Five Reasons Why the GOP Rushed to Confirm Kavanaugh

After Donald Trump nominated Brett Kavanaugh for the Supreme Court, Trump and the GOP leadership mounted a full-court press to ram through his confirmation before October 1, the first day of the Court's new term, for five good reasons, says Marjorie Cohn.

By Marjorie Cohn
Truthout

Why the rush?

The Republican Party and Donald Trump wanted Brett Kavanaugh on the U.S. Supreme Court before the November 6 midterm elections because if the Democrats had achieved a majority in the Senate, there may not have been sufficient votes to confirm him.

But the real hurry to get Kavanaugh confirmed had more to do with the several cases on the Supreme Court's docket: Republicans are hoping to ensure the outcome of several hot-button cases, including those involving double jeopardy, immigration, age discrimination and the Endangered Species Act. Moreover, there is the possibility that the Supreme Court could also decide to take up additional cases affecting gerrymandering, gay and transgender rights, and the separation of church and state.

Below is an in-depth explanation of the top five reasons why the GOP rushed to confirm Kavanaugh in time for him to affect these cases currently on the Supreme Court docket.

1) Double Jeopardy

Potentially most consequential for Trump is the case of *Gamble v. US*, which could affect his ability to pardon his associates, and even himself. On June 4, 2018, Trump tweeted, "I have the absolute right to PARDON myself."

The pardon power, located in Article II, section 2 of the Constitution, says, "The president … shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." It limits the president's pardon power to federal offenses.

In *Gamble v. US*, the justices will decide whether prosecuting a person in both state and federal courts for the same crime violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution, which states, "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb …"

For 150 years, the Supreme Court has held that state and federal courts are separate sovereigns, so a person can be prosecuted in both jurisdictions. After the police officers who beat Rodney King were acquitted in state court, they were tried and convicted in federal court.

If the Court follows its long-standing precedent, Trump could exercise his pardon power in federal proceedings but not in subsequent state proceedings for the same offense. Even if Trump were to pardon Paul Manafort, who was convicted of fraud in federal court, New York and Virginia state prosecutors could still bring charges against him.

It is not settled whether a sitting president can be indicted for a criminal offense. A presidential self-pardon is unprecedented. But if Trump were charged in a federal prosecution and he endeavored to pardon himself, the state of New York could then file criminal charges against him regarding the same matter. Under current law, Trump would be powerless to pardon himself in the state case.

If the justices narrow the scope of the Double Jeopardy Clause, however, state authorities would not likely be able to file criminal charges after Trump had exercised his pardon power in a federal case regarding the same matter.

Kavanaugh has said a sitting president should not be "distracted" by having to answer to a civil or criminal case, notwithstanding the Court's ruling in *Clinton v. Jones.* He has demonstrated extreme deference to presidential power and would likely vote to limit the criminal exposure of Trump and his associates.

2) Immigrants' Rights

The justices will decide in *Nielson v. Preap* whether the government can detain immigrants for the duration of their deportation proceedings, without a hearing, because they have past criminal records.

Kavanaugh's record demonstrates contempt for immigrants' rights.

In *Garza v. Hargan,* Kavanaugh wrote in dissent that the majority was creating "a new right for unlawful immigrant minors in US government detention to obtain immediate abortion on demand." He would have imposed an even longer waiting period on a 17-year-old undocumented immigrant who had fulfilled all state

requirements to secure an abortion.

Kavanaugh voted in *Agri Processor v. NLRB* to annul the results of a union election, charging it was "tainted" by immigrants' votes.

And in *Fogo de Chao v. Department of Homeland Security,* Kavanaugh ruled against granting special visas to Brazilian workers in cases where US workers could perform the same jobs.

Kavanaugh would likely vote to uphold mandatory detention of immigrants in the pending case.

3) Age Discrimination

In *Mount Lemmon Fire District v. Guido*, the Supreme Court will determine whether the Age Discrimination in Employment Act applies to state and local employers who have less than 20 employees.

After the Mount Lemmon Fire District in Arizona laid off John Guido and Dennis Rankin, the district's two oldest employees, the Equal Opportunity Employment Commission (EEOC) concluded that the district had engaged in employment discrimination. The Ninth Circuit Court of Appeals agreed with the EEOC, but since there is a split of authority among the courts of appeals on the parameters of the Age Discrimination in Employment Act, the Supreme Court agreed to hear the case.

Kavanaugh's employment decisions favor employers over employees. He would likely rule against Guido and Rankin in the case pending before the Supreme Court.

4) Endangered Species Act

The first case argued before the Supreme Court on October 1 was *Weyerhaeuser Co. v. US Fish and Wildlife Service*. It pits the fate of the dusky gopher frog — an endangered species — against private property rights. The case also raises the issue of when courts should defer to rulings of government agencies.

Under the Endangered Species Act, the US Fish and Wildlife Service is charged with identifying species that are endangered and designating "critical habitats" that are "essential for their conservation."

In this case, the Service designated private property in Louisiana as a "critical habitat" for the endangered frogs. The land is owned by a group of companies, including Weyerhaeuser, which holds a long-term timber lease for the entire area. The designated land contains ephemeral ponds the frogs require in order to breed, even though they don't live there now. The designation could

limit the development of the land and result in a substantial loss of profits, as the companies would be required to replace existing trees with different species, cease timber management activities, and permit the land to be managed and populated with frogs.

The Fifth Circuit Court of Appeals upheld the Service's designation, relying on the long-standing "Chevron deference" – a doctrine requiring that when a law is ambiguous, courts must defer to an agency's reasonable construction of the statute. The question is whether the courts should defer to the Service's designation of "critical habitat" for the frogs.

Courts that have given deference to agency interpretations ensured essential protections, including deferring to:

– The National Labor Relations Board's reasonable determination that live-haul workers, who catch and transport live chickens, are employees entitled to protections of the National Labor Relations Act;

– The Environmental Protection Agency's (EPA's) rule requiring states to reduce emissions from power plants that travel across state lines and harm downwind states;

– The Department of Labor's interpretation of portions of the Black Lung Benefits Act that make it easier for coal miners afflicted with black lung disease to receive compensation; and

– The EPA's revision of regulations under the Toxic Substances Control Act that provide more protection from exposure to lead paint.

Kavanaugh favors narrowing Chevron deference. He would likely rule against the frogs and in favor of the property owners.

5) Additional Cases on Gerrymandering and More

The Supreme Court may also decide to hear cases involving gerrymandering, church-state separation, and employment discrimination against gay and transgender people.

Kavanaugh's record on voting rights does not augur well for his willingness to limit gerrymandering that restricts voting rights.

And Kavanaugh consistently scorns the separation between church and state.

Anthony Kennedy, whom Kavanaugh would replace, wrote the Court's landmark opinionsupholding consensual homosexual conduct and same-sex marriage. During

his confirmation hearing, Kavanaugh refused to say that *Obergefell v. Hodges*, in which the Court upheld the right of LGBTQ folks to marry, was correctly decided.

