

OPINION

Will Kavanaugh offer cover?

Caroline Fredrickson
Norman L. Eisen

On Monday President Trump nominated Brett Kavanaugh, a judge on the United States Court of Appeals for the District of Columbia Circuit, to replace retiring Justice Anthony Kennedy on the Supreme Court. In the coming weeks, the Senate will undertake its constitutional duty to vet Judge Kavanaugh on issues like health care and abortion. But the Senate must also explore a question central to evaluating the judge's commitment to the rule of law: Does he have the requisite independence from President Trump to serve as a check on his abuses of power?

This issue is particularly important given repeated claims by the president's attorneys that Mr. Trump is essentially above the law — that he can even refuse a subpoena to testify. Given the looming Mueller investigation, these weighty, knotty constitutional questions may soon come before the court.

When it comes to these questions, Judge Kavanaugh is not a blank slate. He worked for Ken Starr, the independent counsel who aggressively investigated President Bill Clinton. But Judge Kavanaugh later adopted views that are outside the mainstream in their deference to the executive.

In a 2009 law review article, Judge Kavanaugh argued that a sitting president should be able to defer civil suits and criminal prosecutions until after he leaves office and should be excused from having to answer depositions or questions during his term.

He went so far as to advocate that Congress "consider a law exempting a president — while in office — from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel."

It is hard to imagine that these extreme views weren't part of Judge Kavanaugh's appeal to President Trump, a man who is a defendant in several civil suits and the subject of at least one criminal investigation. According to media reports, the White House has looked at the judge's views on indicting a sitting president.

Nor are these mere academic mus-

ings. During his service on the appellate court, Judge Kavanaugh has written opinions reflecting an expansive view of presidential power, and on several occasions he has expressed concern about executive branch agencies that are insulated from direct control by the president.

What does this tell us about how he would view the ongoing investigation by Robert Mueller, the special counsel? There are important and — at least under current law — decisive differences between the independence enjoyed by the agencies at issue in those cases and that of the special counsel, who reports directly to a political appointee serving at the pleasure of the president. But the logic employed in Judge Kavanaugh's opinions could easily be extended to argue that the president should enjoy the power to

It is unclear whether the U.S. Supreme Court nominee will stand up to Mr. Trump's claim to be immune from prosecution.

control the course of all criminal investigations — including those into his own alleged misconduct. Judge Kavanaugh's approach to executive power could, moreover, affect other aspects of the federal investigations relating to Mr. Trump. One of the most important is whether a president can pardon himself. In our view, the idea that a president can grant himself a pardon is anathema to our constitutional structure. One need not be a judge to see how antithetical this is to our Constitution: 85 percent of Americans (including 75 percent of Republicans) say that it is unacceptable for a president to pardon himself of a crime. Given Judge Kavanaugh's position on executive authority, it is unclear where he would stand. Senators must find out.

Judge Kavanaugh's writings and opinions also suggest he will be receptive to the bizarre argument that the president cannot obstruct justice by firing Department of Justice officials or taking other actions pursuant to his constitutional authority. There are multiple flaws in this argument, chief among them that both the Constitution and hundreds of years of precedent support the validity of congressional restrictions on the exercise of executive power.

Will Judge Kavanaugh stand with the rule of law or allow the president to interfere with our system of justice with impunity?

Then there is the legality of Mr. Mueller's appointment, which Mr. Trump's former campaign chairman, Paul Manafort, has already tested in the two federal courts where he is facing charges. Both the District of Columbia and Virginia federal district courts rejected motions by Mr. Manafort to dismiss his criminal indictments, and the District of Columbia court rejected a collateral civil suit that he filed there challenging Mr. Mueller's prosecution of the case. The reasoning behind these decisions is straightforward: Congress has given the attorney general broad authority to delegate power to subordinate officials. We cannot help wondering whether Judge Kavanaugh will view this delegation as an intrusion on presidential direct removal authority and reject the common-sense holdings of these lower courts should he have the chance.

The usual practice at Supreme Court confirmation hearings is for the nominee to refuse to answer questions about issues that may have come before him or her. But we have never had a nominee who was chosen by a president identified as the subject of a criminal inquiry — one that already has resulted in serious charges against top aides and could implicate the president himself.

We need to know the judge's views on these issues so we can have an honest and open national discussion, and the Senate make a fully informed decision. If he refuses to share them, Judge Kavanaugh must agree that if he is confirmed he will recuse himself from any decisions concerning the special counsel investigation and the related exercise of presidential powers — or his confirmation must be delayed until after the investigations are resolved.

