



Trump's second Supreme Court nominee, Brett Kavanaugh

If confirmed, Kavanaugh could tilt the court toward the president's views on US public health policy. Susan Jaffe, *The Lancet's* Washington correspondent, reports.

Before Republicans chose Donald Trump as their party's candidate for president in 2016, some doubted whether the New York real-estate developer seeking political office for the first time was truly conservative.

To shore up his conservative credentials, Trump produced a list of judges with help from the conservative Heritage Foundation and Federalist Society that he promised to choose from to fill a vacancy on the Supreme Court should an opening occur during his presidency.

"Some people say maybe I'll appoint a liberal judge", he said in March, 2016. "I'm not appointing a liberal judge."

So far, President Trump has kept his promise twice. Last year, Trump picked Judge Neil Gorsuch, who joined the court after serving on the United States Court of Appeals for the District of Columbia Circuit, a busy court that often decides legal challenges to the actions of federal agencies. And earlier this month, the president nominated Judge Brett Kavanaugh, another name from that list and a member of the same appeals court, to fill the vacancy created by the resignation of Justice Anthony Kennedy. Before spending 12 years as an appeals court judge, Kavanaugh was an associate White House counsel for George W Bush. He graduated from Yale Law School and has taught at Harvard Law School since 2008.

Health-care issues are expected to dominate the debate over Kavanaugh's nomination in the US Senate, which will decide if he should join the court. Several cases involving the Affordable Care Act (ACA) and reproductive rights are working their way through the legal system. It is too soon to know which cases will come before the Supreme Court, but court watchers say health policy will be on the docket in the near future.

Unlike the Gorsuch appointment, the president's second nominee for Supreme Court Justice replaces a moderate justice who did not always support conservative views. If Kavanaugh, aged 53 years, is approved, his lifetime position on the court means his vote could be a deciding factor in cases for several decades.

"...the president's second nominee for Supreme Court Justice replaces a moderate justice who did not always support conservative views."

During the presidential campaign, candidate Trump pledged to dismantle the ACA (so-called Obamacare) and criticised Supreme Court Chief Justice John Roberts for providing the decisive vote upholding the law in 2012. "Justice Roberts really let us down", Trump said at a campaign rally in 2015. "What he did with Obamacare was disgraceful..."

As a candidate, Trump also said that his Supreme Court picks would overturn the 1973 landmark Supreme Court decision in *Roe v Wade*, which legalised abortion in the USA.

Yet, when President Trump announced his nominee at the White House on July 9, he emphasised Kavanaugh's independence.

"What matters is not a judge's political views, but whether they can set aside those views to do what the law and the Constitution require", he said. "I am pleased to say that I have found, without doubt, such a person."

Impartiality

"We've never had a president or a candidate for president put out a list of people for the American people to see exactly what type of individuals he would nominate if there were vacancies on the Supreme Court",

said Elizabeth Slattery, the Heritage Foundation's appellate advocacy programme manager. She commended the president and his team for their transparency in the vetting process. American voters also played a part in that process by electing President Trump after he put out that list, she said.

"Judge Kavanaugh is the complete package", she said. "He's everything you could want in a nominee to the Supreme Court: he's got sterling academic credentials [and] 12 years of service as a judge on a court that has long been called a stepping stone to the Supreme Court."

Jesse Lee, of the liberal Center for American Progress Action Fund, thinks the selection of Gorsuch and now Kavanaugh from Trump's "pre-approved" list indicates something very different.

"Once you have outsourced the [nomination] decision to a list like that, you're not even really pretending to find an even-handed judge who will be looking at things on the merits", he said. "You're almost explicitly choosing judges based on the outcomes that you want."

After reviewing some of Kavanaugh's decisions on health issues, health law



Jim Bourg/Reuters

expert Timothy Stoltzfus Jost said the judge “is not a bomb-thrower”.

“If confronted with a decision involving the [ACA] or abortion, he’s likely to rule on fairly narrow legal grounds, possibly procedural or jurisdictional grounds, in a way that reaches a result which right-wingers would prefer”, said Jost, emeritus professor at Washington and Lee University School of Law in Virginia.

