



Written by [Joe Wolverton, II, J.D.](#) on July 14, 2018

Trump SCOTUS Nominee Kavanaugh Has Big Government Biases

Despite promises to “drain the swamp” once he arrived in the White House, President Donald Trump’s latest nominee to the Supreme Court bench is very at home in the marshy morass.



Judge Brett Kavanaugh (shown) of the U.S. Court of Appeals for the District of Columbia is President Trump’s second Supreme Court appointee, and there are many who worry that Kavanaugh’s record reveals a Deep State denizen rather than a constitutional strict constructionist — the sort that would restore federalism, freedom of conscience, and the free market.

Kavanaugh’s Big Government bona fides are impressive. Writing for the Mises Institute, Tho Bishop reminds readers that Kavanaugh has “a particular closeness with the Bush family. Having worked on matters including the Clinton Impeachment, the 2000 Florida Recount, and challenges to Obamacare.”

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What’s this about ObamaCare? Is Bishop suggesting that President Trump tapped a judge to sit on the highest federal bench that believes (and has issued opinions) that ObamaCare is constitutional?

Yep.

Here’s a summary of Judge Kavanaugh’s take on Obamacare, written by Christopher Jacobs of *The Federalist*:

In Kavanaugh’s view, the mandate could fit “comfortably within Congress’ constitutional powers,” Even as he ‘do[es] not take a position here on whether the statute as currently written is justifiable,’ Kavanaugh concludes that ‘the only potential Taxing Clause shortcoming in the current individual mandate provision appears to be relatively slight.

Read that again, America: Brett Kavanaugh, the man Donald Trump wants to appoint to the Supreme Court, wrote in a judicial holding that the constitutional shortcomings of the individual mandate of Obamacare are “relatively slight.”

With statements such as that, it seems the chances that Brett Kavanaugh will be draining the swamp are “relatively slight,” too.

Many Americans committed to the Constitution value the opinion of Judge Andrew Napolitano. Napolitano has proven himself to be a fearless, full-throated advocate of the Constitution as ratified by the states.

During an appearance on *Fox and Friends* on July 10, Napolitano put a pretty fine point on the pro-Establishment résumé of Judge Kavanaugh.



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“The Washington establishment, sometimes known as the swamp, wanted Judge Kavanaugh,” said Napolitano. “I am disappointed in the president because this is not the type of person he said he would pick. Justice [Neil] Gorsuch was. This person is at the heart and soul of the D.C. establishment against whom the president railed.” (See video below.)

Curt Mills of the *American Conservative* reckons that Kavanaugh’s nomination was a calculated move by the president, describing the judge as “impressive, confirmable, acceptable to his Breitbart base, deeply respected by the conservative political establishment in Washington.”

Again with the desire to appease the “political establishment.”

If you’re ready to forgive Kavanaugh’s pass on socialized medicine, you might not want to read the next paragraph.

Kavanaugh’s record of judicial opinions in the area of government surveillance reveal him to be pro-Big Brother, too.

In 2015, the D.C. Circuit Court refused to take appeal of a case challenging the federal government’s collection of metadata without a warrant, an act which is overtly unconstitutional as it violates the Fourth Amendment’s protection against such searches and seizures.

In a concurring opinion on the case, *Klayman v. Obama*, Kavanaugh shrugged off the searches and the seizures, writing:

Even if the bulk collection of telephony metadata constitutes a search... the Fourth Amendment does not bar all searches and seizures. It bars only unreasonable searches and seizures. ...The Fourth Amendment allows governmental searches and seizures without individualized suspicion when the Government demonstrates a sufficient “special need”—that is, a need beyond the normal need for law enforcement—that outweighs the intrusion on individual liberty.

Later in his concurring opinion, Kavanaugh seemed to suggest that only the president can control the president.

“To be sure, sincere and passionate concerns have been raised about the Government’s program,” he wrote. “Those policy arguments may be addressed by Congress and the Executive. Those institutions possess authority to scale back or put more checks on this program.”

Taken to its logical (and legal) conclusion, this principle would place the president beyond the reach of the rule of law.

Kavanaugh’s concept of a president who is not subject the law the way the rest of us would be is troubling to those who hold to the timeless principles of all — especially those in position of power — being bound to the law and subject to its limits and liabilities.

In a 2009 *Minnesota Law Review* article, Kavanaugh claimed that the criminal prosecution of a sitting president would “cripple the federal government.”

Kavanaugh suggests in the article that Osama bin Laden might have been stopped long before September 11, 2001 if Bill Clinton could have focused on the terror mastermind rather than on the accusations that led to his impeachment.

“[Clinton] could have focused on Osama bin Laden without being distracted by the Paula Jones sexual harassment case and its criminal investigation offshoots,” Kavanaugh hypothesized.



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He wasn't finished fighting for a president free from the distractions of answering criminal charges.

"Even the lesser burdens of a criminal investigation — including preparing for questioning by criminal investigators — are time-consuming and distracting," he wrote.

In fact, if a sitting president is subject to an investigation into the legality of his actions, than that president "is almost inevitably going to do a worse job as president."

About a decade before writing that article advocating a nearly omnipotent president, Kavanaugh, speaking at a conference, espoused the same sentiment regarding the constitutionality of prosecuting a president.

Here's a summary of Kavanaugh's comments, as published by *Politico*:

During a 1998 Georgetown Law School conference on what would turn out to be the dim prospects of renewing the independent counsel law, moderator Mark Tuohey (who hired Kavanaugh onto the staff of independent counsel Ken Starr) put a question to the panel:

"How many of you believe, as a matter of law, that a sitting president cannot be indicted during the term of office?" Tuohey asked.

Kavanaugh's hand went up, as did more than half of the experts on the panel, including some with liberal political outlooks.

Judge Brett Kavanaugh, a man with ties to the Bush family and Bill Clinton, believes ObamaCare, government surveillance, and presidential immunity from prosecution are constitutional.

President Trump would be wise to reconsider his nominee if he is genuinely committed to draining the D.C. swamp of the influence of the Establishment.



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