

An Open Letter from Legal Scholars to Members of the U.S. Senate Regarding Recusal Issues Presented by Brett Kavanaugh's Nomination to the Supreme Court

The debate over Supreme Court nominee Brett Kavanaugh continues along many fronts. Thousands of documents relevant to the nominee's history and conduct as a political operative remain hidden from view. Beyond that, the severely truncated FBI inquiry completed on October 3 has left unresolved serious questions about Kavanaugh's past and his apparent lack of candor with the Senate Judiciary Committee.

Whatever one's conclusions about those matters, Judge Kavanaugh himself has furnished perhaps the strongest argument against his own confirmation as a Justice.

His intemperate personal attacks on members of the Senate Judiciary Committee and his partisan tirades against what he derided as a conspiracy of liberal political enemies guilty of a "calculated and orchestrated political hit" do more than simply display a strikingly injudicious temperament. They disqualify him from participating in a wide range of the cases that may come before the Supreme Court: cases involving individuals or groups that Judge Kavanaugh has now singled out, under oath and in front of the entire nation, as implacable adversaries.

Well before last week's hearing, public officials and scholars of legal ethics were already debating whether a Justice Kavanaugh, with his unusually expansive views of presidential power, would be required to recuse himself from cases involving the legal fate of the president who nominated him.

This is not an abstract concern.

The Supreme Court may have to consider questions about whether a sitting president can be indicted or subpoenaed, and what effect pardoning a federal offense would have on state charges for the same conduct—an issue bound up in *Gamble v. United States*, a double jeopardy case already on the Court's calendar. Many have argued that Judge Kavanaugh should not be confirmed unless he commits in advance to recusing himself from such cases. He has predictably refused to do so.

To be sure, the rules of recusal that bind lower federal court judges do not technically apply to Supreme Court justices—at least according to the self-interested interpretation of the justices themselves. But those rules are not the only source of legal principles requiring all judges, of whatever court, to step aside when the institutional integrity of the judicial process is incompatible with their participation.

Apart from formally promulgated codes of judicial conduct, the Supreme Court has recognized that those whom our legal system entrusts to resolve controversies among litigants have a constitutional duty to step aside whenever a conflict of interest—or the public appearance of such a conflict—is so powerful as to erode public trust in the fair and impartial administration

of justice. In *Caperton v. Massey Coal*, the Court held that a judge politically beholden to one of the litigants must recuse himself, and in *Williams-Yulee v. Florida Bar*, it held that the need to preserve judicial impartiality trumps the rights of judicial candidates to solicit campaign contributions.

Judge Kavanaugh's attacks on identifiable groups—Democrats, liberals, “outside left-wing opposition groups” and those angry “about President Trump and the 2016 election” or seeking “revenge on behalf of the Clintons”—render it inconceivable that he could “administer justice without respect to persons,” as a Supreme Court justice must swear to do, when groups like Planned Parenthood, the NRDC Action Fund, the NAACP Legal Defense Fund, NARAL Pro-Choice America or the American Civil Liberties Union appear as parties or file briefs on behalf of plaintiffs and defendants.

For a Justice Kavanaugh to participate in internal court discussion or oral argument of such cases, much less vote on their resolution, would involve not just an undeniable appearance of conflict but an actual conflict, given his stated animosities and observation that “what goes around comes around.”

His required recusal would extend to a very broad slice of the Supreme Court's docket during his lifetime tenure as a justice. That would leave the court evenly split in far too many cases, for years on end, if he were to recuse himself as required—or deeply damaged in the public's trust if he were not.

It is up to the president and the Senate to decide whether this situation makes him unacceptable as a nominee. But should he be confirmed, it is impossible to see how Judge Kavanaugh could discharge his responsibilities as an associate justice of the Supreme Court.

