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Working for Women's Equality

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August 31, 2018

Chairman Chuck Grassley
Committee on the Judiciary
United States Senate

Ranking Member Dianne Feinstein
Committee on the Judiciary
United States Senate

RE: Nomination of Brett Kavanaugh to the United States Supreme Court

Dear Chairman Grassley and Ranking Member Feinstein,

On behalf of the Feminist Majority Foundation, a national organization dedicated to women's equality, reproductive health, and non-violence, we write to express strong opposition to the confirmation of Judge Brett Kavanaugh to serve as an Associate Justice of the U.S. Supreme Court.

Nominees to the U.S. Supreme Court must meet the highest standards of character and integrity. The decisions made by the Court impact almost every aspect of our daily lives, and the public must be secure in knowing that the nominee is willing to protect the rights of all people, not just the powerful, and uphold the rule of law. Judge Kavanaugh does not meet these requirements. His record shows hostility to reproductive rights and the Affordable Care Act, support for unchecked presidential power, and suggests that he would undermine civil rights and workplace fairness and promote the interests of corporations, the wealthy, and the powerful at the expense of everyday people, with damaging consequences for women, people of color, and other vulnerable communities.

Although the Feminist Majority Foundation submits this letter as part of Judge Kavanaugh's nomination hearing in the Senate Judiciary Committee, we would first like to note our opposition to the decision to proceed with the hearing at this time.

The Committee Should Delay the Nomination Hearing Until All Records are Reviewed

Judge Kavanaugh has been nominated to a lifetime appointment on our nation's highest court, yet neither the Senate Judiciary Committee nor the public has had access to the full record of his time as White House staff secretary to President George W. Bush. In discussing "what prior legal experience has been most useful" to him, Judge Kavanaugh himself acknowledged that the three years he spent as staff secretary were "the most

interesting and informative.”ⁱ It is therefore irresponsible, and not in keeping with the Senate’s constitutional duty to provide meaningful advice-and-consent, for this Committee to conduct a hearing without having reviewed the full range of records pertaining to this time.

As staff secretary to President Bush, Kavanaugh was not a “paper pusher,” but rather he would have been a central figure in the George W. Bush White House who would have reviewed and prioritized almost every document to reach the President and played a substantive role in key policy debates.ⁱⁱ The records related to his service may therefore provide critical insight into his role in some of the Bush Administration’s most controversial actions, including the Administration’s use of torture after September 11.

These records may also help determine whether Judge Kavanaugh misled or lied to members of this Committee in 2006 when, during his confirmation hearing to serve as a federal appeals court judge, Kavanaugh testified that he had no involvement in, or knowledge of, the legal issues surrounding the Bush Administration’s “War on Terror” policies and practices, including warrantless wiretapping, inhumane detainee treatment, and torture.ⁱⁱⁱ Shortly after his confirmation, the Washington Post reported that Kavanaugh had participated in discussions over the legality of these very policies.^{iv}

The question of whether a nominee to the U.S. Supreme Court purposefully misled the Committee on a prior occasion in order to obtain a lifetime appointment as a federal judge is not insignificant. It goes to the heart of Judge Kavanaugh’s judgment and character. It is also a question that can be answered only after a thorough review of the record; assurances from Judge Kavanaugh’s political allies should not be sufficient.

These are challenging times. Our President is the subject of a special investigation into foreign interference in the 2016 Presidential Election. At least five people associated with President Trump have been found guilty of, or have pled guilty to, various federal crimes, including former national security advisor Michael Flynn, former Trump policy advisor George Papadopoulos, former deputy campaign chairman Rick Gates, former campaign chairman Paul Manafort, and, most recently, the President’s former attorney Michael Cohen. In addition, several current and former members of the Trump Administration have been under scrutiny for behavior the average American would consider inappropriate, including misuse of taxpayer money,^v alleged swindling of business associates,^{vi} domestic violence,^{vii} and sexual harassment and misconduct.^{viii}

Under these circumstances, it is more important than ever for the Senate to take its duty to provide advice and consent seriously, especially for a Supreme Court nominee who spent years as a political operative and whose writings suggest that he would shield the President from the rule of law. This nomination comes at a critical time for our democracy, and the Committee’s actions should reflect that reality. The Committee should therefore undertake a complete review of Kavanaugh’s entire record.