Republicans knew Kavanaugh would provide a reliable vote against immigrants, workers, voters, and gay and transgender people. He would deliver a dependable vote for employers, private property and church-state bonding. The GOP can also rest assured that Kavanaugh will do his best to immunize Trump from criminal liability and enable him to continue their mean-spirited, right-wing agenda.

For these reasons, Trump and the Republicans wanted Kavanaugh to join the Supreme Court immediately.

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Sex, Lies and Privilege: The Kavanaugh Case

The use of identity politics by establishment Democrats to obscure a violent and hegemonic foreign policy has led many clear-minded people to conflate the very real problem of sexual assault, with a liberal Democratic agenda, says Joe Lauria.

By Joe Lauria
Special to Consortium News

We may not learn anything new about the Brett Kavanaugh affair when the FBI finishes its week- long investigation. It may still ultimately come down to who you believe. But based on his performance before the Senate Judiciary Committee, Kavanaugh left few doubts about his fitness for the U.S. Supreme Court.

His tirade, crying, petty lies, interruptions of senators and demands

they answer *his* questions—often about beer—and not *theirs*, showed Kavanaugh lacks the emotions and honesty to sit on a bench.

His blatant partisan attacks shattered the myth of impartial justices who just stick to the law.

Lawyers who stand before the Supreme Court are warned not to anger a justice, lest it override the merits of a case. Imagine being a Democrat and standing before Justice Brett Kavanaugh.

His performance was difficult to satirize. *Saturday Night Live*'s routine is as troubling as what actually happened.

Brett the Belligerent

Kavanaugh stormed into the hearing with a strategy: go ballistic, deny everything and hope indignant outrage will carry the day. His supporters saw this as refreshing.

It's said Donald Trump coached him. Trump has certainly created an atmosphere to enable such behavior, even in the Senate. Some Kavanaugh supporters like the frank talk as a repudiation of "aristocratic" speech by those in power.

With Republican votes in his vest pocket, Kavanaugh was free to shout down Democrats on the panel. It won't go down as a great moment in U.S. Senate history:

(SEN. SHELDON) WHITEHOUSE (D-RI): So the vomiting that you reference in the Ralph Club reference, related to the consumption of alcohol?

KAVANAUGH: Senator, I was at the top of my class academically, busted my butt in school. Captain of the varsity basketball team. Got in Yale College. When I got into Yale College, got into Yale Law School. Worked my tail off.

WHITEHOUSE: And did the world "ralph" you used in your yearbook…

KAVANAUGH I already – I already answered…

WHITEHOUSE: … refer to alcohol?

KAVANAUGH … the question. If you're…

WHITEHOUSE:: Did it relate to alcohol? You haven't answered that.

KAVANAUGH I like beer. I like beer. I don't know if you do…

WHITEHOUSE: OK.

KAVANAUGH … do you like beer, Senator, or not?

WHITEHOUSE: Um, next…

KAVANAUGH What do you like to drink?

WHITEHOUSE: Next one is…

KAVANAUGH Senator, what do you like to drink?

The word "beer" came up 53 times in the testimony. Kavanaugh badgered other senators about their drinking habits.

After his meltdown in the witness chair, a single senator raised what should have been obvious to all. Mazie Hirono (D-HI) asked Kavanaugh: "Is temperament also an important trait for us to consider?"

He uttered a muffled "Yes." But he then launched into his filibustering. "So the answer is yes," Hirono cut him off. "I am running out of time. You know, we only have five minutes, so let me get to something else," which was: did Kavanaugh get belligerent when drunk?

No, he said. But he indeed showed how belligerent he could be when sober.

Brett the Partisan

In earlier testimony in September, Kavanaugh appeared the model of judicial restraint and non-partisanship. On Thursday he dropped all the pretenses.

"This whole two-week effort has been a calculated and orchestrated political hit," he said, "fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly

stoked about my judicial record, revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups."

"This is a circus," Kavanaugh said. "The consequences will extend long past my nomination. The consequences will be with us for decades." He then issued what can only be seen as a threat: "And as we all know, in the United States political system of the early 2000s, what goes around comes around."

The judge's outburst unleashed an attack from Sen. Lindsey Graham (R-SC) on Sen. Diane Feinstein (D-CA), the ranking member of the opposition party.

"I hope the American people can see through this sham," Graham screamed. "This is going to destroy the ability of good people to come forward because of this crap… If you vote no, you're legitimizing the most despicable thing I have seen in my time in politics."

And what would that be? The alleged Democratic conspiracy to use the alleged victim to smear Kavanaugh and derail his confirmation.

Feinstein said she tried to keep the name of Kavanaugh's accuser secret. Her staff had not leaked her name, she said, leaving the accuser's friends as the only ones who could have done it. After

reporters had begun stalking the alleged victim, she went on the record.

The Democratic Party did not invent Christine Blasey Ford. Keeping her name confidential, the Democrats tried unsuccessfully to get the FBI to investigate.

Kavanaugh's partisan background was revealed well before last Thursday's hearing. For instance, David Brock, a former conservative and now Clinton operative, wrote on Sept. 7: "Brett and I were part of a close circle of cold, cynical and ambitious hard-right operatives being groomed by GOP elders for much bigger roles in politics, government and media. And it's those controversial associations that should give members of the Senate and the American public serious pause."

As this close circle was watching Bill Clinton's 1998 State of the Union address, Brock noticed than "when the TV camera panned to Hillary Clinton, I saw Brett – at the time a key lieutenant of Ken Starr, the independent counsel investigating various Clinton scandals – mouth the word 'bitch.'"

"In a rough division of labor," within this group, Brock writes, "Kavanaugh played the role of lawyer – one of the sharp young minds recruited by the Federalist Society to infiltrate the federal judiciary with true believers." That plan will succeed if he is confirmed.

Kavanaugh played another part in the Starr investigation. "Kavanaugh took on the role of designated leaker to the press of sensitive information from Starr's operation," said Brock, who opposes his nomination. "That critical flow of inside information allowed Starr, in effect, to set a perjury trap for Clinton, laying the foundation for a crazed national political crisis and an unjust impeachment over a consensual affair."

Stirring up right-wing conspiracy theories was another of Kavanaugh's tasks, Brock said. "A detailed analysis of Kavanaugh's own notes from the Starr Investigation reveals he was cherry-picking random bits of

information from the Starr investigation — as well as the multiple previous investigations — attempting vainly to legitimize wild right-wing conspiracies."

In one of the biggest partisan, political footballs of the 1990s, Kavanaugh also represented, on a pro bono basis, six-year-old Elian Gonzalez after the Clinton administration's Immigration and Naturalization Service decided to return him to Cuba.

It gets worse. Because of his work in the George W. Bush administration, Amnesty International called for a hold on Kavanaugh's confirmation "unless and until any information relevant to Kavanaugh's possible involvement in human rights violations—including in relation to the U.S. government's use of torture and other forms of ill-treatment, such as during the CIA detention program—is declassified and made public."