Signed,*

Laurence H. Tribe

Carl M. Loeb University Professor and
Professor of Constitutional Law
Harvard Law School

Felice Batlan

Professor of Law
IIT Chicago-Kent College of Law

Paula Berg

Professor of Law Emeritus
CUNY School of Law

Henry Allen Blair

Robins Kaplan Distinguished Professor of
Law
Mitchell Hamline School of Law

* Affiliations noted for identification purposes only.

Karen Blum

Professor Emerita
Suffolk University Law School

Eric Blumenson

Research Professor of Law
Suffolk University Law School

Michael Borden

Associate Professor
Cleveland-Marshall College of Law

Ralph Brill

Professor Emeritus
IIT Chicago-Kent College of Law

Mark Brown

Newton D. Baker/Baker & Hostetler Chair
Capital University Law School

Christine Butler

Practitioner in Residence
Suffolk University Law School

Janet Calvo

Professor of Law
CUNY School of Law

Gilbert Carrasco

Professor of Law
Willamette University College of Law

Kim D. Chanbonpin

Professor of Law
The John Marshall Law School

Matthew Charity

Professor of Law
Western New England University School of
Law

Erwin Chemerinsky

Dean and Jesse H. Choper Distinguished
Professor of Law
Berkeley Law School

Carol Chomsky

Professor of Law
University of Minnesota Law School

James Coben

Professor of Law
Mitchell Hamline School of Law

Debra Cohen

Adjunct Professor, Civil Rights Law
Elisabeth Haub School of Law at Pace
University

Doug Colbert

Professor
Maryland Carey School of Law

Meredith Conway

Professor of Law
Suffolk University Law School

Daniel Coyne

Clinical Professor of Law (Ret.)
IIT Chicago-Kent College of Law

Pamela Daiker-Middaugh

Clinical Professor of Law
Cleveland-Marshall College of Law

Lolita Darden

Assistant Clinical Professor of Law
Suffolk University Law School

Lisa Davis

Associate Professor of Law
CUNY School of Law

Frank Deale

Professor of Law
CUNY School of Law

Chris Dearborn

Clinical Professor of Law
Suffolk University Law School

Nora Demleitner

Roy L. Steinheimer, Jr. Professor of Law
Washington and Lee University School of
Law

Sara Dillon

Professor of Law
Suffolk University Law School

Olympia Duhart

Professor of Law
Nova Southeastern University Shepard
Broad College of Law

Angelique EagleWoman

Visiting Professor of Law
Mitchell Hamline School of Law

Heather Elliott

Alumni, Class of '36 Professor of Law
University of Alabama Culverhouse School
of Law

Marie Failinger

Professor of Law
Mitchell Hamline School of Law

Susan Feathers

Assistant Dean
Rutgers Law School

Dave Fields

Senior University Dean
CUNY School of Law

Stephen Feldman

Jerry W. Housel/Carl F. Arnold
Distinguished Professor of Law
University of Wyoming College of Law

Sharon Finegan

Professor of Law
South Texas College of Law Houston

David Finger

Clinic Professor
Loyola University New Orleans College of
Law

Stanley Fisher

Emeritus Professor of Law
Boston University School of Law

Steven Friedland

Professor of Law
Elon University School of Law

Russell Gabriel

Clinical Law Professor
University of Georgia School of Law

David Gerber

Distinguished Professor of Law
IIT Chicago-Kent College of Law

Kristin Glem

University Professor and Dean Emerita
CUNY School of Law

Julie Goldscheid

Professor of Law
CUNY School of Law

Anne Goldstein

Professor of Law
Western New England University School of
Law

Anne Gordon

Senior Lecturing Fellow
Duke University School of Law

Eric Gouvin

Professor of Law and Dean Emeritus
Western New England University School of
Law

Steven Green

Fred H. Paulus Professor
Willamette University College of Law

Catherine Grosso

Professor of Law
Michigan State University College of Law

Douglas Heidenreich

Professor Emeritus
Mitchell Hamline School of Law

Helen Hershkoff

Herbert M. & Svetlana Wachtell Professor
of Constitutional Law and Civil Liberties
New York University School of Law

