

‘With Kavanaugh on the Court, Checking and Balancing Is Not Going to Happen’

By [Prof. Marjorie Cohn](#) and [Janine Jackson](#)

Global Research, October 10, 2018

[FAIR](#) 9 October 2018

Region: [USA](#)

Theme: [History](#), [Law and Justice](#), [Media Disinformation](#)

Janine Jackson interviewed Marjorie Cohn about the Brett Kavanaugh nomination for the [October 5, 2018, episode](#) of CounterSpin. This is a lightly edited transcript.

Janine Jackson: Donald Trump’s [public mockery of Christine Blasey Ford](#), the woman who testified [she was assaulted](#) by Supreme Court nominee Brett Kavanaugh, was an acutely despicable spectacle in an administration that is no shirker when it comes to despicable spectacle. But the Kavanaugh hearings, the FBI “investigation” into allegations against him, the whole process, seemed to indicate more serious failures than Trump’s vindictive creepiness. What is going on here, and what might it mean for the Supreme Court going forward?

Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, former president of the National Lawyers Guild, and deputy secretary general of the International Association of Democratic Lawyers. She joins us now by phone from San Diego. Welcome back to **CounterSpin**, Marjorie Cohn.

Marjorie Cohn: Thanks for having me, Janine.

JJ: We’re in media res here, of course. We just heard this morning, October 4, that the FBI had completed its investigation, which Susan Collins [called](#) “very thorough,” despite it [not including](#) statements from Ford, or dozens of others who wanted to contribute. I have so many questions, but they really all kind of amount to, how is this happening? How are we at a place where a man who shout-sobbed his way through his hearings, [snarling and accusing](#), and making clear that he hates “Democrats,” “the Clintons” and “the left,” could even be *considered* to have the temperament appropriate to a Supreme Court justice?



MC: That's an excellent question, but it's very clear, and it's been clear from the start, that the Republican leadership, in concert with Donald Trump, is going to [ram this nomination through](#) so that they can achieve a solid, right-wing majority on the Supreme Court which will last for decades, and will reverse many of the rights that we hold dear.

The Republicans [know](#) that Kavanaugh would provide a reliable vote against immigrants, workers, voters, and gay and transgender people. He would deliver a dependable vote for employers, private property and church-state bonding, and they can rest assured that he would do his best to [immunize Trump from criminal liability](#), and enable him to continue their mean-spirited, right-wing agenda. And this is more important to them than any judicial temperament, than any credible allegations of sexual assault, because the bottom-line issue—one of the most significant issues—is abortion rights, reproductive rights, and [overturning](#) *Roe v. Wade*, in addition to [gay rights](#), and they have rationalized all of these other horrors to that end.

JJ: Kavanaugh seems so tainted, though, at this point. Why not just some other conservative? What is it about the timeline that you think makes them feel like they have to keep going with *this* candidate, over the objection of now, you know, millions of people?

MC: In part, they [want](#) Kavanaugh on the Supreme Court before the November 6 midterm elections, because if the Democrats achieve a majority in the Senate, then there might not be sufficient votes to confirm him after the election. That's the most immediate consideration, but they [were in a hurry to get him confirmed](#) by October 1, which was the first day of the Supreme Court's new term, and they want to help ensure the outcome of several hot-button cases that are on the Court's docket, including cases involving double jeopardy, immigration, age discrimination and the Endangered Species Act. And there is a possibility that the Court might decide to take up cases involving gerrymandering, gay and transgender rights, and the separation of church and state.

JJ: You've been [writing](#) about Brett Kavanaugh for a while now, and you have [pointed out](#) that there's plenty to undermine his candidacy even before we get to sexual assault allegations, and those other things are, in a way, at risk almost of being overlooked. And one of the concerns is around his record on international law and the power of the president. What are the flags there? And, again, they're nothing to do with his "personality," but they're derived from his public record as a judge.

MC: Keep in mind that international law—insofar as the United States has ratified treaties—or customary international law are part of US law, under the Supremacy Clause of the Constitution, and yet Kavanaugh has [nothing but scorn](#) for international law, *and* he confuses *international law* with *foreign law*. International law, as I said, is treaty law and customary international law, which is customs that countries have built up over the years. But foreign law is totally different. It's the law of France or Brazil or Germany; and he conflates the two.

Now that he's been on the Court of Appeals, and during the Bush administration's so-called "War on Terror," Kavanaugh almost always deferred to the president on executive power. Now, the Supreme Court, during the Bush administration, did check and balance the executive, the president, and [said](#) that federal courts have jurisdiction to hear habeas corpus petitions by Guantánamo detainees; they said that a US citizen who's being held as an enemy combatant has due process rights to contest his detention, and they said that Bush's military commissions [violated](#) the Geneva Conventions and the Federal Uniform Code of Military Justice.

Now, in 2008, the Supreme Court [ruled](#) in *Boumediene v. Bush* that Guantánamo detainees held as enemy combatants have the right to file habeas corpus petitions in US federal courts, to say, "I'm being unlawfully held."

But after *Boumediene*, Kavanaugh—on the Court of Appeals—[did his best to try to neuter these habeas corpus rights](#) that the Supreme Court had upheld in *Boumediene*, in case after case. And also, Kavanaugh has a record of [dangerous deference to the president](#). [Notwithstanding](#) the case of *Jones v. Clinton*, the Paula Jones case, which said that a president has to answer to at least a civil case—that didn't involve a criminal case—Kavanaugh [doesn't think](#) that a president should be bothered to answer to a civil case or a criminal case while he's in office.