Upcoming cases

“A new justice will walk into a court evenly divided on the issue of abortion and therefore have the ability to tip the balance of the court”, said Megan Donovan, senior policy manager at the Guttmacher Institute. “We know that President Trump has promised to appoint justices hostile to abortion and we can anticipate that Brett Kavanaugh will tilt that balance against abortion access.”

Numerous cases challenging state restrictions to abortion are in the legal pipeline, she said. For example, Iowa recently banned abortions after a fetal heartbeat is detected, which can be as early as the sixth week of pregnancy. Louisiana and Mississippi prohibit abortions after 15 weeks.

Justice Kennedy rejected certain state laws that restricted access to abortion, said Jonathan Adler, a member of the Federalist Society and a law professor at Case Western Reserve University School of Law who specialises in regulatory issues.

Kavanaugh probably would not immediately overrule *Roe v Wade*, said Jost. “It is just that in every case that came before him, he would say that [restriction] is not an undue burden and before long there wouldn’t be anything left of *Roe v Wade*.”

In a recent case before the DC appeals court, Kavanaugh opposed the majority decision requiring the federal government to permit an undocumented immigrant in its custody to receive an abortion.

One of the lawsuits challenging the ACA that may be headed to the

Supreme Court is a Texas case filed by the Texas attorney general and 19 other state attorney generals that would invalidate the ACA’s protection for people with pre-existing health conditions. The provision, one of the most popular features of the law, bans health insurers from refusing to sell insurance to or otherwise discriminate against people with health problems.

“...we can anticipate that Brett Kavanaugh will tilt that balance against abortion access.”

Other cases making their way through the legal system include the Trump administration’s decision to end federal payments to insurers that subsidise medical costs for low-income enrollees.

Battle lines drawn

The president’s announcement almost immediately triggered a multimillion-dollar campaign by special-interest groups across the political spectrum to influence members of the US Senate.

So far, the groups include Judicial Crisis Network, which has spent US\$3.8 million on cable, broadcast, and digital advertisements promoting the Kavanaugh nomination in four states. Demand Justice plans to raise \$10 million this year to sway the Senate on judicial nominees. And the National Abortion Rights Action League (NARAL) Pro-Choice America organisation is spending six figures, they say, for an ad campaign urging Republican senators in five states to reject Kavanaugh’s nomination.

Kavanaugh, along with any witnesses testifying for or against him, will be questioned at a hearing held by the Senate Judiciary Committee. Although no hearing date has been set, some Republican senators hope it will be held in early September, in time for him to join the court when its fall session begins on Oct 1. Once the committee issues a positive, negative, or neutral recommendation on Kavanaugh, the full Senate makes the final decision.

Democrats will target his potential to undermine the ACA and reproductive rights. They have also requested thousands of pages of documents relating to his work in the Bush White House.

Republicans hold a slim majority of 51 members in the Senate, compared with 49 Democrats (including two independents who usually vote Democratic). It takes 51 votes to approve a Supreme Court nominee. John McCain, a Nevada Republican and former presidential candidate, has been absent most of this year while being treated for brain cancer. If he missed the vote and there was a 50–50 split, Vice President Mike Pence would cast the deciding vote in favour of Kavanaugh.

The vote will probably take place fewer than 8 weeks before the Nov 6 election. Pro-Kavanaugh groups are warning Democratic Senators on the ballot in states that supported Trump for president that a vote against his Supreme Court nominee could hurt their chances at the polls.

Kavanaugh’s opponents are targeting Republican senators Susan Collins of Maine and Alaska’s Lisa Murkowski, who have said they want to protect *Roe v Wade* and a woman’s right to an abortion.

Both sides will try to discern Kavanaugh’s views without much help from the judge himself, said Adler. Even if judicial nominees promised to vote a certain way on a case, they would have to recuse themselves from that case and the promise would be meaningless, he said. But that does not discourage Senator Patty Murray, a Democrat from the state of Washington.

“We know exactly where the nominee will fall on specific issues...because President Trump told us openly, publicly, and repeatedly. More than any president I have seen, he has been explicit about what he expects from his nominee.”

Susan Jaffe