

NOMINATION OF BRETT KAVANAUGH TO THE U.S. SUPREME COURT

Mr. UDALL. Mr. President. The Supreme Court nomination before us is of historic importance. We have a nominee whose nomination is clouded with credible allegations of sexual assault, whose truthfulness before Congress is questionable, and who showed himself as partisan and lacking in judicial temperament before this body in his supplemental hearing.

As of today, more than 2,400 law professors throughout the country are on record that Judge Kavanaugh's display of lack of judicial restraint during that hearing is disqualifying. The growing list includes professors from all political stripes, and professors who had previously supported his nomination. Indeed, former Justice John Paul Stevens – a highly respected jurist – has taken the unusual step of publicly opining the same.

Yesterday, I spoke on the Senate floor about why Judge Kavanaugh should not be confirmed in light of the allegations swirling around him, his lack of candor with this body, and his demeanor during the supplemental hearing.

But Mr. President – on the merits as well – Judge Kavanaugh has not shown himself deserving of elevation to our highest court.

Let's start with his overly expansive view of executive power – a view that could shield our current President from being held to account for potential crimes and misdeeds.

Judge Kavanaugh has written and spoken extensively about the need to shield the President from criminal investigation while in office. He is on record that, in his opinion, the President has authority under the Constitution to terminate an independent counsel at will. Indeed, there is probably no other viable candidate to the seat who has argued more strenuously in favor of presidential immunity and the President's absolute authority to fire a special prosecutor.

It is no coincidence, then, that this President – who is under criminal investigation by a special counsel – selected Brett Kavanaugh to sit on the Court.

Judge Kavanaugh is clear that, as a matter of policy, presidents should be completely immunized from criminal and civil suit while in office. He writes that, "... the President should be free from some of the burdens of ordinary citizenship ..."

For Judge Kavanaugh, freeing the President of "burdens" the rest of us must bear takes precedence over ensuring the President follows the law.

Judge Kavanaugh's supporters point out that his writings in support of broad presidential immunity represent his policy views, not his constitutional analysis.

But his writings do not tell us that he would uphold Special Counsel Mueller's investigation. Nor would he tell us during his confirmation hearing that he would hold the President to account for any crimes.

In my view, the "burdens" of a criminal investigation do not outweigh the dangers of a criminal occupying the Oval Office.

And there is nothing in the Constitution that immunizes a President from criminal investigation and prosecution while in office.

The drafters knew how to immunize public officials if they wanted. Members of Congress, for example, have express immunity "from arrest or interrogation for any speech or debate entered into during a legislative session."

The speech and debate immunity for Congress is narrowly tailored. The drafters gave no immunity – narrow or broad -- to the President or members of his Cabinet.

While Judge Kavanaugh claims to be a strict constructionist, I have no confidence he would stick to the text of the Constitution and not grant the President immunity.

There is evidence in the public record that close associates and even family of the President may have conspired with Russia. And we have the President's own inexplicable behavior cozying up to and trying to curry favor with Vladimir Putin.

There is abundant evidence in the public record that the President has worked to undermine the investigation into Russian interference in our election and investigation into himself.

And we have sworn testimony from the President's former personal lawyer that the President directed commission of two campaign-related felonies.

If the President has committed crimes, he should be held responsible -- just like the rest of us.

Judge Kavanaugh has said he would "put the final nail in" *Morrison v. Olson*. *Morrison v. Olson* is the 1988, 8 to 1, decision written by Chief Justice Rehnquist that upheld the Independent Counsel Act. That act was passed in the aftermath of Watergate to curb executive abuse and mitigate the obvious conflict of interest the U.S. Department of Justice would have investigating the President.

Judge Kavanaugh sides with the lone dissent in that case. And with the idea that the President should be able to fire the person who is investigating him – with no check.

If the constitutionality of Special Counsel Mueller's investigation comes before the Supreme Court – and it is likely that it will -- there is every reason to believe Justice Kavanaugh would have his chance to hammer in that nail.

Judge Kavanaugh espouses a “unitary executive” theory of the separation of powers. Hidden behind this legalese is a simple and dangerous idea: that the President holds absolute power over the executive branch.

Under his theory, President Trump could actually fire Special Counsel Mueller because he uncovered wrongdoing by the President. In plain terms – he would let the fox raid the henhouse.

Judge Kavanaugh’s theory that the Constitution requires no checks on the President’s authority strains that document to the point of breaking.

Our entire constitutional system of separation of powers is built on the principle of checks and balances – so that one branch of government does not accumulate and exercise an inordinate amount of power.

Under DOJ regulations, the Attorney General, or Acting Attorney General if the Attorney General is recused, may only appoint a special counsel if it’s warranted and there is a conflict with the Department or other “extraordinary circumstances.”

Only the Attorney General -- not the President -- may remove a special counsel. And the Attorney General – or in the case of Special Counsel Mueller, the Deputy Attorney General, may only do so for “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.”

The DOJ regulations provide appropriate – and constitutionally sound -- checks on the executive’s authority.