And under *US v. Nixon*, a unanimous Supreme Court said that Nixon had to turn over the tapes during the Watergate scandal, and that led to Nixon's resignation. And yet, although that case, *US v. Nixon*, is a settled precedent, Kavanaugh has [said](#) he thinks it should be reconsidered. And one of the most disturbing things, Janine, is that in a law review article, Kavanaugh wrote in 2014, he [wrote](#) that, yes, the [Take Care Clause](#) of the Constitution requires the president to enforce the law, it says that the president shall "take care" that the laws are faithfully executed. But then Kavanaugh went on to say, yes, the president has to enforce the law

at least unless the president deems the law unconstitutional, in which event the president can decline to follow the statute until a final court order says otherwise.

So Kavanaugh would create a dangerous presumption in favor of a president who refuses to follow the law. That is very worrisome.

JJ: And it should be worrisome, I should think, to people of any political stripe, allowing the president to make the law. And there are references, also, "Well, we're in wartime." But of course, given that the war is the "War on Terror," it's like we're always going to be in wartime, so we can't really think of that as a temporary status.

MC: Yes, that's the excuse for whatever the president wants to do: "Oh, we're fighting terrorism, the 'War on Terror.'" The "War on Terror" is a misnomer. Terrorism is a tactic; it's not an enemy. And yet, under the guise of the so-called "War on Terror," Bush and Obama, and now Trump, are [decimating](#) our civil liberties. And Congress, unfortunately—not in every case, in some cases there's pushback, but—largely defers to him, and the courts are the last resort to check and balance an out-of-control executive. And yet with Kavanaugh on the Court, that checking and balancing is not going to happen.

JJ: It seems important for the conversation to separate our concerns about Kavanaugh in particular, and then also this process that's happening, that's allowing him to advance in this way. There's the lack, as Anita Hill [pointed out](#) in an op-ed, the lack of a protocol for vetting charges of harassment or assault in confirmation hearings, which should have been put in place *before* Clarence Thomas, but certainly after.

There's Jeff Flake [saying](#), we're going to have an investigation by the FBI to last "no longer than a week." What kind of an investigation decides how long it's going to last before it starts?

The process, I think, just seems so broken to folks.

And I know that we knew that the Supreme Court was subject to partisan push and pull. I mean, [Merrick Garland](#), [George W. Bush](#), it's not a new thing. But, I don't know, it's hard to see how anyone can, going forward, see the Supreme Court as a check or balance at this point.



MC: I think you're absolutely right, and I think when Kavanaugh, and I say *when* because I think his confirmation is a forgone conclusion, especially because this so-called FBI investigation, which didn't even last a week, this perfunctory investigation, which [ignored](#) many people coming forward who had evidence, including a professor at Princeton Theological Seminary who would confirm and corroborate the allegations of Deborah Ramirez, who said that Kavanaugh waved his penis in her face, forcing her to touch it.

It really is a farce, but Collins and Flake, at least the two of them, are getting political cover

from this so-called week-long investigation—[saying](#) there’s “no new credible corroboration,” it was a “thorough” report. Whereas many, many people—it was detailed in Jane Mayer and Ronan Farrow’s **New Yorker** [article](#)—came forward and tried to contact the FBI, saying that they had relevant information, and yet the FBI did not contact them. They gave it a lick and a promise.

And evidently, during his testimony, Kavanaugh said, oh, I’ve been through six FBI investigations and there’s never been a problem. Well, actually, during the FBI investigation for his appointment to the Court of Appeals, the American Bar Association [reduced](#) their “Very Qualified” rating to “Qualified,” because there were problems with his judicial temperament.

And we saw that on display in the hearings—terrible judicial temperament. I mean, he was having tantrums, he was aggressive, he was acting, you know, “I know you are but what am I?” with the senators, which is just unheard of.

And I am proud to say that I’m one of more than 1,000 law professors who [signed](#) a letter saying that he should not be confirmed, solely on the basis of his judicial temperament, which is really, really beyond the pale.

JJ: I understand that Chuck Schumer is [asking](#) for the FBI report to be made public, along with the White House directive. I imagine that many folks who see it will or would think, “Well, yeah this was a sham.” But what does that outrage translate to? What can we do, and is this a tipping point, potentially, for making actual, structural changes to the Court itself?

MC: Well, I don’t know about structural changes. I mean, that’s a tall order. But you see people in the streets today, yesterday, probably tomorrow and Saturday. The #MeToo movement has really galvanized the whole issue of women—and men, in some instances—being afraid to come forward to report sexual assault, because of feelings of humiliation or the ramifications.

And because of this time in history, where Kavanaugh has been accused of these things in the wake of the #MeToo movement, this has galvanized people all over this country, and these people are not going to go away. We are not going to go away. We are going to continue to pressure the branches of government.

And the fact that there were two courageous women, survivors of sexual assault, in an elevator with Jeff Flake, in his face, [challenging](#) him, is the only reason, I think, or certainly a primary reason, that he agreed to this investigation, this so-called investigation.

So political pressure, and I’m talking about people pressure, really does have an effect, and we have to keep it up, and people should be sitting in Collins’ office, and Murkowski and Flake and Manchin, who are the swing voters, and they should be around the block, and they should be demanding that they vote “No” on this confirmation.

JJ: We’ve been speaking with Marjorie Cohn. You can find her most recent piece, “[Five Reasons Why the GOP Is Rushing to Confirm Kavanaugh](#),” online at [TruthOut.org](#), that and other work at [MarjorieCohn.com](#). Marjorie Cohn, thank you so much joining us this week on **CounterSpin**.

MC: Thank you so much, Janine.

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