

The Two Brett Kavanaugh Stories

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There were two simultaneous Brett Kavanaugh stories. Together, as part of the confirmation process regarding his nomination as Supreme Court Justice, they revealed how political discourse in the United States has reached a new low, with debate over the man's possible predilection to make judgments based on his own preferences rather than the US Constitution being ignored in favor of the politically motivated kabuki theater that was deliberately arranged to avoid that issue and instead go after his character.

Consider first of all, his flaws as a candidate. He was regularly framed as a “conservative,” but what did that mean in the context of his career? Some of the critics are referring to his time spent as a government lawyer, specifically for the George W. Bush Administration, where he was a supporter of wide executive authority in the context of the war against terror while others point to his decisions and writings during his time as a US Circuit judge from 2006 until the present. That meant essentially that Kavanaugh then supported and apparently [continues to support](#) what is now referred to as the John Yoo doctrine, named after the Department of Justice lawyer who penned the memo that made the case for the president to act unilaterally to [do whatever is required in national security cases](#) even if there be no direct or immediate threat. Yoo specifically argued that the president, by virtue of his office, is not bound by the War Crimes Act. This theory of government, also more broadly dubbed the unitary executive, was popularized by Yoo, fellow government lawyer Jay Bybee and Eric Posner of the University of Chicago.

For those who find Kavanaugh unacceptable in terms of his judicial philosophy, this repudiation of the constitutional principle of three branches of government that check each other was enough to disqualify him from a position on the Supreme Court, principally as it impacts on both the first and second articles of the constitution by granting to the president the authority to both begin and continue a war on his own recognizance. It also means that the president on his own authority can suspend first and fourth amendment rights to freedom of speech and association as well as freedom from illegal search. He supported, for example, the government's “right” to conduct mass searches of private data such as was conducted by the NSA. Kavanaugh supports government authority to legitimize incarceration without trial and to order assassinations and torture. Kavanaugh is also on record as favoring limiting the public's right to use the courts to redress government overreach.

But curiously enough, or perhaps not so curiously, Kavanaugh was treated with kid gloves on those critical issues, basically because both major parties are now supportive of the unitary executive concept even if they would not admit that to be the case. Bill Clinton launched cruise missiles attacks on Sudan and Afghanistan on his own authority and involved the US in a war in the Balkans. George W. Bush did the same in approving torture

and expanding the war on terror to Iraq and also globally, while Barack Obama attacked both the Syrian and Libyan governments and assassinated US citizens abroad, all acts of war or war crimes carried out without a congressional declaration of war or without any real pushback by the judiciary.

The failure of Congress to carry out its duty to review Kavanaugh's ability or lack thereof to interpret the constitution impartially was the more important story line in the confirmation process but it was ignored by the media. The other narrative that ran simultaneously, the purely political attempt made by the Democrats and some Republicans to destroy Kavanaugh as a person through the exploitation of random claims of sexual assault dating from more than thirty-five years ago, was an attempt to discredit the candidate that everyone knew right from the beginning could not be substantiated.

This all means that the important issue of Kavanaugh's likely comportment as a judge was subjected to too little inquiry while his character as evidenced by tales from his past life received far too much attention. Ironically, the media, which has been frantically searching for an explanation for the breakdown of democracy in the United States, has been pillorying the Russians and more recently the Chinese for outside interference in the process, while ignoring the intense public dissatisfaction with the government it has been allowed to have by the Establishment, which is exemplified by the dystopic reality demonstrated by Kavanaugh. Some Americans would have rejected him based on his merits as a judge, but the case was not clearly made. Many instead came to view him as a victim of a vicious personal campaign and that was apparently enough to win confirmation, at least as reckoned by the calculus of those in Congress who cast the actual votes. In either case, the system failed to produce a good result and we only have our polarized and dysfunctional government to blame for that failure.

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