should acquiesce in the president's selection of judges.<sup>2</sup>

In addition, his legal experience is undistinguished. Kavanaugh has been a lawyer for a little over 13 years and has written only two pieces of legal scholarship, a student note and a law review article about the independent counsel's role.

Finally, Kavanaugh has been a leader of the Federalist Society, the conservative group whose mission is to overturn many of the fundamental rights and protections recognized by the courts over the last fifty years. In particular, Kavanaugh has worked on school voucher issues as co-chair of the school choice subcommittee of the Federalist Society's religious liberties practice group.

In contrast, all nine of the active D.C. Circuit judges had more legal experience than Kavanaugh at the time of their appointment. And, of the 54 judges appointed to the U.S. Court of Appeals for the D.C. Circuit since Congress created it almost 111 years ago in 1893, only one, Kavanaugh's mentor Kenneth Starr, had fewer years of legal experience than Kavanaugh. The average legal experience of these 54 attorneys was double that of Kavanaugh—D.C. Circuit lawyers have averaged over 26 years on the bench, compared with Kavanaugh's 13 years. In fact, 45 of the 54 D.C. Circuit judges had at least 5 more years of legal experience than Kavanaugh.<sup>3</sup>

It is clear from Kavanaugh's record that he does not have the experience and stature befitting a lifetime appointee on the powerful D.C. Circuit. If appointed, Kavanaugh would perpetuate the legacy of the judge he has been nominated to replace, Laurence Silberman, whose tenure on the D.C. Circuit is characterized by inconsistent views of the law in highly-charged political matters that, like Kavanaugh on executive privilege, can be explained only as a testament to his continued allegiance to the Republican Party. The Senate should reject Kavanaugh's nomination.

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<sup>1</sup> Editorial, *The Reality of a Judicial "Crisis"*, NEW YORK TIMES, May 11, 2003.

<sup>2</sup> See Sheldon Goldman, *et al.*, *W. Bush Remaking the Judiciary: like father like son?*, 86 JUDICATURE, 282 (2003).

<sup>3</sup> These statistics are true even if the search is limited to modern times. Starting with the Nixon Administration, 18 of the 22 D.C. Circuit judges appointed during this time period have had at least 5 more years of legal experience than Kavanaugh. Of the four others, two, David Ginsburg and Harry Edwards, were law professors at top law schools for significant periods and one, Clarence Thomas, worked for nine years as a senior member of the Reagan and George H.W. Bush Administration. Again, only Ken Starr had a similar record to Kavanaugh.

## **Importance of the D.C. Circuit**

The D.C. Circuit is widely viewed as second only to the Supreme Court in influence over law and policy in this country. Congress has conferred on the court concurrent or exclusive jurisdiction over the interpretation of many federal statutes and over the validity of regulations issued by executive agencies. As a result, the D.C. Circuit establishes precedent in areas such as labor and workers' safety laws and environmental protections that affect all Americans in very significant ways. The court is also a stepping-stone for nomination to the Supreme Court. Justices Scalia, Thomas and Ginsburg all served on the D.C. Circuit before elevation to the Supreme Court.

The D.C. Circuit currently has five active Republican-appointed judges, four active Democrat-appointed judges, and three vacancies. During the previous administration, President Clinton nominated Elena Kagan and Allen Snyder to the court, but the Republican-controlled Senate held up both nominations, preserving the opportunity for a Republican president to give his party a majority on the court. Had Snyder and Kagan been confirmed, filling the remaining vacancies with Republican nominees would have retained the court's balance.

The D.C. Circuit nominations of Kavanaugh and Janice Rogers Brown, who is currently being filibustered in the Senate, must be considered in the context of the Republicans' efforts during the Clinton years to hold seats vacant in the hopes of a Republican takeover of the White House, as well as of the court's current breakdown. Recent studies have confirmed that appellate panels come to very different results in cases dealing with significant issues including environmental protection, campaign finance and employment discrimination, depending on whether the panel is made up of Republican or Democratic appointees.<sup>4</sup> Furthermore, the partisan and ideological breakdown on the court has proven critical in several *en banc* decisions issued by the D.C. Circuit over the last ten years. One vote decided many of these cases.<sup>5</sup>

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<sup>4</sup> See Sunstein, et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, AEI-Brookings Joint Center for Regulatory Studies (2003) (available at <http://aei-brookings.org/admin/pdffiles/php7m.pdf>).