The American people deserve to know the truth about Russia’s attack on our democracy. They deserve to know whether candidate Trump or his campaign was part of the attack. And they deserve to know all the facts behind the President’s efforts to stop DOJ’s investigation into Russian interference and any Trump collusion. The President should not be able to hide the truth and the facts by firing Special Counsel Mueller.

And that’s not all. There is open speculation that the President may pardon close associates. His family. Even himself.

The new Justice may be called upon to determine the scope of the President’s power to pardon – and whether that power may be exercised for corrupt purpose.

Given Judge Kavanaugh’s overly expansive view of executive authority, I am concerned he would set no limits on the President’s power to pardon. And would allow a presidential pardon even if wielded to obstruct justice.

At this point in our history – with so many questions whether the President, his family, or others close to him committed crimes – the American public must be assured that the

new Justice will provide a check on the President. And not give him a blank check to commit crimes.

I'm proud that New Mexico is a majority minority state. But I'm really worried that a Justice Kavanaugh will not protect minority rights.

Ten percent of our state's population is Native American. Judge Kavanaugh, however, has shown a distinct hostility to indigenous people's rights. For example, in *Rice v. Cayetano*, he argued in the Supreme Court against a voting system limited to Native Hawaiians -- arguing they should not be treated like tribes, even though Native Hawaiians and tribes share a history of forced assimilation. In that case, he represented the Center for Equal Opportunity -- a fervently anti-affirmative action group.

While the case was pending, he authored an op-ed in the *Wall Street Journal* arguing that, "Any racial group with creative reasoning can qualify as an Indian tribe." He called the voting system a "naked-racial spoils system."

Such an offensive view demonstrates a level of misunderstanding -- perhaps even willful ignorance -- unworthy of a nominee to our highest court. While the Court ultimately struck down the voting system, it did not do so on Mr. Kavanaugh's claimed grounds.

Recently disclosed emails that Judge Kavanaugh wrote as a White House lawyer confirm he is a threat to indigenous communities.

In his view, if Native peoples are not organized into tribes and live on reservations, they are not entitled to any special recognition under the law. But, not all tribes are alike. Not all indigenous peoples are organized the same way. Alaska Natives, for example, are organized as tribes, villages, and regional corporations. Alaska Natives are rightfully concerned whether he will protect their rights.

Bottom line: Judge Kavanaugh questions the constitutionality of programs specifically dedicated to Native Americans -- a view that could upend decades of progress for Indian Country on everything from housing to government contracting.

As ranking member of the Committee on Indian Affairs, I wrote to the Chair of the Judiciary Committee, in August, asking for all of Judge Kavanaugh's documents related to Native issues.

The Chair refused my request.

And so, we don't even know if we have the full extent of emails and memos from Judge Kavanaugh disparaging Native rights.

But we do know that Judge Kavanaugh is hostile to affirmative action programs.

When he was a White House lawyer, he called Department of Transportation regulations designed to remedy past and present discrimination “a naked racial set-aside.” But those regulations – that favored “socially and economically disadvantaged individuals” -- were upheld by the federal courts under established equal protection principles.

While Judge Kavanaugh advocates strongly for “race neutrality” when it comes to distribution of government benefits, he’s not so quick to embrace race neutral policies when it comes to racial profiling.

In the aftermath of 9/11, in a series of White House emails labeled “racial profiling,” the idea of long term use of racial profiling at airports and by law enforcement was raised. Mr. Kavanaugh responded that “. . . the people (such as you and I) who generally favor effective security measures that are race-neutral in fact DO need to grapple – and grapple now – with the interim question of what to do before a truly effective and comprehensive race-neutral system is developed and implemented.”

In other words -- maybe we use racial profiling in the interim because coming up with a race-neutral system is so hard.

In New Mexico, almost 49 percent of our population is Hispanic – the largest percentage of any state. If we were to accept racial profiling in New Mexico -- coupled with our Native population and other minority groups -- over 62 percent of our population would be targeted. That would be wholly unacceptable.

As would be doing away with federal and state programs intended to redress past and present discrimination.

One of the most critical roles the courts play is protecting minority rights. But Judge Kavanaugh’s record does not demonstrate he will fulfill this role.

He simply doesn’t appear to understand . . . to appreciate the discrimination, oppression, the assault that Native peoples, Hispanics, African Americans, and other groups have faced over time. And continue to face. Supreme Court equal protection jurisprudence is informed by this history.

Whether it’s affirmative action, voting rights, redistricting – we must have a Justice on the Court who protects minority rights. And Judge Kavanaugh has not shown himself to be that Justice.

The same is true for women’s reproductive rights.

Trump the candidate promised only to appoint justices who would overturn *Roe v. Wade*. Potential Supreme Court candidates can only make it onto the Federalist Society list if they will vote to overturn *Roe*.

And Judge Kavanaugh’s record does not bode well for women’s rights.

He tried to stand in the way of a 17-year old pregnant girl, an immigrant held in federal detention, who wanted an abortion.

He would have required her to find a “sponsor” in the U.S., who would provide housing for her and allow her to terminate her pregnancy. And if the federal government couldn’t find a sponsor, the young woman could return to the district court in two weeks. Of course, the longer a pregnancy continues, the greater the risk to the woman’s health and safety.

