Opinion

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President Donald Trump shakes hands with Brett Kavanaugh, a Catholic, who is a judge on the U.S. Court of Appeals for the District of Columbia Circuit, after Trump named him his Supreme Court nominee July 9 at the White House in Washington. At left is Kavanaugh's wife, Ashley Estes Kavanaugh, and their two daughters, Margaret and Liza. (CNS/Reuters/Leah Millis)



by Michael Sean Winters

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In a really fine profile of U.S. Supreme Court nominee Brett Kavanaugh, published in The Washington Post, his neighbor, a Democrat named Gregory Chernack said, "I know there are things we disagree on, based on what I've read. But I also know how eminently qualified he is to do this. He's the type of Republican you would want the Republicans to nominate."

There is the conundrum. President Donald Trump was never going to nominate someone I would like to see on the Supreme Court. Kavanaugh is, so far as we can tell, not a part of the Steve Bannon-Laura Ingraham "let's make nice to the white nationalists" brigade. He was originally put on the District of Columbia Court of Appeals by President George W. Bush. Those of us on the left had many, many problems with Bush, but he knew enough to go to a mosque in the days after 9/11, and he did not go out of his way to antagonize our allies while kissing up to our enemies.

In fact, a case could be made that if the Democrats were to somehow manage to derail the confirmation of Kavanaugh, Trump would be so angry he would likely nominate someone who is more extreme, someone more conservative, someone more aligned with his version of the Republican Party than what it was in decades past.

But senators who take to heart the opening words of our Constitution, who believe that government must strive to make our Union more perfect and promote the general welfare, not the specific interests of the monied class, those senators still have good reasons to vote no on Judge Kavanaugh's nomination. At the end of the day, conservative jurisprudence is still offensive to any set of values worthy of the name Christian.

You don't have to be a Trumpite to be wrong for the country. I respect enormously those Republicans who have stood up to Trump. Sen. Jeff Flake's speech to the Senate announcing his decision not to seek reelection was a rare profile in courage set amidst a sea of cowardice on that side of the aisle. Professor Robert P. George is someone with whom I have profound disagreements, but I admire his principled adherence to the "never Trump" creed. But just because Trump is an unhinged narcissist and Mussolini-wannabe does not mean that Republicans on the court are good for America.

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Justice Anthony Kennedy joined the four consistently conservative justices in the case *Janus* v. *AFSCME* that forced every state in the country to become a so-called "right-to-work" state. So much for interpreting the law and not making it. The Supreme Court, also on a 5-4 vote, gutted antitrust laws in large parts of the economy last month also. "In practice, the Court has shielded from effective antitrust scrutiny a huge swath of firms that provide services on more than one side of a transaction — and, in today's digital economy, there are many (as Justice Stephen Breyer noted in a dissent he read from the bench to emphasize his concerns)," observed Lina Khan at Vox. These are decisions that will make the rich and powerful richer and more powerful.

When the White House announced Kavanaugh's nomination, they sent out talking points that specifically highlighted those decisions he wrote while serving on the District of Columbia Court of Appeals in which he invalidated government regulations. Look at the number of cases he decided that were affirmed by the Supreme Court on a 5-4 vote with the late Justice Antonin Scalia writing the opinion. Remember, to liberals, Scalia was a nightmare. Like many conservative jurists, he apparently thinks money is speech, which is a phrase I have been unable to find in the text of the Constitution as it is written. Originalist when it is convenient, just like Scalia, too. In sum, we can expect 30 or more years of pro-business decisions from this nominee, and that is reason enough to vote against him.

N.B. I take for granted that the days when senators thought it was enough to vouch for the nominee's professional credentials, irrespective of their ideology, are long

gone. The best reason to vote against a nominee is because you disagree with them.

There are only two reasons that suggest themselves for supporting Kavanaugh's nomination. First, it is likely, though far from obvious, that he would support reversing *Casey* v. *Planned Parenthood* and allowing the states to regulate abortion more aggressively than they are permitted to do now. The pro-life movement would have to engage in a great deal of education to help states adopt responsible legislation restricting abortion and doing it in such a way that we do not court an enormous backlash. I am not confident that can be done. But it is impossible to deny the stain upon the nation caused by the injustice of abortion and the coarsening effect on our culture brought on by legalized abortion at all stages of pregnancy.

The second reason has to do with the famous law review article in which Kavanaugh urged Congress to adopt laws that would keep a president from facing legal challenges, or even investigations, while in office. Democratic critics, poised to jump on anything, seized on this article to make the case that Trump was picking him precisely so that he would, for example, vote to shut down the Mueller investigation if that question came before the court. But as Benjamin Wittes wrote at Lawfare:

> If Kavanaugh's writings on special counsel investigations really influenced Trump's decision to nominate him, then Trump is a bigger fool than I have imagined. Kavanaugh's writings on the subject don't clarify all of his views on the subject of the Mueller investigation. But they clarify certain big things, and those things are really not good for Donald Trump. Noah Feldman writes that "Properly understood, Kavanaugh's expressed views actually support the opposite conclusion" than the one to which many knees are jerking.

Wittes shows that Kavanaugh's writings on the subject of special, or now independent, counsels should worry Trump, not comfort him, because the kind of special counsel he envisioned looks a lot like the rules that in fact govern the Mueller investigation.

This latter concern brings me to what should be decisive for senators, including Democratic senators. The clear and present danger to the constitutional order at this moment is our president. In meeting with Kavanaugh, in sizing him up, does he appear like a future quisling, or does he have the same kind of mettle that led Sen. John McCain to vote against the repeal of the Affordable Care Act? The divide

between liberal and conservative remains important, as does the divide between Democrat and Republican. But the crucial divide in America today is between those who have become collaborators with the president and those who resist him. I do not know which camp Kavanaugh fits into, but it is a key question senators should have in their minds when they welcome the nominee into their office for a meeting. Will he stand up for the rule of law or for the rule of Trump? And, if it is not perfectly clear that he will resist the president's willingness to upend the rule of law, Kavanaugh should be rejected.

[Michael Sean Winters covers the nexus of religion and politics for NCR.]

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