Francis Boyle, an international law professor at the University of Illinois, said:

> "Contrary to the mantra that the Democrats on the Senate Judiciary Committee have it in for Kavanaugh, they've largely let him off the hook on a number of critical issues, instead favoring theatrics."
>
> "While there's substantial attention being paid to the serious charges of sexual assault by Kavanaugh, there's been very little note that he is a putative war criminal. Specifically, recently released documents show that while Kavanaugh worked for the George W. Bush administration, one of the people he attempted to put on the judiciary was John Yoo, who authored many of the justifications for torture that came out of the Bush administration."

Brett the Liar

After the hearing Hirono told CNN Kavanaugh hadn't spoken the truth about witnesses at the party where his accuser testified he'd tried to rape her.

Kavanaugh denied the attack ever happened. He said the potential

witnesses denied it happened too. In fact they said they didn't recall it happening. Hirono said a judge should know the difference between denial and not knowing.

There were other fibs.

WHITEHOUSE: … Judge, have you — I don't know if it's "boufed" or "boofed" — how do you pronounce that?

KAVANAUGH: That refers to flatulence. We were 16.

WHITEHOUSE:: Devil's triangle?

KAVANAUGH: Drinking game.

WHITEHOUSE: How's it played?

KAVANAUGH Three glasses in a triangle.

WHITEHOUSE: And?

KAVANAUGH You ever played quarters?

WHITEHOUSE: No (ph).

KAVANAUGH: OK. It's a quarters game.

Online "urban dictionaries" give quite different meanings to the terms "boofing" and "three glasses in a triangle."

He claimed he had no connections to Yale, but apparently his grandfather went to Yale.

Smearing the Alleged Victim

The use of identity politics by establishment Democrats to obscure a violent and hegemonic foreign policy has led many otherwise clear-minded people to conflate the very real problem of sexual assault with a liberal Democratic agenda

That has led to facile belief in Kavanaugh's rant that this is all a Democratic plot against him.

It is up to him to prove that. In the meantime, believing this to be

only a political game makes it easy to dismiss what we know about how sexual assault victims remember, and react to their attacks. There is a big body of evidence about memory, and the reluctance to report such crimes.

“Dr. Ford has at times been criticized for what she doesn’t remember from 36 years ago,” Sen. Patrick Leahy (D-VT) said at the hearing. “But we have numerous experts, including a study by the U.S. Army Military Police School of Behavioral Sciences Education, that lapses of memory are wholly consistent with severe trauma and stressful assault.”

Ford is being smeared on social media for supposedly making things up and for waiting too long to speak up. Being smeared is a principal fear that keeps victims silent.

Some of those questioning Ford’s memory have evidently never been sexually attacked.

I am not questioning it, because someone tried to sexually attack me. I was an altar boy at a parish church in the Bronx. After mass a certain priest would talk to me about religion. Then one time he gave me the wine to drink that was used in the ceremony. That led to him massaging my shoulders. Then one day he suddenly swooped down to kiss me on the lips and attempted to un-zip my trousers. I did not understand what it meant but I knew it was wrong. I immediately ran away, all the way back to my house across the street and quit being an altar boy. As we know today, many children have not been so lucky to escape the clutches of pedophile priests.

If you ask me how old I was I can’t remember. I may have been eight or nine or ten. I don’t remember what season it was. I can’t remember just about any other details. But I remember exactly what was done to me and the name of the person who did it. And that was more than 50 years ago.

So when Ford cannot recall the date or the exact place where she says she was attacked, it does not mean she wasn’t. People who ask why she waited 36 years, don’t understand the reluctance to report these

crimes: many people won't believe you and when they do, often blame the victim.

I didn't tell anyone because I didn't think they'd believe that a priest was capable of such a thing. This was in the mid-1960s before the pedophile priests scandal had broken.

I remember this priest once joking that he wanted to be pope. In this fantasy if he had really been a candidate for pope years later I would have come forward, yes, out of a sense of civic duty. That's what Ford said motivated her, despite the pain she knew she'd put herself through.

When the first stories of the priests scandals started to appear during the 1980s I told my family for the first time what had happened to me. One family member ridiculed me, laughing about me and the priest being a couple.

I do not feel traumatized by my experience and rarely think about it. But I was reminded of it as this story continues to dominate. And it gave me insights into Ford's memory.

In contrast to Kavanaugh's outbursts, she was composed, though shaken, as she spoke of what happened.

Had she or any woman at the hearing behaved liked Kavanaugh in that situation, she would of course have been immediately dismissed as lacking all credibility. The double standard was on full display. Kavanaugh carried on and he's on the verge of a lifetime appointment. Had any of the five female senators in the room (all Democrats) behaved like Lindsey Graham, they would have put their political futures in jeopardy.

There Goes the Judge

Democrats on the panel wasted much of their time trying to get Kavanaugh to call for an FBI investigation. He refused to. If he was as innocent as he professed, why should he worry?

Of all the witnesses the FBI is talking to, probably none is more

important than Mark Judge, the Kavanaugh friend that Ford said was in the room during the alleged assault. The FBI began questioning Judge on Monday, according to his lawyer.

It was inexcusable, though perfectly understandable, that the Republican majority on the committee did not subpoena Judge. Instead he offered a statement, written by his lawyer, which he signed "under penalty of felony."

Testifying to Congress under oath is under penalty of perjury. Lying to an FBI agent is a crime.

Judge's statement said: "I have no memory of the alleged incident … I do not recall the party described in Dr. Ford's letter. More to the point, I never saw Brett act in the manner Dr. Ford describes."

Making a statement prepared by your lawyer is in no way the same as being examined by a senator or an FBI agent in which the subject's memory can be probed and his answers questioned.

Yet Kavanaugh, a lawyer and federal judge who presumably knows these things, tried to palm off Judge's letter as the same thing.

LEAHY: If she's saying Mark Judge was in the room then, then he should be in the room here today. Would you want him called as a witness?

KAVANAUGH: Senator, this allegation came into the committee…

LEAHY: No, I'm just asking the question. Would you want him to be here as a witness?

KAVANAUGH: He's — he's already provided sworn testimony to the committee. This allegation's been hidden by the committee…

LEAHY: Now, well…

KAVANAUGH: … by — by members of the…

LEAHY: … it hasn't been — it has not been investigated by the FBI. The committee has refused to allow it to be.

KAVANAUGH: It was dropped on …

KAVANAUGH: … it was sprung.

LEAHY: It was not investigated by the FBI, and he has not been called where he might be under oath.

KAVANAUGH You see (ph) he's provided sworn testimony and the…

LEAHY: He has — he has not…

KAVANAUGH … Senator — Senator, let me — let me finish. He — the — the allegation came in weeks ago and nothing was done with it by the ranking member.

And then it's sprung on me…

Though the Republicans resisted it, bringing in the FBI, even for just a week, shows the country the Senate is doing its due diligence. If in the end the GOP confirms him, that will benefit the party. It's amazing the Republicans resisted the FBI involvement for so long, as if Kavanaugh has something to hide.

Entitlement

There are possibilities that Kavanaugh is not lying, but instead doesn't remember the incident.