Judge Kavanaugh did not believe these onerous, bureaucratic requirements represented an “undue burden” on the young woman’s constitutional right to terminate her pregnancy.

Fortunately, however, the full D.C. court of appeals did. They quickly overturned the decision, and allowed the young woman to immediately exercise her right.

The American public – Democrats, Republicans, and independents – support a woman’s right to choose. If Judge Kavanaugh would have this country go back to the days of back alley abortions, he should have said so during his confirmation hearings. But he would not. I cannot vote for a nominee who is not willing to affirm a woman’s right to choose.

A woman’s reproductive right is not the only health care right at risk with Judge Kavanaugh’s nomination. Our entire system of health care rights and benefits under the Affordable Care Act is in jeopardy.

A group of Republican Attorneys General and Governors has filed suit to gut critical ACA protections.

They want to take away protections from the millions of Americans with pre-existing conditions, and allow insurance companies to discriminate on this basis again.

They want to take away the prohibition against life time limits on benefits, and go back to the days when you could get booted off insurance because you have high medical expenses. They want to take away the right to cover children up to age 26, to get free preventive care, and prescription drug coverage for seniors. And they want to eviscerate Medicaid expansion -- that has given 11 million Americans health care they didn’t have before.

The Trump Administration has sided with the Republican Attorneys Generals and Governors who want to decimate our health care system.

Despite the President’s repeated campaign promises to cover everyone, protect people with pre-existing illnesses, and cover children up to age 26.

This case is now before a federal court in Texas, and will likely make its way to the Supreme Court. We do not want a justice who sides with corporate interests over consumers, who is willing to throw statutory language and constitutional principles aside

to get the results he wants. I am concerned that a Justice Kavanaugh would do the President's bidding, and gut critical health care rights that Congress has enacted and that the American people overwhelmingly stand by.

But there's more at stake. In his legal opinions, Judge Kavanaugh inevitably sides with business and against the environment, workers, and consumers.

His environmental record deserves a spotlight. Interpreting environmental statutes, Judge Kavanaugh will veer far from the legal text he claims to honor to reach the result he wants.

For example, Judge Kavanaugh once blocked the Environmental Protection Agency from protecting "downwind" states from nitrogen oxide and sulfur dioxide coming from "upwind" states under the "Good Neighbor Provision" of the Clean Air Act.

Nitrogen oxide and sulfur dioxide develop into ozone and cause respiratory illnesses and other health problems.

However, the Supreme Court reversed Judge Kavanaugh. In a 6 to 2 decision -- that included Justice Kennedy and Chief Justice Roberts in the majority -- the Court found that Judge Kavanaugh "rewrites a decades-old statute whose plain text and structure" are clear.

In case after case, whether in dissent or the majority, Judge Kavanaugh votes against the environment and with industry. He voted to invalidate EPA rules to regulate emission of greenhouse gasses by plants and factories, to overturn EPA's Mercury and Air Toxics Standards limiting hazardous emissions from power plants, to allow EPA to delay implementation of its methane control rule, to overturn an EPA rule regulating greenhouse gas emissions from cars and trucks, to overturn an EPA decision to revoke a coal company permit that would harm the environment.

This is not the record the American people want from a justice likely to rule for decades on the most important environmental law cases.

And his record on matters addressing climate change is especially troubling. Climate change can hit minorities and low income communities the hardest. In New Mexico, traditional land grant and acequia communities depend on the land to sustain their families. The climate change-induced drought we're experiencing in New Mexico and the Southwest threatens our way of life.

And if we are looking for a justice who will put balance back into our campaign finance system, Judge Kavanaugh is not a likely candidate.

He has been clear that he believes that money equals free speech.

And so it's a good bet he will not scrutinize *Citizens United* or the other Supreme Court cases that now allow unlimited, dark money to run rough shod over our campaigns and tear at the fabric of our democracy.

Our campaign finance system is broken beyond repair. Unless we change the rules – either through Supreme Court decision or congressional action and constitutional amendment – we will continue to see the kind of perverse results we now see. Where a few super-wealthy individuals and big corporations drown out the many.

But we are pretty much assured that a Justice Kavanaugh will not change the rules that now allow unfettered dark money to pollute our elections.

It is hard to overstate the importance of the Supreme Court nomination before the Senate.

New Mexicans and the American people want a nominee who has been 100 percent honest. Whose nomination is not tainted by credible allegations of sexual assault and misconduct.

And, New Mexicans and the American people want a nominee who will act as a check on the powerful.

But President Trump chose this nominee to do the opposite.

At this critical point in our nation's history – when we have a President who is under DOJ investigation for conspiracy with Russia to undermine our national election and obstruction of justice. Who may have broken campaign finance laws to win the presidency. We must have justices on the Court who believe in the rule of law. Who believe that no one is above the law. Even the President.

At this historic juncture, the American people must have assurance that any judicial nominee will hold the President true to our laws, true to our Constitution.

But Judge Kavanaugh cannot give the American people this assurance. And I cannot support his nomination.

Mr. President, I yield the floor.