

The Jewish take on Judge Kavanaugh

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WASHINGTON — When President Donald Trump nominated Brett Kavanaugh, a federal appeals court judge in Washington, DC, to replace Supreme Court Justice Anthony Kennedy, the pick disappointed Jewish liberals concerned about reproductive rights and civil liberties, but was welcomed by Jewish conservatives.

Kavanaugh, 53, is respected by the Republican establishment, although some on the right have said he is not conservative enough. Trump reportedly was wary of Kavanaugh's close ties to George W. Bush, who nominated him to his current position in 2003.



"A judge must interpret the law and not make the law," Kavanaugh said in remarks from the East Room of the White House on Monday night, July 9.

"A judge must interpret statutes as written, and a judge must interpret the Constitution as written, informed by history and tradition and precedent."

He also thanked Associate Justice Elena Kagan, who hired him to teach a course on the Supreme Court when she was the dean of Harvard Law School.

Kavanaugh is a graduate of Yale Law School and he clerked for Kennedy on the Supreme Court.

He helped draft the Starr Report, which called for President Bill Clinton to be impeached because he lied about having had an intimate relationship with Monica Lewinsky, a White House intern.

He fought on the legal team urging Florida not to have a recount in the 2000 presidential election between Bush and Al Gore, Clinton's vice president. The Supreme Court decision not to do so led to Bush becoming the president.

Kavanaugh served in the Bush administration, including as the president's staff secretary. His wife, Ashley Estes, served as personal secretary to George W. Bush.

In 2015, Kavanaugh, a Roman Catholic, filed a dissent in a case involving religious employers and reproductive rights.

The case said that religious employers did not have to provide contraceptives but had to file a form telling the government they were not doing so, but Kavanaugh argued that the requirement violated religious freedom.

Kavanaugh has stated that he considers *Roe v. Wade* binding and would seek to uphold it, though he has ruled in some cases to place restrictions on abortion.

Liberal Jewish groups, such as the National Council of Jewish Women, were disappointed with Trump's pick, regretting what might be the Supreme Court's long-lasting shift to the right.

Within an hour of the announcement, the National Council of Jewish Women released a statement saying it was "incensed" by the choice and helped organize an opposition rally in front of the Supreme Court.

The Reform movement and the OU both told JTA that they were studying Kavanaugh's record before deciding whether to take a position on his nomination.

NCJW CEO Nancy K. Kaufman said in a statement:

"Kavanaugh also dissented from rulings upholding the Affordable Care Act and claims that the Consumer Financial Protection Bureau is unconstitutional. He routinely decides for the powerful against the powerless when safety, equality, consumer rights, the environment and workers protections are at stake.

"Although Kavanaugh worked on the impeachment of President Clinton, he now maintains that 'criminal investigations and prosecutions of the president' should be deferred while a president is in office."

The Workmen's Circle, a progressive Jewish organization with roots in the labor movement, said Kavanaugh's nomination represents the latest salvo in a "war against the working people of this country."

"While the President's selection of a conservative candidate is not a surprise, it exemplifies the direction of this administration to further divide, rather than unite, our country," said Ann Toback, its executive director.

Agudath Israel of America, a *haredi* Orthodox organization, has not yet taken an official position on the nomination, but its Washington director, Rabbi Abba Cohen, called Kavanaugh "a very impressive candidate." Cohen was happy about Kavanaugh's rulings related to religious freedom based on an initial overview of the judge's record.

Agudah and other Orthodox groups favor rulings that would exempt religious groups and individuals from generally applicable laws that clash with their beliefs.

“We’re gratified that he’s given due deference to religious liberty and that he has been supportive of a greater involvement of religious organizations and institutions in society,” Cohen told JTA.

Cohen cited Kavanaugh’s opinion in a case relating to contraceptive care exemptions for religious groups, *Priests for Life v. HHS*. The appeals court agreed that religious employers did not have to provide contraceptives, but had to file a form telling the government they were not doing so. Kavanaugh in his dissent argued that the filing requirement violated the plaintiffs’ religious freedom.

“We support that position, we think that’s giving proper deference to religious rights, and we don’t think that’s in any way a retreat from the rights of others, so that’s one area where we are pleased about,” Cohen said.

Orthodox groups are likely to welcome a court that protects public religious expression over strict separation, as it did in recent rulings confirming a baker’s right to refuse to bake a cake for a same-sex wedding.

During his time in private practice, Kavanaugh took on pro bono cases, including that of a Reconstructionist synagogue, *Adat Shalom* in Bethesda, Md., which was facing challenges from its neighbors in constructing a building.

In 2000, a US District Court sided with the synagogue, saying a permit issued to the congregation was consistent with the Establishment Clause. The synagogue confirmed to JTA that it was represented by Kavanaugh but did not return a request for further comment in time for publication.

The Anti-Defamation League was also wary of Trump’s nominee.

“We are concerned that Judge Kavanaugh’s judicial record does not reflect the demonstrated independence and commitment to fair treatment for all that is necessary to merit a seat on our nation’s highest court,” Jonathan Greenblatt, ADL’s CEO and national director, said in a statement.

“Because he has written and spoken prolifically on many issues of deep concern, we believe his positions merit close scrutiny. These include his demonstrated hostility to reproductive freedom and his past support for greatly expanded and unchecked executive power,” said Greenblatt.

In 2006, Kavanaugh said he would respect *Roe v. Wade*, but Rabhan said that did not assuage her concern.

Rabhan and others cited a case, *Garza v. Hagan*, in which Kavanaugh opposed a detained undocumented immigrant minor’s right to obtain an abortion. In that 2017 case, the government had mandated that the teen could leave her detention center to have an abortion. Kavanaugh vacated the order, postponing the abortion for another week-and-a-half, until a court ultimately ruled in her favor.

Kavanaugh dissented, writing that the government had betrayed its “interest in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.”

Marc Stern, the general counsel of the American Jewish Committee, said most of Kavanaugh’s legal record was “unremarkable,” but that his opinion in the *Garza* case was “disturbing” and raised questions.

“It’s not clear to us what that means exactly,” Stern said. “Does he believe that immigrants have lesser constitutional rights than everybody else? Does he think that teenagers don’t have a right [to an abortion]? . . . Does he mean only that the government has a right not to participate and you’re sort of on your own?”

The AJC has not taken a position on the nomination, and Stern said it was studying Kavanaugh’s record, specifically with regard to issues of immigration law, religious liberty, separation of church and state, and reproductive freedom.

He said that Kavanaugh’s opinion in *Newdow v. Roberts*, a case presenting a challenge to prayers at the presidential inauguration and the phrase “so help me G-d” in the presidential oath, offered “some glimmer of hope” for those supporting separation of church and state.

Though the challenge by the plaintiff, an atheist opposing the prayers, was dismissed, Kavanaugh said he did have standing to sue.

Stern does not think Kavanaugh would radically shift the court. Although Kennedy was a swing vote on issues like abortion and same-sex marriage, he often was reliably conservative.

“On separation [of church and state] issues, he will read the principle more narrowly than AJC would like,” Stern said. “But from what little he’s written, it doesn’t appear that he’s going to be writing in a whole different vein than where the court as a whole has been — but that’s a guess.”