First, he was not a victim so he might well have forgotten it, especially if there were similar escapades at the numerous high school parties he attended.

Second, Ford was outside his circle of friends. He may not have known her name.

Third, he may have been so drunk that he didn't remember what he did, which would mean he lied under oath that he was never so drunk that he couldn't remember what he did.

His supporters are going on about "innocent until proven guilty." But of course as many commentators have noted, this is not a court of law but a glorified job interview under oath. The reverse may well be true: he has to prove he has the character and qualifications for the job.

Kavanaugh came off like a very privileged white guy who went ballistic because he thinks someone without power is trying to stop him from a job he thinks he is owed and was groomed for.

It always comes down to power, doesn't it?

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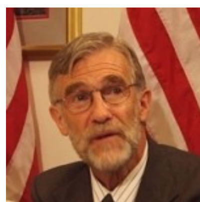
Will 'God' Save Kavanaugh?

That attitudes may not have changed from an older generation to Kavanaugh's – and may have gotten still worse, and not only at elitist Georgetown Prep, but in society at large – is sad beyond telling, says Ray McGovern.

By Ray McGovern
Special to Consortium News



"Are boys really better than girls? I know you are one, but please try to be fair," asked eight year-old Helen in a letter to God.

From my own experience while a callow youth at a Jesuit boys-only high school, I believe it highly unlikely that Georgetown Jesuit Prepster Brent Kavanaugh ever thought of asking God the question Helen posed. For Kavanaugh, as for the rest of us, the answer was self-evident – much clearer than 13th century Thomas Aquinas's "proofs" for the existence of God.

At my Jesuit high school, as at Kavanaugh's, the concept of God-like male supremacy was deeply entrenched – from the priests and other all-male faculty to the *bonhomie* of the young "good-natured men" in the smoke-infested Senior Room.

The Jesuits encouraged us to think of ourselves – each one of us – as exceptional, down to the last man, so to speak. It was Lake Wobegone on

steroids. We had been pre-selected to become the future leaders of the sole exceptional country in the world – an ethos that prevails, in spades, at Georgetown Prep.

Happily, we were spared Aquinas's "insights" on women, whom he described as defective, misbegotten males. It was not until college that I learned Thomas deemed women "the result of some debility … or of some change effected by external influences, like the south wind, for example, which is damp, as we are told by Aristotle."

Is God 'One of the Boys'

Even without Aquinas, though, the culture of the Prep spoke loudly, if less directly, of the subordinate status of women. It should come as no surprise, then, that this prep-school milieu left us precocious adolescents quite comfortable with an all-powerful God who was "one of the boys."

For me, though, high school was a half-century ago. The reality that attitudes have not changed between my generation and Kavanaugh's – and may have gotten still worse, not only at Jesuit-run elitist Georgetown Prep, but in society at large – is sad beyond telling. Can we forget that the 2016 election went to a man who bragged about sexually assaulting women? "When you're a star, they let you do it. You can do anything." … and that this same man is now defending Kavanaugh "all the way."

To Be Fair

Taking a cue from eight year-old Helen, let's try to be fair. Who among us is without blame? Most of us still refer to God as "he." And how many of us still visualize the Last Supper, through the oils of Leonardo da Vinci, as a stag party rather than the traditional Passover meal it was – with women and children galore. (Psst! DaVinci wasn't even there.)

Perhaps worst of all, how many of Catholics join Kavanaugh in bowing submissively to the arbitrary ban on women priests, a prohibition based not on Scripture or the practice of the first-century Church, but rather on out-and-out misogyny.

In his kid-gloves interview on Fox Tuesday evening, Kavanaugh again denied having sexually assaulted anyone, pointedly adding, "I have faith in God." But the tide has turned. This has become clearer with every new accusation against him, plus the unseemly rush by Judiciary Committee Chair Charles Grassley (R, Iowa) and his ten white male Republican apostles to ram through the confirmation. Like the protagonists of the Greek tragedies – Kavanaugh will

need a *Deus ex Machina* to pluck him out of his distress. "Supportive" comments on Wednesday from the aforementioned "star," who now happens to be president, are not going to help.

Those who know Washington are aware that the closest thing to an all-powerful God is a congressional committee chairman. But it does not help Kavanaugh's candidacy when Sen. Grassley seems to know nothing other than the power-over type of God — the same model that dominated what Kavanaugh calls his "formative years" at Georgetown Prep.

Throw in Grassley's obtuseness and insensitivity, and add a pinch of omniscience from the likes of Sen. Orin Hatch (R, Utah) and you have a recipe that could spell defeat. Asked why he branded "phony" the very recent allegation by Deborah Ramirez, a Yale classmate of Kavanaugh, Hatch snapped, "Because I know it is, that's why."

If Kavanaugh's nomination does reach the Senate floor, what will be most interesting of all will be to observe the degree to which Senators Susan Collins (R, Maine) and Lisa Murkowski (R, Alaska) have themselves internalized male supremacy — whether of God or of demigod Republican committee chairmen.

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Europe Shows a Polarized Supreme Court is Not Inevitable

The U.S. Supreme Court is riven by political division and the nomination process riddled by partisan battles, unlike Europe's highest courts, argues David Orentlicher.

By David Orentlicher

United States President Donald Trump has nominated Brett Kavanaugh to replace retiring Supreme Court Justice Anthony Kennedy. His choice solidifies a conservative majority on the nation's nine-member highest court.

Trump's conservative bench could overrule Roe v. Wade, eliminating women's constitutional right to abortion. It also could condone political gerrymandering

and put LGBTQ people at further risk for discrimination by employers, landlords and business owners.

A politically polarizing court is not inevitable. In some European countries, the judicial appointment process is actually designed to ensure the court's ideological balance, and justices work together to render consensus-based decisions.

Europe's Centrist Constitutional Courts

I am a scholar of high courts worldwide, which are typically called "constitutional courts."

Europe's constitutional courts differ from country to country, but they have some important similarities. They generally decide only constitutional questions posed by the legislature or by lower courts, rather than cases brought by individuals.

Oral arguments are rare, and the justices deliberate in private, considering written arguments. The courts generally have more members than the U.S. Supreme Court – 12 to 20 judges – but they also often operate in smaller panels.

Judicial appointments in such systems rarely provoke the kind of partisan confirmation battle that is likely to play out now in Washington.

That's because many European countries ensure that all sides of the political spectrum have a say in choosing constitutional court judges.

In Germany, for example, the legislature conducts the appointment process in a bipartisan fashion. The political parties negotiate over the nominees, identifying candidates who are acceptable to both the left and right.

Because each justice must be approved by a two-thirds vote, all candidates need to appeal to lawmakers from across the political spectrum.

Spain and Portugal likewise require a legislative supermajority to approve constitutional court nominees.

In the U.S., by contrast, the president picks a Supreme Court nominee – in this case, Judge Kavanaugh, a conservative mainstay on the D.C. Circuit Court of Appeals. He must now be confirmed by a simple majority – 50 percent, plus one vote – in the Senate.

Compromise Works

Many European courts also take a more centrist approach to issuing rulings.