Thus far, though, the Committee Chair has not even requested documents related to the three years Kavanaugh spent as President Bush's staff secretary, and the Committee has received only a small fraction of the documents related to the more than five years Kavanaugh served in the White House. Many of the documents that have been produced were not reviewed and released by the politically neutral National Archives, as is the usual process;^{ix} instead, they were handpicked by a partisan lawyer, who represents President George W. Bush (not the American people) and who once served as a deputy to Kavanaugh himself.^x The Committee has received no explanation for why documents have been omitted and has been given no information on why other documents have been redacted. The American people deserve better. There is no reason for this Committee to rush forward with a nomination hearing without the full record.

A review of what we do know, however, leads the Feminist Majority Foundation to oppose the confirmation of Judge Kavanaugh.

Access to Abortion and Birth Control

The right to access a full range of reproductive healthcare services, including abortion and birth control, is central to the lives of millions of women in the United States. The availability of affordable modern contraception has contributed to tremendous gains in women's educational and economic advancement in the United States,^{xi} and has had positive impacts on both infant and maternal health.^{xii} Birth control has allowed women to participate more fully in the social and economic life of the nation and has given women the ability to more freely determine their destinies by allowing them greater control over whether and when to have a child. Similarly, access to safe, legal abortion has given women greater ability to make personal life and health decisions that are best for them, and often, their existing families.

Before the Supreme Court's landmark decision in *Roe v. Wade*, which decriminalized abortion throughout the country, illegal abortions were common. According to the Guttmacher Institute, in the 1950s and 1960s, estimates of the number of illegal abortions were as high as 1.2 million per year.^{xiii} Although not all illegal abortions ended in death, the number of deaths from illegal abortion was high. In 1965, for example, illegal abortion accounted for 17 percent of all deaths attributed to pregnancy and childbirth that year.^{xiv} That number, however, only includes those deaths that were officially reported as related to abortion; the real number is likely higher.^{xv} Women forced to receive care clandestinely also suffered serious health consequences, and hospital admissions for incomplete abortion or infection were also quite common.^{xvi} Women for whom pregnancy is a life-threatening health condition are also at grave risk when legal abortion is unavailable or restricted. Since *Roe*, however, the number of maternal deaths in the U.S. has plummeted.^{xvii}

Despite the right to abortion, access to abortion is still severely restricted for many people,^{xviii} and abortion rights are under constant threat in this country, putting women's lives, their economic security, and their health at risk. Poor women and women of color, for whom access to health care is already limited because of structural and other barriers, are disproportionately impacted by lack of abortion access.^{xix}

In this climate, President Trump has consistently indicated that he would only nominate a Supreme Court justice who would overturn *Roe*. Brett Kavanaugh’s record both on and off the bench clearly demonstrates that he could be the justice to do it. Just last year, Kavanaugh gave a speech at the American Enterprise Institute in which he strongly implied that *Roe* should be overturned. During the speech, Kavanaugh, while praising former Chief Justice William Rehnquist for “stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition,” noted that the former Chief Justice had been unsuccessful in curtailing these rights in *Roe*.^{xx} Other unenumerated rights, of course, include the right to use birth control and the right to marriage equality.

In his only case addressing abortion rights, *Garza v. Hargan*, Kavanaugh twice tried to block a young immigrant woman in Texas from obtaining an abortion.^{xxi} Although the full D.C. Circuit Court of Appeals eventually allowed Jane Doe to have the abortion, Judge Kavanaugh would have continued to delay the procedure, threatening to push Jane Doe past the 20-week limit on abortion in Texas. In his dissent, Kavanaugh claimed that the court had created a right “to obtain immediate abortion on demand,”^{xxii} ignoring that Jane Doe had to jump through numerous hoops to access abortion—including a judicial order allowing her to consent to the abortion on her own—and that the government had unnecessarily delayed the procedure for weeks.