If the Senate confirms him without resolving these questions, we face the prospect of a new associate justice who poses a grave danger to the legitimacy of the court — and our democratic system of checks and balances.

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How NATO helps the U.S.

Nicholas Burns

Donald Trump prepared for this week's NATO summit by doing what no president had done before — making a case that the alliance is a bad deal for the American people. Last week in Great Falls, Mont., he said that he had told Chancellor Angela Merkel of Germany, "I don't know how much protection we get by protecting you." Mr. Trump has been even tougher on the European Union, branding it "as bad as NAFTA" and adding, "Sometimes our worst enemies are our so-called friends."

I have visited four European countries during the last two weeks, and it has been shocking to see how far from grace the United States has fallen in the eyes of its allies. European leaders point to Mr. Trump's support for anti-democratic populists in Hungary, Poland and Italy. They view his recent Twitter attack on Ms. Merkel as a transparent attempt to push her from office.

Many fear he may now remove American sanctions against Moscow over its occupation of Crimea after his meeting with President Vladimir Putin of Russia in Finland next week. Confidence in Mr. Trump has plummeted so much that the German foreign minister, Heiko Maas, recently grouped "Donald Trump's egotistic policy of America First" along with Russia and China as global concerns. None of this, of course, is likely to disturb Mr. Trump, who remains steadfast in his belief that whatever benefits the United States gained from the trans-Atlantic alliance in the past, the country no longer profits. But he's wrong — there are compelling reasons that NATO in particular will be a distinct advantage for America's security far into the future.

First, NATO's formidable conventional and nuclear forces are the most effective way to protect North America and Europe — the heart of the democratic world — from attack. Threats to our collective security have not vanished in the 21st century. Mr. Putin remains a determined adversary preying on Eastern Europe and American

elections. NATO is a force multiplier: The United States has allies who will stand by us, while Russia has none.

And while it's true that most of America's NATO allies need to increase their defense spending under the treaty, they're not freeloaders: The United States has relied on NATO allies to strike back against Al Qaeda in Afghanistan and the Islamic State in the Middle East. European troops have replaced American soldiers in peacekeeping missions in Bosnia and contribute the large majority in Kosovo.

Our NATO allies are also getting better about contributing their fair share. They have increased their defense spending by a total of more than \$87 billion since Mr. Putin annexed Crimea in 2014. Fourteen more allies will reach NATO's military spending target — 2 percent of gross domestic

The president calls it a bad deal. In fact it's America's best defense in a dangerous 21st century.

product — by 2024. Mr. Trump would be smart to claim credit for this at this week's summit. A second reason for maintaining the trans-Atlantic alliance is America's economic future. The European Union is our country's largest trade partner, and its largest investor. The United States and the European Union are the world's two largest economies, and can steer global trade to their advantage if they stick together. More than four million Americans work for European companies in the United States. Forty-five of the 50 states export more to Europe than to China.

Mr. Trump is right that the two sides are also economic competitors, and trade disputes are inevitable. His predecessors kept this tension in balance lest there be damaging consequences for American businesses, workers and farmers — a good reminder for Mr. Trump, whose ill-conceived trade war with Canada and Europe risks harming the American economy.

Third, future American leaders will find Europe is our most capable and willing partner in tackling the biggest

threats to global security: climate change; drug and cybercrime cartels; terrorism; pandemics and mass migration from Africa and the Middle East. And America's NATO allies will continue to be indispensable in safeguarding democracy and freedom, under assault by Russia and China.

Mr. Trump's campaign to undermine the European Union and diminish America's leadership in NATO serves none of these interests. He seems driven by resentment about European trade surpluses and low defense budgets, issues that blind him to all the other benefits Americans derive from our alliance with Europe and China.

Mr. Trump may believe his blistering attacks on Europe's trade policies and defense budgets are a good negotiating tactic before the summit. But in fact they have already done enormous damage. While he cannot outright kill NATO — the American public and Congress support it too strongly — he has eroded significant levels of trust and good will. As it became clear during my recent visits across Europe, a dangerous breach has opened in the trans-Atlantic alliance — by far the worst in seven decades.

Mr. Trump wants Americans to believe that their allies are simply taking advantage of them. On Sept. 11, 2001, I witnessed a far different reality as American ambassador to NATO. Canada and the European allies volunteered within hours of the attacks to invoke Article 5 of the NATO treaty, which compels all members to respond to an attack on any single member, for the first time in history. They came to our defense when we most needed them. They sent troops to fight with us in Afghanistan. They are still there with us 17 years later. Are we now going to throw off that mutual protection, and go it alone in a dangerous 21st-century world? That would be a historic mistake. But that is where we may find ourselves if Mr. Trump's anti-Europe vendetta continues.