Rather than deciding cases by majority vote, as the U.S. Supreme Court does, constitutional courts in Europe often operate on consensus. German and Spanish justices rarely write dissenting opinions to express their disapproval of a court ruling. Dissents do not exist in Belgium, France and Italy.

When all justices have to agree, compromise is essential.

The U.S. Supreme Court itself recently demonstrated this. More than a year elapsed between the death of Justice Antonin Scalia in 2016 and the appointment of Justice Neil Gorsuch in 2017. During that time the court was evenly split between liberals and conservatives, four to four.

The eight justices worked harder to find common ground on divisive issues. When asked to decide whether religiously oriented employers must provide health coverage that covers contraception, they fashioned a compromise: Insurance companies would be required to provide coverage to employees without the employers having to take any action to ensure that the coverage was provided.

Centrist Courts are Popular

Somewhere between two-thirds and three-quarters of Germans express confidence in their highest court, and approval is strong from both the left and right.

In contrast, public approval of the U.S. Supreme Court has been steadily declining for years. A majority of Americans once expressed strong confidence in the court. Today, a Gallup poll finds, only 37 percent do.

While public approval has historically tended to be similar for Democratic and Republican voters, the past two decades have seen increasing polarization. Currently, 44 percent of Republicans have a great deal of confidence in the court. Just 33 percent of Democrats do.

If Kavanaugh is confirmed by the Senate, the court will likely swing decidedly to the right, further polarizing Americans.

Conservative Americans can feel confident that their interests on abortion, civil rights and the role of religion in society are well reflected on the Supreme Court. Liberal and moderate Americans – who make up about 60 percent of the U.S. population – cannot.

A one-sided court majority also increases the risk of ill-advised legal decisions. Numerous studies on decision-making find that groups make better decisions when they take into account a diversity of perspectives.

Can the US Depoliticize its Courts?

The Senate and the Supreme Court could agree to do things differently in the United States.

Consensus-based judicial decision-making is only required by law in some European countries. Many European constitutional courts have simply imposed this norm upon themselves and developed policies to ensure consensus is reached.

The U.S. Supreme Court itself even observed a norm of consensual decision-making for most of its history. Until 1941, the justices typically spoke unanimously. Only about 8 percent of cases included a dissenting opinion. Now, one or more justices dissent in about 60 percent of rulings.

Chief Justice John Roberts has pushed for greater consensus on the court, saying that the court functions best "when it can deliver one clear and focused opinion."

With Justice Kennedy's retirement, Justice Roberts will sit at the ideological middle of the court. He could use that position to forge judicial consensus.

Going forward, the Senate could also insist on more centrist appointments. For example, it could refuse to confirm the president's nominees if they do not appear on a list already approved by a special bipartisan Senate committee.

Political polarization in the United States has led to highly partisan battles over Supreme Court justices, jeopardizing the credibility country's celebrated highest court. European countries have figured out how to minimize partisan conflict in their judicial systems.

The U.S. would do well to follow that example.

This article was originally published on The Conversation.

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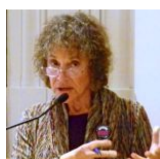
Supreme Court Ignored International Law in Upholding Muslim Ban

The Supreme Court majority ignored two treaties and customary law in upholding Donald Trump's latest travel ban, which the president himself said targeted Muslims, reports Marjorie Cohn.

By Marjorie Cohn



The Supreme Court's opinion last month in *Trump v. Hawaii*, affirming Donald Trump's Muslim ban, has permitted the United States to act in flagrant violation of international law.

Under the guise of deferring to the president on matters of national security, the 5-4 majority disregarded a litany of Trump's anti-Muslim statements and held that the ban does not violate the First Amendment's Establishment Clause, which forbids the government from preferring one religion over another. Neither the majority nor the dissenting opinions even mentioned the U.S.'s legal obligations under international human rights law.

The travel ban violates two treaties to which the United States is a party: the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. It also runs afoul of customary international law.

Both of these treaties and customary international law prohibit the government from discriminating on the basis of religion or national origin. Trump's Muslim ban does both.

Trump v. Hawaii "signals strongly that international law in general, and international human rights law in particular, no longer binds the United States in federal courts," Aaron Fellmeth, professor at Sandra Day O'Connor College of Law, wrote me in an email. "Fortunately, it does not squarely hold that, but the effect may prove to be the same. For now, the Supreme Court appears determined to be complicit in U.S. human rights violations and cannot be relied upon as a

check on the Executive Branch."

The case that the Supreme Court ruled on involved the legality of Trump's third travel ban. Issued by Trump in a "Proclamation" on September 24, 2017, the third iteration of the ban restricts travel by most citizens of Libya, Syria, Iran, Yemen, Chad, Somalia and North Korea. The ban forbids everyone from Syria and North Korea from obtaining visas. Nationals from the other six countries have to undergo additional security checks. Iranian students are exempted from the ban. The ban also forbids Venezuelan government officials and their families from traveling to the U.S.

More than 150 million people, roughly 95 percent of them Muslim, are affected by the ban.

Two prior iterations of the ban restricted travel of citizens from only Muslim-majority countries. After federal courts struck them down, Trump appeared to cosmetically added Venezuela and North Korea to avoid charges of religious discrimination.

As Justice Sonya Sotomayor, joined by Ruth Bader Ginsburg, wrote in her dissent, "it is of no moment" that Trump included "minor restrictions" on North Korea and Venezuela – two non-Muslim-majority countries. Travel by North Korean nationals was already restricted and the ban only bars travel by Venezuelan officials and their families.

Court Never Addressed International Law

All of the justices on the Supreme Court ignored significant international law arguments in their majority and dissenting opinions in spite of an amicus brief signed by 81 international law scholars, including this writer, and a dozen non-governmental organizations. The amicus brief drew attention to the travel ban's violation of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, both of which the United States has ratified.

Ratification of a treaty not only makes the United States a party to that treaty, its provisions also become part of U.S. domestic law under the Supremacy Clause of the Constitution, which says treaties "shall be the supreme law of the land."

Customary international law arises from the general and consistent practice of states. It is part of federal common law and must be enforced in U.S. courts, whether or not its provisions are enshrined in a ratified treaty. Courts have a duty to rein in federal executive action, which conflicts with a ratified treaty.

In *Trump v. Hawaii*, the high court concluded that the ban did not violate the Immigration and Nationality Act. The international law scholars argued in their amicus brief:

> The Immigration and Nationality Act and other statutes must be read in harmony with these international legal obligations pursuant to the Supremacy Clause of the Constitution and long established principles of statutory construction requiring acts of Congress to be interpreted in a manner consistent with international law, whenever such a construction is reasonably possible.

But the Court did not construe the legality of the travel ban in light of U.S. treaty obligations and customary international law.

The the scholars argued that the primary thrust of the ban is to prohibit Muslims from entering the United States and thus constitutes religious discrimination. By singling out specific countries for exclusion, the ban also makes a prohibited distinction on the basis of national origin.