<sup>5</sup> These *en banc* decisions include: *Hoffman Plastic Compounds v. NLRB*, 237 F.3d 639 (DC Cir 2001), *rev'd* 122 S. Ct. 1275 (2002) (DC Circuit upheld 5-4 – with three Democrats and two Republicans in the majority and four Republicans in dissent – an NLRB order of reinstatement and backpay on behalf of undocumented worker fired by company for attempts to organize a union); *Kolstad v. American Dental Association*, 139 F. 3d 958 (DC Cir 1998), vacated 527 U.S. 526 (1999) (Court voted 6-5 – with all Republican appointees in the majority and all Democratic appointees in dissent – to limit punitive damages in a Title VII gender discrimination suit to cases in which plaintiff showed “egregious conduct.” The Supreme Court vacated the decision, holding that the DC Circuit’s articulated standard for awarding punitive damages was too harsh.); *Action for Children’s Television v. FCC*, 58 F.3d 654 (DC Cir 1995) (By a vote of 7-4, with all Republicans in the majority and all Democratic appointees in dissent, the court upheld a ban in the Public Telecommunications Act on “indecent” material between the hours of 6 a.m. and 12 midnight.); *Steffan v. Perry*, 41 F.3d 677 (DC Cir 1994) (By a vote of 8-3, with seven Republicans and one Democrat in the majority and three Democrats in dissent, the Court upheld the discharge of a gay midshipmen based only on his statements that he was gay).

## **Kavanaugh's Record as an Associate Independent Counsel**

After law school, Kavanaugh clerked for two judges, spent a year working for Solicitor General Starr in the George H.W. Bush administration and then clerked for Justice Anthony Kennedy on the U.S. Supreme Court. He then went to the office of new-appointed Independent Counsel Kenneth Starr.

According to his Judiciary Committee questionnaire responses, Kavanaugh performed a wide variety of controversial tasks for Starr. Kavanaugh lists three subject areas in which he primarily took part: the investigation into Foster's death; the investigation into allegations of obstruction of justice regarding whether documents had been removed from Foster's office after his death; and the drafting of the "Information that 'may constitute grounds' for impeachment" section of the Starr Report to Congress regarding Monica Lewinsky. Kavanaugh also worked on countering the Clinton Administration's claims of privilege in all areas.

Kavanaugh wrote that he conducted numerous interviews to determine "both the cause of death and Mr. Foster's state of mind." After years of wasteful investigation into the issue, Kavanaugh drafted a report concluding that Foster committed suicide. His investigation of the handling of Foster's files similarly resulted in a costly investigation and a 300-page memo, but no charges.

Regarding the Clinton impeachment report, Kavanaugh has repeatedly emphasized that he did not draft the "narrative" section, setting out the lurid alleged facts of the affair. However, Kavanaugh has made several statements that show that he endorsed this section. He co-wrote an op-ed regarding the Lewinsky matter stating: "Starr uncovered a massive effort by the president to lie under oath and obstruct justice."<sup>6</sup> Kavanaugh displays a vitriol towards President Clinton and attempts a staunch defense of Starr, concluding: "Over time, fair-minded people will come to hail Starr's enormous contributions to the country and see the presidentially approved smear campaign against him for what it was: a disgraceful effort to undermine the rule of law, an episode that will forever stand, together with the underlying legal and moral transgressions to which it was connected, as a dark chapter in American presidential history."<sup>7</sup> In an interview on *Burden of Proof*, he stated that the Starr report was "a group [effort] . . . . We assessed the evidence and put together in a—by consensus a report that said there were substantial and credible information that may constitute grounds for impeachment. When we did that report, our goal was to be thorough, it was also to be fair, and we think we accomplished both of those goals."<sup>8</sup>

It appears that Kavanaugh's only real concern with the report was its public release: "it really was a mistake for Congress to take this sensitive information, to put it on the Internet before they even read it. They had not even read the report, and obviously, given the nature of

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<sup>6</sup> Robert J. Bittman, Brett M. Kavanaugh, Solomon J. Wisenberg, *To Us, Starr is an American Hero*, WASHINGTON POST, Nov. 15, 1999.