Steven J. Heyman

Professor of Law
IIT Chicago-Kent College of Law

Jim Hilbert

Associate Professor of Law
Mitchell Hamline School of Law

Michael Hoffheimer

Professor of Law
University of Mississippi School of Law

K. Babe Howell

Professor of Law
CUNY School of Law

Nicole Huberfeld

Professor of Law
Boston University School of Law

Chaumtoli Huq

Associate Professor of Law
CUNY School of Law

Aziz Huq

Frank & Bernice Greenberg Professor of
Law
University of Chicago Law School

Eric Janus

Professor of Law
Mitchell Hamline School of Law

Paula Johnson

Professor of Law
Syracuse University College of Law

Jonathan Kahn

Professor
Mitchell Hamline School of Law

Doron Kalir

Clinical Professor of Law
Cleveland-Marshall College of Law

Maritza Karmely

Clinical Professor of Law
Suffolk University Law School

Eileen Kaufman

Professor of Law
Touro College Jacob D. Fuchsberg Law
Center

Shani King

Professor of Law, Director of the Center on
Children and Families
University of Florida Levin College of Law

Kit Kinports

Professor & Folisher Family Distinguished
Faculty Scholar
Penn State Law

Dan Kobil

Professor of Law
Capital University Law School

Steve Lazarus

Associate Professor of Law
Cleveland-Marshall College of Law

Donna Lee

Professor of Law
CUNY School of Law

Raleigh Hannah Levine

Professor of Law
Mitchell Hamline School of Law

Degna P. Levister

Assistant Dean of Admissions and
Enrollment Management
CUNY School of Law

Stephen Loffredo

Professor of Law
CUNY School of Law

Gregory Magarian

Professor of Law
Washington University School of Law

Amy Meyers

Instructor of LRW, Director of Bar Passage
Willamette University College of Law

Sharmila Murthy

Associate Professor
Suffolk University Law School

Gene Nichol Boyd

Tinsley Professor
University of North Carolina School of Law

Suzianne Painter-Thorne

Associate Professor of Law
Mercer University School of Law

Tamara Piety

Professor of Law
University of Tulsa College of Law

Alicia Plerhoples

Professor of Law
Georgetown University Law Center

Sara Rankin

Associate Professor of Law
Seattle University School of Law

Allie Robbins

Associate Professor of Law
CUNY School of Law

Ruthann Robson

Professor of Law & University
Distinguished Professor
CUNY School of Law

Marc Rodwin

Professor of Law
Suffolk University Law School

Amy Ronner

Professor Emeritus
St. Thomas University School of Law

Michael Rooke-Ley

Professor of Law Emeritus
Nova Southeastern University Shepard
Broad College of Law

Henry Rose

Curt and Linda Rodin Professor of Law and
Social Justice
Loyola University Chicago School of Law

Merrick Rossein

Professor of Law
CUNY School of Law

David Rudstein

Professor of Law Emeritus
IIT Chicago-Kent College of Law

Michael Rustad

Thomas F. Lambert Jr. Professor of Law
Suffolk University Law School

Eliot Shavin

Adjunct Clinical Professor of Law
Southern Methodist University Dedman
School of Law

Patrick Shin

Professor of Law
Suffolk University Law School

Linda Simard

Professor of Law
Suffolk University Law School

Michael Steenson

Professor of Law
Mitchell Hamline School of Law

Richard Storrow

Professor of Law
CUNY School of Law

Barry Sullivan

Cooney & Conway Chair in Advocacy &
Professor of Law
Loyola University Chicago School of Law

Mary Pat Treuthart

Professor of Law
Gonzaga University School of Law

Danielle Tully

Assistant Professor of Legal Writing
Suffolk University Law School

Michael Vitiello

Distinguished Professor of Law
McGeorge School of Law

Wendi Warren H. Binford

Professor of Law & Director, Clinical Law
Program
Willamette University College of Law

Michael Wise

Professor of Law
Willamette University College of Law

Deborah Zalesne

Professor of Law
CUNY School of Law