The International Covenant on Civil and Political Rights prohibits distinctions based on religion or national origin, which have “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of human rights and fundamental freedoms,” the United Nation Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, has said.

Although the Covenant does not generally “recognize a right of aliens to enter or reside in the territory of a State party … in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise,” the Human Rights Committee opined.

The Covenant also prohibits discrimination against the family: “The family is the natural and fundamental group of society and is entitled to protection by society and the State.” Immigrants and refugees who flee their countries of origin and come to the United States to reunify with their families are protected by the Covenant against discrimination based on religion or national origin. They need not be physically present in the United States to enjoy these protections.

The non-discrimination provisions of the Covenant on Civil and Political Rights also constitute customary international law. In 1948, the United States approved the Universal Declaration of Human Rights, which is part of customary international law. The declaration forbids discrimination based on religion or

national origin, guarantees equal protection of the law, and shields family life against arbitrary interference.

The International Convention on the Elimination of All Forms of Racial Discrimination also prohibits discrimination based on religion or national origin and doesn't confine its non-discrimination provisions to citizens or resident non-citizens. While the Convention "does not speak specifically to restrictions on entry of nonresident aliens," the scholars' amicus brief states, "The general language of [the Convention Against Racial Discrimination] expresses a clear intention to eliminate discrimination based on race or national origin from all areas of government activity."

States parties to the convention "shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination." Parties are required to outlaw speech that stigmatizes or stereotypes non-citizens, immigrants, refugees and people seeking asylum.

The Discriminatory Nature of the Travel Ban

Even though the Supreme Court majority held that the ban did not violate the Establishment Clause of the First Amendment, much evidence exists to the contrary.

The Establishment Clause says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." That means "one religious denomination cannot be officially preferred over another," according to Supreme Court case law.

After quoting a few of Trump's anti-Muslim statements, Chief Justice John Roberts noted, "the issue before us is not whether to denounce the statements"

but rather “the significance of those statements in reviewing a Presidential directive,” that is “neutral on its face” because he text doesn’t specifically mention religion. Roberts said the Court was “addressing a matter within the core of executive responsibility,” adding, “We must consider not only the statements of a particular President, but also the authority of the Presidency itself.”

Roberts wrote that the Court could consider the president’s statements “but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” Courts must give great deference to the president in immigration matters and will uphold his policy if it has any legitimate purpose, Roberts argued. “The entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility,” he said.

Sotomayor spent seven of the 28 pages of her dissent listing more than a dozen statements by Trump denigrating Muslims. She cited, in Trump’s words, the policy’s initial purpose as a “total and complete shutdown of Muslims entering the United States.” But that policy “now masquerades behind a façade of national security concerns,” Sotomayor wrote.

She quoted a Trump adviser who said, “When [Donald Trump] first announced it, he said, ‘Muslim ban.’” Sotomayor also listed Trump’s declarations that “Islam hates us,” “we’re having problems with Muslims coming into the country,” and “Muslims do not respect us at all.”

Trump said President Franklin D. Roosevelt “did the same thing” with his internment of Japanese Americans during World War II, Sotomayor noted. Trump

told a story about General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pig's blood. When he issued his first ban, Trump explained that Christians would be given preference for entry as refugees into the United States. He also retweeted three anti-Muslim videos.

"Taking all the relevant evidence together," Sotomayor wrote, "a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national security justifications." The Proclamation, she added, "is nothing more than a 'religious gerrymander.'"

Looking Ahead

There is hope that the most abhorrent effects of this case can be mitigated. Yale law professor Harold Hongju Koh wrote on Scotus blog that transnational actors – including nation-states, international organizations, non-governmental organizations, multinational enterprises and private individuals – will invariably file litigation in international fora based on international law to lessen the impact of the ruling in *Trump v. Hawaii*:

> [A]s they have done against other Trump policies, other transnational actors will invoke what I have called "transnational legal process" to contest and limit the impact of the court's ruling. As they did after losing the Haitian interdiction case at the Supreme Court 25 years ago, litigants will surely seek out international fora to make arguments against the travel ban based on international law.

The Constitution's Take Care Clause requires the president to "take care that the laws be faithfully executed." Trump has a constitutional duty to comply with U.S. legal obligations under both treaty and customary international law.

This article was reprinted with permission from TruthOut.

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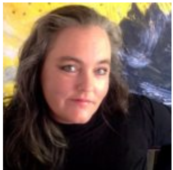
America Celebrates Lateral Move From Monarchy To Corporate Rule

Americans celebrate their independence 242 years ago today from Britain with little thought it seems about who rules them now, comments Caitlin Johnstone.

By Caitlin Johnstone



Today America celebrates its liberation from the shackles of the British Crown and the beginning of its transition into corporatist oligarchy, which is a lot like celebrating your lateral promotion from housekeeping to laundry staff. Fireworks will be set off, hot dogs will be consumed, and a strange yellow concoction known as Mountain Dew will be imbibed by patriotic high-fiving Yankees eager to celebrate their hard-fought freedom to funnel their taxes into corporate welfare instead of to the King.

Spark up a bottle rocket for me, America! In trouncing King George's red-coated goon squad, you made it possible for the donor class to slowly buy up more and more control of your shiny new government, allowing for a system of rule determined not by royal bloodlines, but by wealth bloodlines. Now instead of your national affairs being determined by some gilded schmuck across the pond, they are determined by the billionaire owners of multinational corporations and banks. These oligarchs have shored up their rule to such an extent that congressional candidates who outspend their opponents are almost certain to win, and a 2014 Princeton study found that ordinary Americans have no influence whatsoever over the behavior of their government while the will of the wealthy has a direct influence on US policy and legislation.

The elite class secured its stance as British Rule 2.0 by throwing their money behind politicians who they knew would advance their interests, whether those interests are in ensuring that the arms and munitions they manufacture get used frequently, the expansion of predatory trade policies, keeping tax loopholes open and keeping taxes on the wealthiest of the wealthy very low, deregulating corporations and banks, or enabling underhanded Wall Street practices which hurt the many for the benefit of the few. The existence of legalized bribery and corporate lobbying as illustrated in the video above have enabled the plutocrats to buy up the Legislative and Executive branches of the US government, and with these in their pockets they were eventually able to get the Judicial branch as well since justices are appointed and approved by the other two. Now having secured all three branches in a system of checks and balances theoretically

designed to prevent totalitarian rule, the billionaire class has successfully secured totalitarian rule.

By tilting the elections of congressmen and presidents in such a way as to install a corporatist Supreme Court bench, the oligarchs successfully got legislation passed which further secured and expanded their rule with decisions like 1976's *Buckley v. Valeo,* 1978's *First National Bank of Boston v. Bellotti,* and 2010's *Citizens United v. FEC*. This has had the effect of creating a nation wherein money equals power, which has in turn had the effect of creating a system wherein the ruling class is, in a very real way, incentivized to try and keep everyone else poor in order to maintain its rule.

