

Statement of

The Honorable Charles E. Schumer

United States Senator
New York
April 27, 2004

REMARKS ON THE NOMINATION OF BRETT KAVANAUGH TO DC CIRCUIT COURT OF APPEALS

US Senator Charles Schumer issued the following statement at the Judiciary Committee's markup of the nomination of Brett Kavanaugh to the DC Circuit Court of Appeals:

Mr. Chairman, I want to welcome Brett Kavanaugh, his parents, and his fiancée, to today's hearing. Something tells me this won't be the easiest or most enjoyable hearing for them or for us, but I know that he appreciates what an important position he has been nominated to and how important this process is and I know how proud his family is of him.

Mr. Chairman, it's really unfortunate that we have to be here yet again on a controversial nomination. It's unfortunate because it's so unnecessary. We have offered time and time and time again to work with the Administration to identify well-qualified mainstream conservatives for these judgeships, especially on the DC Circuit. Instead, the White House insists on giving us extreme ideological picks. In this instance, the nomination seems to be as much about politics as it is about ideology.

While the nominations of William Pryor, Janice Rogers Brown, and Priscilla Owen may be among the most ideological we've ever seen, the nomination of Brett Kavanaugh is among the most political in history. In short, this nomination appears to be judicial payment for political services rendered.

Mr. Kavanaugh is a tremendously successful young lawyer. His academic credentials are first rate. He clerked for two prestigious circuit court judges and a Supreme Court justice. And he has been quickly promoted through the ranks of Republican lawyers. Some might call Mr. Kavanaugh the Zelig of young Republican lawyers, as he has managed to find himself at the center of so many high-profile controversial issues in his short career.

From the notorious Starr report, to the Florida recount, to this President's secrecy and privilege claims, to post-9/11 legislative battles including the Victims' Compensation Fund, to controversial judicial nominations, if there's been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there. And if he was there, there's no question what side he was on.

In fact, Mr. Kavanaugh would probably win first prize as the hard-Right's political lawyer. Where there's a tough job that needs a bright, hard-nosed political lawyer, Brett Kavanaugh has been there.

Judgeships should be above politics. Brett Kavanaugh's nomination seems to be all about politics.

If President Bush truly wanted to unite us, not divide us, this would be the last nomination he would send to the Senate. Anyone who has any illusion that President Bush really wants to change the tone in Washington ought to take a look at this nomination. You could not think of another nomination, given Mr. Kavanaugh's record, more designed to divide us.

Brett Kavanaugh's nomination to the DC Circuit is not just a drop of salt in the partisan wounds, it's the whole shaker.

There is much that many of us find troubling about this nomination and I look forward to hearing the nominee address our myriad concerns. I'd like to take just a moment to lay out two areas that will be central to this discussion.

First, for the first two years of the Administration, when the Administration was developing and implementing its strategy to put ideologues on the bench, Mr. Kavanaugh quarterbacked President Bush's judicial nominations battles. He spoke frequently at public events defending the President's decisions to nominate such controversial jurists as Charles Pickering, Carolyn Kuhl, Priscilla Owen, and William Pryor.

As you all know, many of us have been shocked and appalled by the extreme and out-of-the-mainstream ideologies adhered to by these and other nominees. I speak for myself, many of my colleagues, and a sizeable majority of the American people when I say that we do not want ideologues on the federal bench - whether too far Left or too far Right.

Judges who bring their own agendas to the Judiciary are inclined to make law, not interpret law as the Founding Fathers intended. We want fair and balanced judges, in the real sense of those words.

Nonetheless, this Administration has repeatedly bent over backwards to choose nominees who defend indefensible ideas and whose records are rife and replete with extreme activism.

During his time in the White House Counsel's office, Brett Kavanaugh played a major role in selecting these judges, prepping them for hearings, and defending their nominations at public events. In the course of defending the Administration's record on judicial nominations, Mr. Kavanaugh routinely cited the five criteria used by President Bush in selecting judges.

The five criteria he cites are:

1. Extraordinary intellect;
2. Experience;
3. Integrity;
4. Respect in the legal community and the nominee's home state community; and,
5. Commitment to interpreting law, not making law.

I don't think I'm stepping out on a limb when I say that every one of us up here sees those five criteria as outstanding factors to consider when choosing judges.

But in the same public discussions of the President's judicial nominations where he has cited these five criteria, Mr. Kavanaugh has routinely denied that the President considers a nominee's ideology. The record before us starkly belies that claim -- it just doesn't hold water.

If ideology did not matter, we would see nominations scattered across the ideological spectrum. There would be roughly equal numbers of Democrats and Republicans with a healthy dose of independents thrown in. We would see some nominees edge left of center while others tip right, with a few outliers at each extreme.

Even a President who wanted to have only some ideological impact on the bench would have some balance. That's not the case with the nomination's Brett Kavanaugh has shepherded.

If you were to map the circuit court nominees on an ideological scale of 1-10, with 10 being very liberal and 1 being very conservative, there's a huge number of 1's with some 2's and 3's thrown in and only a smattering of 4's and 5's.

Of course ideology has played a role in this process. Suggesting otherwise insults our intelligence and the intelligence of the American people.

For the last three years, I have been trying to get us to talk honestly about our differences over these judicial nominees. We have pretty much stopped citing minor personal peccadillos in nominees' histories as pretexts for stopping nominations that we really oppose on ideological grounds. The process is better for the honesty we have brought to it.

I hope we can continue having an honest dialogue today. Toward that end, I look forward to hearing Mr. Kavanaugh explain how it's possible that the President who has made the most extreme ideological nominations in history does not consider ideology when he makes those picks.