As a judge on the Court of Appeals, Kavanaugh is bound by *Roe*, even though he tried to undermine its promise. If he is confirmed as a Supreme Court justice, Kavanaugh would not be bound; he could provide the fifth vote to overturn *Roe*. But even if he did not overturn *Roe* outright, his record of hostility to abortion rights in *Garza* is a dark sign. Kavanaugh could rubber stamp so many abortion restrictions that *Roe* and the right to abortion would become meaningless.

If *Roe* were overturned, the right to privacy and personal liberty would be severely jeopardized, including the right to birth control. In particular, *Griswold v. Connecticut* and *Eisenstadt v. Baird*—two landmark Supreme Court cases that made birth control legal and accessible nationwide through the right to privacy—would be at stake, and Kavanaugh’s record is hostile to birth control access. In *Priests for Life v. U.S. Department of Health and Human Services*, Judge Kavanaugh argued in dissent that an employer’s religious beliefs should override an individual’s right to access birth control,^{xxiii} a position that would allow rampant discrimination against women.

The Affordable Care Act and Access to Health Care

The Affordable Care Act (ACA) has allowed millions of people to gain access to health insurance coverage, making critically-needed healthcare services more available and ensuring coverage for certain care. The ACA requires that insurers provide essential health benefits, including maternity and newborn care, mental health treatment, prescription drug coverage, preventive services, chronic disease management, pediatric care, and more. It has also ensured that

people with pre-existing conditions have access to affordable coverage and provides protections against discrimination in healthcare on the basis of race, color, national origin, sex, age, or disability.

The ACA has been particularly beneficial for women. After passage of the ACA, uninsured rates for women of color, who face numerous healthcare disparities, dropped dramatically.^{xxiv} The ACA also prohibits charging women more for the same health plans as men and has stopped insurance companies from treating women as pre-existing conditions, ending the practice of charging women more or denying coverage for prior pregnancies, Cesarean sections, or domestic or sexual violence.

Despite these benefits to everyday people, the ACA has been under constant attack. During his election campaign, President Trump promised that he would repeal the ACA and criticized Chief Justice John Roberts for not striking down the law. In a 2015 tweet, Trump wrote: “If I win the presidency, my judicial appointments will do the right thing unlike Bush’s appointee John Roberts on ObamaCare.”^{xxv}

As a federal appeals court judge, Brett Kavanaugh has twice dissented in decisions upholding the ACA.^{xxvi} These decisions suggest that if he were confirmed, Kavanaugh would repeal or otherwise undermine the ACA, putting the health of millions of people at risk. One of Kavanaugh’s former law clerks even wrote that Kavanaugh had provided a “roadmap” to the Supreme Court on finding the ACA unconstitutional.^{xxvii}

Right now, a multi-state lawsuit challenging the constitutionality of the ACA and its protections for people with pre-existing conditions is making its way through the federal courts.^{xxviii} The next Supreme Court justice may be the deciding vote on whether millions of people, including those with pre-existing conditions, continue to receive coverage and care.

Overturing the ACA would be disastrous for women’s health, leave the LGBTQ community vulnerable to healthcare discrimination, and jeopardize treatment coverage for transgender individuals, people suffering from substance use disorder, as well as people living with HIV and other serious health conditions. Insurers could, once again, impose annual and lifetime caps on coverage, and healthcare would be out of reach for many, including those most in need of care.

Unchecked Presidential Power

Even as this hearing begins, the President of the United States continues to be the subject of a special investigation into Russia’s interference in the 2016 Presidential Election. Though the President has tried to disparage the investigation and Special Counsel Robert Mueller, the special counsel investigation has resulted, so far, in more than 300 criminal counts against 33 people and three companies.^{xxix}