Just as King George didn't give up rule of the New World colonies without a knock-down, drag-out fight, King George 2.0 has no intention of relinquishing its rule either. The oligarchs have been fighting to keep their power, and, in the money-equals-power system that they have built for themselves, this necessarily means keeping you from having money. Just as King George's kingship would have meant nothing if everybody was King, the oligarchs won't be oligarchs anymore if ordinary Americans are ever able to secure enough money for themselves to begin influencing their government within its current money-equals-power paradigm.

So if you've ever wondered why seemingly common sense matters like a living wage and healthcare as a right consistently get shot down by your government, this is why. In order to rule you as King George ruled you, the oligarchs need to make sure most of America is toiling just to keep its head above water. Progressives were able to mount an intimidating insurgency using tiny 27-dollar donations on 2016; imagine what they could do if ordinary working Americans were being paid their fair share of the U.S. economy?

The oligarchs can keep that from happening by continually escalating income inequality. They use their massive political power to repress the minimum wage, to undermine the power of unions, and to continually pull more and more energy away from socialist programs and toward the corporate deregulation of neoliberalism. If you don't depend on running the rat race for some corporate boss in order for your family to have health insurance, you're suddenly free to innovate, create, and become an economically powerful entrepreneur yourself.

America is a corporatist oligarchy dressed in drag doing a bad impression of a bipartisan democracy. Sometimes it doesn't even keep its wig on; a recent party at the Hamptons saw Jared Kushner, Ivanka Trump, Kellyanne Conway and Charles Koch mixing it up with Chuck Schumer and George Soros. When they're not dining on champagne and rare fillet together, these people pretend to be locked in a vicious partisan battle that is "tearing the nation apart," but at Lally

Weymouth's annual Southampton summer party the act stops and the oligarchs frolic together like children.

1776 turned out to be nothing other than a transition from one form of exploitative rule to another, but who knows? Maybe a year in the not-too-distant future will see America celebrating a *real* Independence Day.

This commentary was originally published on Medium.

Caitlin Johnstone is a rogue journalist, poet, and utopia prepper who publishes regularly at Medium. Follow her work on Facebook, Twitter, or her website. She has a podcast and a new book *Woke: A Field Guide for Utopia Preppers*. This article was re-published with permission.

Congress Weighs Indefinite Detention of Americans

A Senate bill under consideration could allow Donald Trump to indefinitely jail American citizens without charge if they oppose U.S. military action, says Marjorie Cohn.

By Marjorie Cohn

Under the guise of exercising supervisory power over the president's ability to use military force, Congress is considering writing Donald Trump a blank check to indefinitely detain U.S. citizens with no criminal charges. Alarmingly, this legislation could permit the president to lock up Americans who dissent against U.S. military policy.

The bill that risks conveying this power to the president is the broad new Authorization for Use of Military Force (AUMF), S.J.Res.59, that is pending in Congress. Senate Foreign Relations Committee chair Bob Corker (R-TN) and Democratic committee member Tim Kaine (VA) introduced the bipartisan bill on April 16, and it has four additional co-sponsors.

This proposed 2018 AUMF would replace the 2001 AUMF that Congress gave George W. Bush after the September 11 attacks. Although the 2001 AUMF authorized the president to use "all necessary and appropriate force" only against individuals and groups responsible for the 9/11 attacks, three presidents have relied on it to justify at least 37 military operations in 14 countries, many of them unrelated to 9/11.

But the 2018 AUMF would codify presidential power to make war whenever and wherever he chooses.

S.J.Res.59 allows the president "to use all necessary and appropriate force" against Iraq, Afghanistan, Syria, Yemen, Libya and Somalia, al-Qaeda, ISIS (also known as Daesh), the Taliban and their "associated forces" anywhere in the world, without limitation.

However, the bill contains no definition of "co-belligerent." A president may conceivably claim that a U.S. citizen who writes, speaks out or demonstrates against U.S. military action is a "co-belligerent" and lock him or her up indefinitely without charge. "Associated forces" is defined as "any organization, person, or force, other than a sovereign nation, that the President determines has entered the fight alongside and is a co-belligerent with al Qaeda, the Taliban, or ISIS, in hostilities against the United States or its coalition partners."

Under the new AUMF, the president could tell Congress he wants to use force against additional countries or "associated forces" that are not listed in the bill. It would put the burden on Congress to say no by a two-thirds vote, a virtually impossible margin to achieve in the current political climate.

The International Covenant on Civil and Political Rights — a treaty the United States has ratified, making it part of U.S. law under the Constitution's Supremacy Clause — forbids arbitrary detention without charge.

Supreme Court Has Not Ruled on It

Nevertheless, in the 2004 case of *Hamdi v. Rumsfeld*, the Supreme Court upheld the enemy combatant designation of U.S. citizen Yaser Hamdi, who had been apprehended in Afghanistan in 2001. But the Court limited its holding to people fighting against U.S. forces in Afghanistan, and did not include the broader "war on terrorism."

The Court also stated that U.S. citizens held as enemy combatants must be provided due process to contest the factual basis for their detention before a neutral decision maker.

The Supreme Court has not ruled on whether a U.S. citizen who is apprehended in the United States can be detained indefinitely. It declined to decide the case of José Padilla, who was arrested at Chicago's O'Hare International Airport in 2002 and held in military custody as an enemy combatant by the Bush administration, relying on the 2001 AUMF.

The Court ruled that Padilla's habeas corpuspetition was mistakenly filed in New

York instead of South Carolina. Justice Sandra Day O'Connor wrote for the Court's plurality, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," adding, "even the war power does not remove constitutional limitations safeguarding essential liberties."

Criminal charges were eventually brought against Padilla in 2005. He had been held in isolation for more than three years and tortured while in custody.

Padilla was tried and convicted in 2007 of conspiracy charges and providing material support to terrorism, and sentenced to 17 years imprisonment. In 2014, his sentence was increased to 21 years. Meanwhile, the Fourth Circuit and the Second Circuit U.S. Courts of Appeal came to opposite conclusions about whether an American citizen apprehended on U.S. soil could be held indefinitely as an enemy combatant.

"John Doe" is another American citizen detained by the U.S. government. In September 2017, the U.S.-Saudi citizen was named an enemy combatant for allegedly fighting for ISIS and has been held in military custody in Iraq ever since. Although the 2001 AUMF never mentioned ISIS, the government used it as a basis to detain Doe. In April, the Department of Defense attempted to transfer Doe to Saudi Arabia and avoid a judicial ruling in the case, but a federal judge in Doe v. Mattis blocked the move.

It is not clear how passage of the proposed 2018 AUMF would affect Doe's case.

Does AUMF Permit Indefinite Detention?

There is a 1971 U.S. statute that says, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." An AUMF is an Act of Congress.

Another Act of Congress is the National Defense Authorization Act for fiscal year 2012 (NDAA). Relying on the 2001 AUMF, the 2012 NDAA purported to codify the president's authority to hold U.S. citizens in military custody indefinitely.

Section 1021 of the NDAA says, "Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."

When he signed the NDAA, Barack Obama declared in a signing statement that section 1021 does not "limit or expand the authority of the President or the scope of the Authorization for Use of Military Force," pledging that "my

Administration will not authorize the indefinite military detention without trial of American citizens."