A second area I expect we will get into is closely related to the first. As I noted at the outset, there is no question that Brett Kavanaugh is a bright and talented young lawyer. There is no question that for someone of his age, he has an extraordinary resume and that he has achieved in every job he has held.

But there are serious questions as to why, at 39, having never tried a case, and with a record of service almost exclusively to highly partisan political matters, he is being nominated to a seat on the second most important court in America.

Why is the DC Circuit so important?

The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands a cases a year brought by Americans seeking to vindicate their rights. All the other federal appellate courts handle just those cases arising from within its boundaries. So, for example, the Second Circuit, where I'm from, takes cases coming out of New York, Connecticut, and Vermont.

But the DC Circuit doesn't just take cases brought by residents of Washington, DC. Congress has decided there's value in vesting one court with the power to review certain decisions of administrative agencies.

We've given plaintiffs the power to choose the DC Circuit B and in some cases we've forced them to go to the DC Circuit B because we've decided, for better or worse, that when it comes to these administrative decisions one court should decide what the law is for the whole nation.

When it comes to regulations adopted under the Clean Air Act by the EPA, labor decisions made by the NLRB and rules propounded by OSHA, gas prices regulated by the Federal Energy Regulatory Commission, and many other administrative matters, the decisions are usually made by the judges on the DC Circuit.

To most, it seems like this is the Alphabet Soup Court, since virtually every case involves an agency with an unintelligible acronym. EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so on.

The letters that comprise this Alphabet Soup are what make our government tick.

They are the agencies that write and enforce the rules that determine how much reform there will be in campaign finance reform.

They determine how clean water has to be for it to be safe for our families to drink.

They establish the rights workers have when negotiating with corporate powers.

The DC Circuit is important because its decisions determine how these federal agencies go about doing their jobs. And, in so doing, it directly impacts the daily lives of all Americans more than any other court in the country, with the exception of the Supreme Court.

There's a lot at stake when considering nominees to the DC Circuit, how their ideological predilections will impact the decisions coming out of the court, and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Perhaps more than any other court aside from the Supreme Court, the DC Circuit votes break down on ideological lines with amazing frequency. The divide happens in cases with massive national impact.

So we have a real duty to closely scrutinize the nominees who come before us seeking lifetime appointment to this court. And it is no insult to Mr. Kavanaugh to say that there is probably not a single person in this room, except perhaps Mr. Kavanaugh and his family, who doesn't recognize that there are scores of lawyers in Washington and around the country who are of equally high intellectual ability, but who have much more significant judicial, legal, and academic experience to recommend them for this post.

It's clearly an honor and a compliment that despite his relative lack of experience, this Administration wants Brett Kavanaugh to have this job. But when a lifetime appointment to the second-highest court in the land is at stake, the Administration's desire to honor Mr. Kavanaugh must come into question.

When the President picked Brett Kavanaugh, he was not answering the question, "Who has the broadest and widest experience for the job?" He was rewarding a committed aide who has proven himself in some tough political fights.

Would we have welcomed the renomination of Allen Snyder or Elena Kagan (now the dean of Harvard Law School), two moderate and extremely well-qualified Clinton nominees who never received consideration from this Committee? Of course, we would have.

But we also would have welcomed the nomination of a mainstream conservative who has a record of independence from partisan politics, who has a demonstrated history of non-partisan service, who has a proven record of commitment to the rule of law, and who we can reasonably trust will serve justice, not his political patrons, if confirmed to this powerful lifetime post.

Brett Kavanaugh is the youngest person nominated to the DC Circuit since his mentor, Ken Starr. If you go through the pre-judicial appointment accomplishments of the 9 judges who currently sit on the DC Circuit, you will see that Mr. Kavanaugh's accomplishments pale by comparison.

Chief Judge Ginsburg held several high level Executive Branch posts including heading the antitrust division at DOJ and was a professor at Harvard Law School.

Judge Edwards taught at Michigan and Harvard Law Schools, was the Chairman of Amtrak's board of directors, and published numerous books and articles.

Judge Sentelle had extensive practice as a prosecutor and trial lawyer, and experience as a state judge and as a federal district court judge.

Judge Henderson had a decade in private practice, a decade of public service, and five years as a federal district court judge.

Judge Randolph spent 22 years with federal and state attorneys general offices, including service as Deputy Solicitor General of the United States, and a law firm partnership.

Judge Rogers had roughly 30 years of service in both federal and state governments, including a stint as the Corporation Counsel for DC, and several years on DC's equivalent of a state supreme court.

Judge Tatel divided his nearly 30 years of experience between the public and private sectors, including a partnership at a prestigious law firm and service as general counsel of the Legal Services Corporation.

Judge Garland practiced for 20 years, held a law firm partnership, and supervised both the Oklahoma City bombing trial and Unabomber trial while in a senior position at the Department of Justice.

And Judge Roberts spent nearly 25 years going back and forth between his law firm partnership where he ran his law firm's appellate practice and significant service in the Department of Justice.

Like Mr. Kavanaugh, many of the 9 current judges on this court held prestigious clerkships, including clerkships on the Supreme Court. But they all had significant additional experience, non-partisan experience, to help persuade us that they merited confirmation.

If Mr. Kavanaugh had spent the last several years on a lower court or in a non-political position proving his independence from politics, we might be approaching this nomination from a different posture. But he has not. Instead, his resume is almost unambiguously political. Perhaps with more time, and different experience, we would have greater comfort imagining Mr. Kavanaugh on this court.

Suffice to say, on the record before us, Mr. Kavanaugh faces a serious uphill battle. I look forward to hearing his answers to the difficult questions he will face.

###