No one is above the law, except maybe President Trump if Kavanaugh is confirmed. Judge Kavanaugh has previously written that presidents should not be subject to civil lawsuits,

criminal investigation, or indictment while in office.^{xxx} Perhaps unsurprisingly, then, Kavanaugh has also suggested that *U.S. v. Nixon*—the Supreme Court case that forced President Nixon to turn over the Watergate tapes—was wrongly decided.^{xxxi} In a 1998 article, Kavanaugh also wrote that a sitting president should have “absolute discretion” about whether and when to appoint a special counsel,^{xxxii} and that Congress should allow the President to act when he believes “that a particular independent counsel is ‘out to get him’.”^{xxxiii}

Kavanaugh’s record raises huge red flags for the Mueller investigation, the rule of law, and the future of our democracy. His position is also stunning as Kavanaugh himself was a member of Kenneth Starr’s independent counsel team when a Democratic president was under investigation. If confirmed, Kavanaugh would be in a position to deconstruct our system of checks and balances to create an unaccountable executive branch.

Civil Rights and Equitable Workplaces

The Supreme Court plays an essential role in helping to ensure fairness in the workplace, something that is critically important for women, people of color, people with disabilities, and LGBTQ individuals who have been historically marginalized in the public sphere. Kavanaugh’s record, however, reflects hostility toward both workers’ rights and basic civil rights. Throughout his career on the bench, he has consistently sided with employers over workers, putting the interests of corporations, the powerful, and the wealthy over the interests of everyday people.

Kavanaugh has repeatedly ruled against employees asserting claims of racial discrimination and has tried to make it more difficult for employees to have their cases heard in court.^{xxxiv} In one case, he would have blocked an African-American women fired from her job from having her day in court,^{xxxv} and in another, he would have prevented a black Muslim FBI agent of Jamaican descent from pursuing a retaliation claim.^{xxxvi} Although Kavanaugh has, on occasion, recognized the availability of racial discrimination claims, including in a concurring opinion in which Kavanaugh noted that a single incident of a supervisor calling an employee the N-word could create a hostile environment,^{xxxvii} his record suggests that Kavanaugh has adopted a narrow view of what constitutes racial discrimination: a view that does not reflect the reality of people’s lives.

In a 1999 interview with the *Christian Science Monitor*, Judge Kavanaugh remarked: “I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government.”^{xxxviii} The adoption of colorblindness theory, however, only hides the ways in which racism manifests in our institutions, systems, and structures. Far from creating a more just society, colorblindness theory erases the experiences of people of color and prevents implementation of the remedial measures that would affirm the dignity, worth, and constitutional and civil rights of all people. Such a perspective also suggests an inability to appreciate how racial discrimination intersects with sexism and other forms of discrimination.

Gun Violence

Gun violence is a deeply feminist issue. According to a 2016 research study, about 4.5 million women in the U.S. have had an intimate partner threaten them with a gun, and nearly 1 million have been shot, or shot at, by an intimate partner.^{xxxix} Around 50 women per month in the U.S. are shot to death by an intimate partner, and domestic violence victims are five times more likely to be killed when their partners have a firearm.^{xi} Women of color are at particular risk. Black women, for example, are twice as likely to be fatally shot by an intimate partner as white women.^{xii} Overall, women in the U.S. are 11 times more likely to be murdered with a firearm than women in any of our peer nations.^{xlii}

Mass shootings are also often linked to violence against women. In at least 54 percent of mass shootings between 2009 and 2016, the shooters killed intimate partners or other family members.^{xliii} Reporting also shows a large number of mass shooters with a history of violence against women or girls, including the Virginia Tech shooter, the Isla Vista shooter, and the Pulse Nightclub shooter.^{xliv}

Gun violence is a crisis in the United States, but Kavanaugh's record suggests an extreme view of the Second Amendment that would block common-sense gun laws designed to keep people safe. In the 2011 case *District of Columbia v. Heller*, a panel of three judges ruled 2-1 that a D.C. ban on assault weapons and high-capacity magazines was constitutional.^{xlv} Judge Kavanaugh dissented, reasoning that there was "no meaningful or persuasive constitutional distinction" between assault weapons and handguns,^{xlvi} the latter of which were found to be constitutionally protected in a 2008 Supreme Court case brought by the same plaintiff.