NICHOLAS BURNS, a former under secretary of state and ambassador to NATO, teaches diplomacy and international relations at Harvard.

Brexiters flee their mess

RUSSELL, FROM PAGE 1

In the two years since the Leave campaign unexpectedly won, nobody, from the prime minister to Mr. Johnson to the Labour Party, has been able to come up with a plan for exiting the European Union that can satisfy both a majority in Parliament and the expectant public. Why? Because fulfilling the false promises peddled by Mr. Johnson during the campaign is impossible.

The gulf between the easy, prosperous, productive Brexit that its voters are impatiently expecting, and the grim, complicated cost of disentangling economies that have been intertwined for decades has poisoned and paralyzed British politics.

The Conservatives' leaders cannot admit to the electorate that they were deceived without splitting the party. And instead of apologizing for misleading voters, Mr. Johnson and the other Brexiters have doubled down, taking refuge in optimistic slogans and vapid promises, refusing to believe the increasingly agitated evidence from hospitals, airlines, farmers, supermarkets and factories that a hard Brexit will damage them all.

Last week, Mrs. May finally attempted to force a recognition of reality on her divided cabinet by coming up with a compromise; a partial Brexit that allows goods free access in and out of Europe at the cost of accepting many European rules. It was an imperfect plan, but still it provided, finally, a starting point for negotiations with Brussels.

For three days, that compromise held, until the first political delusionist, the Brexit Secretary David Davis, broke free, still claiming that in some magical future Britain could get almost everything it wanted, if only the country would just stand by its demands.

Petrified of being outflanked, Mr. Johnson followed suit, bringing with him the implicit threat that he could

lead a rebellion against the government that other hard-line Brexiters will follow. It is a desperate move by a man who has lost almost all the credibility he had three years ago.

All of Mr. Johnson's weaknesses have been exposed: his lazy reluctance to do detail, his preference for bluster over thinking, his contempt for business. The campaign was meant to secure his future; instead, in damaging the country, he fears he has wrecked his own future, too. As one of his allies told me last month: "He knows that the verdict of history is about to come down on him — and bury him."

Mr. Johnson seems to believe that this is his last chance to become prime minister: After his resignation this week, he hopes to be reborn as a rebel who will lead the party. But more likely is that he will once again create political chaos without delivering what he wants.

Two years ago, the side effect of Mr. Johnson's ambitious maneuvering was to split the country and risk the prosperity and security of all Britons for decades. Now, just as a fragile basis for negotiation emerges, his selfish drive for vindication, attention and admiration threatens that, too.

It is petrifying that the deliberate deceptions and wild ego of one man can so mislead a nation. (Americans know all about that.) One insider told me that Mrs. May was prepared for Mr. Johnson's defection, and will outflank him, persuading wavering Conservatives that the time for fantasy has passed.

But Britain is teetering on the edge, on the verge of making catastrophic, irreversibly damaging mistakes. The danger is that Johnson might tip the balance in the wrong direction once again.

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Texas Latinos and the G.O.P.

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Voter suppression and gerrymandering aside, Mr. Muniz believes more grass-roots work and encouragement of civic engagement could build the party's Latino wing, but today's Republican leadership — in Texas and nationally — can't even find those places with a map. Mr. Muniz is a Bush-era Republican and knows its smaller South Texas towns and urban neighborhoods where the battles have to be waged. Old-style Republicans — moderate, Bush-era people — have to learn new ways. "This is not Midland, Tex., where you jump off a golf cart," Mr. Muniz said.

As for Cynthia? She was busy when I called the other day, giving a tour of her plant to some vice president of something or other, another white guy she'd have to convince of her competency as a woman and as a Mexican-American. She gave me a long sigh when I asked about President Trump.

"I think the Republican Party is in the middle of a change, just like everything else in the world," she told me, sounding like the conservative she is. She wasn't angry, she said, just disappointed. She wants to be a loyal Republican, but she has come to see that the people leading the party these days don't speak to the ideals that fueled her dreams.

"You have to adapt to change. We have not been able to adapt our Republican beliefs to the world we live in," she said, and I started to hear just a hint of doubt as she spoke about the party she loves, the one that clearly wants nothing to do with her. "We need the Republicans who made America different. Where are the Lincolns of the world? That's not them anymore."

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