<sup>7</sup> *Id.*

<sup>8</sup> *CNN Burden of Proof*, Sep. 9, 1999.

the case, there were going to be some sensitive details. I think that was a mistake, that was unfortunate, it redounded to our detriment.”<sup>9</sup> Despite his assertions that he wanted to keep sensitive materials out of the public eye, he had earlier told the *Washington Post* that he wanted Congress to investigate the Monica Lewinsky incident as soon as it became public in early 1998:

From the country's perspective, it is absurd that Congress is doing nothing,” said Brett Kavanaugh, a former Starr prosecutor. “The way to avoid a long, drawn-out process is for Congress to gather the relevant evidence, hold a hearing and ask Mr. Jordan, Ms. Lewinsky and the president to provide testimony. Then Congress and the people can determine directly and quickly what the facts are and whether any sanction should be imposed against the president, which are clearly the most important questions for the country.”<sup>10</sup>

Of course, the possible grounds for impeachment are at least as controversial as the “narrative” section. Kavanaugh laid out 12 grounds for impeachment. The House Judiciary Committee accepted most of these, although they combined them into three articles of impeachment, and added one of their own dealing with impeding a Congressional investigation.<sup>11</sup> The Republican-controlled House of Representatives accepted only two of these articles and both failed to obtain even a majority vote in the Republican-controlled Senate, much less the two-thirds vote necessary for the president’s removal from office.

Kavanaugh was also assigned to attack the Clinton Administration’s claims of privilege. On his Judiciary Committee Questionnaire, he lists three cases in which he challenged President Clinton’s privilege claims. In *In re Lindsey*<sup>12</sup>, he challenged President Clinton’s claim of government attorney-client privilege in response to a federal grand jury subpoena issued to Bruce R. Lindsey, a White House attorney. In another case, *In re Grand Jury Subpoena Duces Tecum*<sup>13</sup>, Kavanaugh was responsible for challenging Clinton’s claim of government attorney-client privilege when a federal grand jury subpoena was issued for attorney notes from the White House Office. In *Rubin v. United States*, he challenged a “protective function” privilege claim that Secret Service agents should not be required to testify before a grand jury. In each of these cases the court held that the privilege did not apply. Kavanaugh also lists on his questionnaire a case involving private attorney-client privilege after the client is deceased. He challenged the claim of privilege by Vincent Foster’s former attorney after Foster’s death.<sup>14</sup> In this case, the court held that the privilege did apply. The *Washington Post* noted how far Starr’s office had

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<sup>9</sup> *Id.* In his responses to the Judiciary Committee questionnaire, Kavanaugh writes that he “regret[s] that the House of Representatives did not handle the report in a way that would have kept sensitive details in the report from public disclosure (as had occurred with the House’s handling of the Special Prosecutor’s report in 1974) . . . .” These sensitive details are not matters of national security but lurid details that Starr and his team chose to include in the report.

<sup>10</sup> Ruth Marcus, *Probe Bogs Down in Tangle of Privilege; As Starr’s Subpoenas Proliferate, So Do Claims of Special Protection*, WASHINGTON POST, Feb. 26, 1998.

<sup>11</sup> The Starr report can be found, among other places at <http://www.cnn.com/starr.report/>.

<sup>12</sup> See 158 F. 3d 1263 (D.C. Cir. 1998), *cert. denied*, *Office of the President v. Office of Independent Counsel*, 525 U.S. 996 (1998).