We are deeply concerned that Judge Kavanaugh does not appreciate a distinction between assault weapons and handguns. It is especially troubling given that in the 2008 *Heller* case, the Supreme Court cautioned that even though it had overturned D.C.'s handgun ban, the Second Amendment "is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."^{xlvii}

Sexual Harassment and Assault

The growing #MeToo movement in the U.S. has forced the country, once again, to reckon with our nation's high rates of sexual harassment and assault. Though research on the prevalence of sexual harassment in the workplace is scarce, a recent online survey found that 81 percent of women have experienced some form of sexual harassment in their lifetime.^{xlviii} Of that number, 77 percent had experienced verbal harassment, 51 percent had experienced unwelcome sexual touching, and 27 percent had experienced a sexual assault.^{xlix} Looking specifically at workers, the Equal Employment Opportunity Commission (EEOC) determined that as many as 85 percent of women have been harassed at work.¹

Workplace sexual harassment can have multiple, cascading effects on women's economic advancement and also causes emotional and psychological distress. Most people do not report sexual harassment at work. Reviewing the available data, the EEOC determined that between 87 to 94 percent of individuals do not file a formal complaint.^{li} These percentages may reflect the high levels of retaliation against those who do report. Up to 75 percent of employees who report sexual harassment face workplace retaliation, and many workers report that their claims were trivialized or that they faced hostility after speaking up.^{liii}

The issue of workplace sexual harassment and assault are important in this context given Judge Kavanaugh's relationship to Judge Alex Kozinski, who left the U.S. Court of Appeals for the Ninth Circuit in disgrace in late 2017 after former clerks, law students, and a fellow judge made over a dozen allegations of sexual harassment against him.^{liiii} Those allegations included unwanted sexual touching, asking for sex, and asking clerks to watch pornography with him in chambers.^{liv}

Kavanaugh, of course, clerked for Judge Kozinski and has reportedly remained close to him. Judge Kozinski's son even clerked for Kavanaugh in 2017-2018.^{liv} The White House has claimed that Judge Kavanaugh "had never heard any allegations of sexual misconduct or harassment" by Kozinski before the Washington Post reported on the allegations,^{lvi} but many in the legal community have indicated that Kozinski's behavior was an open secret.^{lvii} It is therefore extremely important for this Committee to ask, and for Judge Kavanaugh to speak fully on, exactly what he knew about Kozinski's behavior, whether he recommended people to clerk for Kozinski knowing of his behavior, and what, if anything, he has done to help the women who were harassed.

The Committee should also ask whether Judge Kavanaugh knew of, or was part of, Kozinski's "Easy Rider Gag List," which Kozinski used to share tasteless and sexually explicit "jokes" and material.^{lviii} The "gag list," reportedly included law clerks, federal judges, attorneys, and journalists. Clearly, engaging in this type of conduct would show incredibly poor judgment and would not demonstrate the type of character required for a member of the highest court in the nation.

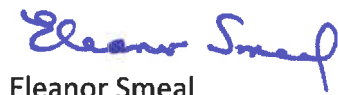
Conclusion

Now more than ever, the public needs a Supreme Court Justice who will uphold the Constitution and protect the rights of all people. Brett Kavanaugh is not that judge. His record shows not only that he is hostile to reproductive rights and the Affordable Care Act, but that he has a pattern of putting the concerns of corporations, the wealthy, and the powerful over the interests of everyday people, with damaging consequences for women, workers, people of color, and other vulnerable communities.

The Supreme Court has the ability to shape our rights, our laws, and our democracy for generations to come; we therefore need a justice who will uphold the rule of law, for everyone, and has demonstrated the willingness and ability to be an independent check on presidential

power. There is nothing in Brett Kavanaugh's record that indicates that he is the right nominee for this job. We urge you to oppose his confirmation.

Sincerely,



Eleanor Smeal
President



Gaylynn Burroughs
Director of Policy & Research

ⁱ Brett M. Kavanaugh, *One Government, Three Branches, Five Controversies: Separation of Powers under Presidents Bush and Obama*, Marquette Lawyer 9 (Fall 2016), <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2016-fall/2016-fall-p08.pdf>.

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