<sup>13</sup> See 112 F.3d 910 (8<sup>th</sup> Cir.1997), *cert denied*, 521 U.S. 1105 (1997).

<sup>14</sup> See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

gone in stripping privilege claims away from the White House in these cases and called on Congress to “remed[y]” the damage done.<sup>15</sup>

### **Kavanaugh’s Record in the Bush White House**

Kavanaugh came to the White House within days of George W. Bush’s inauguration, joining the White House Counsel’s office.<sup>16</sup> Kavanaugh took on highly controversial tasks in the new administration. According to press reports, he has been involved in the Bush Administration’s unprecedented attempts to shield the White House from public scrutiny. He wrote the executive order that blocked the release of presidential papers despite a federal law requiring their release after 12 years in many cases.<sup>17</sup> According to the *Washington Post*, Kavanaugh has also played a role in stymieing a Senate Governmental Affairs Committee’s request to see the Administration’s Enron-related documents.<sup>18</sup> As noted in articles on the secrecy subject, it is troubling that Kavanaugh worked so diligently to force the Clinton Administration to turn over all documents the Independent Counsel wanted to see, but once the White House changed hands, he immediately went to work trying to shield President Bush from public accountability.

One of Kavanaugh’s other principal responsibilities was selecting candidates for President Bush to nominate to the federal bench.<sup>19</sup> The *New Yorker* called Kavanaugh White House Counsel Al Gonzales’s “main deputy on the subject . . . .”<sup>20</sup> During Kavanaugh’s time picking judges, the White House sent a slate of ideologically-driven nominees to the Senate including Miguel Estrada, Priscilla Owen, Charles Pickering and William Pryor. The *Washington Post* noted that Kavanaugh coordinated the Estrada and Owen fights.<sup>21</sup> Kavanaugh has been an unabashed cheerleader for Bush’s most extreme nominees, stating that Bush’s first nominees, a group that included Estrada, Owen, and several other controversial nominees “exemplified 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.”<sup>22</sup> Questions remain regarding whether the White House Counsel’s office received copies of memos stolen from Democrat Senate Judiciary Committee members’ computers by Republican staffers.<sup>23</sup> Citizens for Responsibility filed a Freedom of Information Act request to find out whether either the Department of Justice or the White House had received copies of the documents.<sup>24</sup> Because of his prominent role in the judicial nomination process,

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<sup>15</sup> Benjamin Wittes, *Damage Control*, WASHINGTON POST, Feb. 18, 1999.

<sup>16</sup> Dana Milbank, *White House Counsel’s Office Now Full of Clinton Legal Foes*, WASHINGTON POST, Jan. 30, 2001.

<sup>17</sup> See, e.g., Al Kamen, *In the Loop*, WASHINGTON POST, Nov. 9, 2001; Stanley I. Kutler, *Classified!: George W. Uses 9/11 as a Pretext to Reverse the Will of Congress and Wall Off Presidential Records*, CHICAGO TRIBUNE, Jan. 2, 2002; *Ashcroft’s Secrets*, THE NATION, Jan. 28, 2002; Russ Baker, *What Are They Hiding?*, THE NATION, Feb. 25, 2002.

<sup>18</sup> Dana Milbank, *Whitewater Lawyer Turns Proponent of Presidential Power*, WASHINGTON POST, Oct. 15, 2002.

<sup>19</sup> See *id.*; Jeffrey Toobin, *The Fight Over the President’s Judicial Nominations*, NEW YORKER May 26, 2003.

<sup>20</sup> Toobin, *supra* note 19.

<sup>21</sup> Milbank, *supra* note 18.

<sup>22</sup> Goldman, *et al.*, *supra* note 2 at 296.

<sup>23</sup> See Christopher Hayes, *Calls Mount for Investigation into Republican Staffers Piracy of Democratic Files*, IN THESE TIMES, Apr. 12, 2004.

<sup>24</sup> Chuck Lindell, *Leaked Memos, a Case of Cybertheft or Corruption*, COX NEWS SERVICE, Feb. 28, 2004.

Kavanaugh should be probed about whether these memos were shown to the White House Counsel's office and whether they were used in coaching judicial nominees for their hearings before the Senate Judiciary Committee.

### **Kavanaugh's Tenure at Kirkland & Ellis**

One of Kavanaugh's most notable cases while practicing at the law firm of Kirkland & Ellis was his representation of the American relatives of Elian Gonzalez<sup>25</sup> in the family's claim that the INS's denial of asylum to the boy violated Due Process and the Refugee Act of 1980. The Eleventh Circuit Court of Appeals ruled against the relatives.

Kavanaugh lists corporate giants Verizon, America Online, General Motors, and Morgan Stanley among his most significant clients while working at Kirkland and Ellis. He lists two of his General Motors cases among his ten most significant litigated matters. In one case he defended General Motors in a design defect products liability case. In the other, he filed an amicus brief on the company's behalf regarding the Boat Safety Act. Kavanaugh also represented the president's brother, Governor Jeb Bush,<sup>26</sup> in his official capacity in a case involving a challenge against the state of Florida's school choice law, the Opportunity Scholarship Program

### **Kavanaugh's Level of Experience**

As discussed above, Kavanaugh's experience lacks the length, breadth and stature of that of almost all appointees to the D.C. Circuit. D.C. Circuit judges have been U.S. Senators and Representatives, state attorneys general, members of the Nuremberg war crime prosecutor's office, federal district judges, state appellate and trial judges, law professors at top law schools across the nation. One was a Solicitor General of the United States. Some appeared dozens of times before the U.S. Supreme Court. Kavanaugh has had no similar experience.<sup>27</sup>

Even Kavanaugh's courtroom experience is limited. The Judiciary Committee questionnaire asks each judicial nominee to "[d]escribe the ten most significant litigated matters which you personally handled."<sup>28</sup> Kavanaugh was able to list only five cases in which he appeared in court. He filled out the balance of the response to this question with a case in which he wrote briefs but did not argue,<sup>29</sup> a case in which he petitioned for rehearing and *certiorari* but was denied,<sup>30</sup> a case in which he wrote a brief opposing a petition for *certiorari*,<sup>31</sup> and two cases in which he only represented an *amicus curiae*, one of which—the case he lists last on his questionnaire responses—settled and therefore did not result in a decision on the issue he had

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<sup>25</sup> See *Gonzalez v. Reno*, 215 F.3d 1243 (11<sup>th</sup> Cir. 2000)

<sup>26</sup> 767 So. 2d 668 (Fla. Dist. Ct. App. 2000).

<sup>27</sup> Appendix A contains a comparison of the experience levels of the D.C. Circuit judges and of Kavanaugh.

<sup>28</sup> Senate Judiciary Committee Questionnaire, Question 18 (2003).

<sup>29</sup> *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8<sup>th</sup> Cir.) *cert. denied*, 521 U.S. 1105 (1997).

<sup>30</sup> *Gonzalez v. Reno*, 215 F.3d 1243 (11<sup>th</sup> Cir.), *cert. denied*, 530 U.S. 1270 (2000). His request for rehearing *en banc* was denied without any judge even requesting a poll on the motion.

<sup>31</sup> *Rubin v. United States*, 525 U.S. 990 (1998).

briefed.<sup>32</sup> In two of the cases he listed, *Concerned Citizens of Carderock v. Hubbard* and *Lewis v. Brunswick*, he was not even the lead counsel on the case.

## **Conclusion**

Kavanaugh's career is distinguished only by its extreme partisanship. There is nothing in his record to suggest that he would show the independence of thought necessary for a seat on the second-most powerful court in the nation. And his short record stands in sharp contrast to those of the many legal giants who have been chosen by past presidents to sit on the D.C. Circuit. The Senate should reject his nomination.

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<sup>32</sup> *Lewis v. Brunswick*, No. 97-288 (U.S.) (dismissed as moot because of settlement); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).