Obama's statement implied that while a president does have the power to indefinitely detain Americans, he chose not to exercise that power.

Sen. Lindsey Graham (R-SC) supported the NDAA, stating that it would "basically say in law for the first time that the homeland is part of the battlefield," adding that people could be held without charge by the military, "American citizen or not."

Hedges et al. v. Obama

Chris Hedges, Noam Chomsky, Daniel Ellsberg, and other human rights activists and journalists sued Barack Obama and the U.S. government in January 2012, claiming the 2012 NDAA would have a chilling effect on their freedom of speech because they could be arrested. A federal district court judge found section 1021(b)(2) unconstitutional and in May 2012 issued a permanent injunction prohibiting the government from relying on it.

But the Second Circuit Court of Appeals lifted the injunction in July 2013, stating that section 1021 of the NDAA "has no bearing on the government's authority to detain American citizen plaintiffs" because "Section 1021 simply says nothing about the government's authority to detain citizens." The Supreme Court refused to hear the case in April 2014, letting the Second Circuit's ruling stand.

Nothing in the 2018 AUMF would prevent the president from adding an American organization or individual to the list set forth in the bill, according to Christopher Anders of the ACLU.

The 2018 AUMF has no expiration date. Every four years, the president would be required to give Congress a proposal to repeal, modify or maintain the authorization. Once again, it puts the onus on Congress, by a two-thirds majority, to take contrary action.

S.J.Res.59 may not make it to the floor of the Senate and/or the House. Congress has thus far resisted enacting a new AUMF that could be seen in any way to limit the president's military authority.

Ironically, however, the enactment of this new 2018 AUMF could both enshrine the president's unlimited power to wage war and also provide the president with a basis for indefinitely detaining U.S. citizens in military custody without criminal charges.

If this bill were to pass, it would imperil our right to speak out and challenge whatever military adventures the president decides to undertake.

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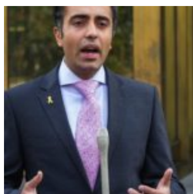
Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, former president of the National Lawyers Guild, deputy secretary general of the International Association of Democratic Lawyers and an advisory board member of Veterans for Peace. The second, updated edition of her book, Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues, was published in November. Visit her website: MarjorieCohn.com. Follow her on Twitter: @MarjorieCohn.

Four Lessons From the Strike on Syria

The lessons from last weekend's strike on Syria by the United States of America and two of its allies do not bode well for the future of democracy or the future of peace, says Inder Comar.

By Inder Comar



Lessons from the U.S. strike on Syria reveal uncomfortable truths about the current state of international affairs.

But they must be confronted, and dealt with, in order to create a better future.

Here are four lessons to take from the Syria strike:

Lesson One: Dictatorial Power

The Syria strike underscores that the powers of the Presidency, in matters of foreign affairs, are now those of a dictator.

President Trump, like his forebears, swept aside tepid concern that Congress had to weigh in on the legitimacy of any strike against a foreign power.

Instead, and like his predecessors, the President has taken a broad, Caesar-like view of his powers, marshaling American military might as a unitary actor, without any scrutiny.

The most that a few senators and members of Congress could do in the run up to

the attack was raise tepid, half-hearted questions over Twitter about the need for Congress to authorize an act of war, as the Constitution says.

That members of the most powerful legislative body in the world could do nothing other than tweet in the face of missile strikes speaks for itself.

As noted in "the Saleh v. Bush case", the Judiciary will not scrutinize executive conduct, either, because the President is presumed as acting in the best interests of the nation – even when committing heinous international crimes.

The Legislative and the Judicial branches have walked away from their constitutional roles, and are declining any mandate to oversee the Executive branch in matters of war.

Checks and balances are swept away. And the strike now sets further precedent for unilateral executive authority to attack or invade another country based. It is one person, and one person alone, who commands American military might, without scrutiny or later accountability.

Lesson Two: Death of Collective Security

The Syria strike underscored that the United Nations system of collective security is at death's door, and perhaps never coming back.

The U.N. suffered a critical blow to its legitimacy in 2003 because of the U.S. invasion of Iraq without Security Council authorization or evidence that the U.S. acted in self-defense under Article 51 of the U.N. Charter.

But the Syria strike further advances the perception that the U.N. has lost its role as a neutral, honest broker.

Smaller countries are realizing they are nakedly at the whim of the great powers. Bolivian president Evo Morales, in perhaps the strongest critique of the strikes to date (other than from Russia), warned that the United States is now the greatest threat to democracy in the world today.

It seems that like the League of Nations, the U.N. can only stand by as the storms of war gather.

The world is one attack away from a destructive, global war that could spread far beyond the borders of Syria or the Middle East.

Lesson Three: Bi-Partisan Perpetual War

The Syria strike affirms the American two-party consensus that perpetual war, and perpetual imperialism, is the open and intended purpose of American government and economic institutions.

Media outlets, concentrated by a handful of corporate owners, understand and exploit the perverse incentives that make war profitable, and they cheer on a war because it sells viewers to advertisers.

The revolving door in Washington D.C. means that government officials go on to lucrative consulting and think-tank jobs, where they research and advise the next generation of government leaders on how to promote imperialism abroad.

Tellingly, the voices questioning the Syria strike came from a minority wing of both parties. Perpetual war is the bipartisan consensus.

Lesson Four: Spiritual Crisis

There is a grave political, cultural and spiritual crisis in the United States today.

War has eaten at the country's soul and left Americans deprived of a consistent sense of ethics.

In any other country, an attack on another country would be a matter of grave concern, with protests threatening a ruling party in a parliamentary system.

But in the United States, where attacks are common in a presidential system,

another bout of militarism is absorbed with the morning coffee.

Hannah Arendt spoke of the banality of evil; she would write today about the banality of militarism, and the neutering of American public conscience.

The U.S. could be a tremendous source of good if it could change its ways and act as a real leader in building meaningful peace, environmental sustainability, and economic opportunity.

But there are almost no prominent voices advocating a peacetime economy and an end to imperialism. There are few influential voices with the imagination to think of something other than empire.

Inder Comar is the executive director of Just Atonement Inc., a legal non-profit dedicated to building peace and sustainability, and Managing Partner of Comar LLP, a private law firm working in technology. He is a recognized expert on the crime of aggression, the legality of the Iraq War, and international human rights. He holds a law degree from the New York University School of Law, and a B.A. and Master of Arts degree from Stanford University.

Restoring the Rule of Law

The rule of law is in grave danger in the U.S. and can be saved by ending perpetual war, prosecuting war crimes, and reforming campaign finance and the judicial system, argues Inder Comar.

By Inder Comar

The rule of law is in serious jeopardy in the United States.

The executive branch is unconstrained, engaging in foreign wars without oversight even while it dismantles the regulatory and administrative state that protects citizens from abuses of power.

The legislative branch has been hopelessly bought-and-sold by monied interests.

And the judicial branch refuses to intervene, actively closing the doors to any accountability over other elected officials.

Some scholars like Ryan Alford, a professor of international law at Lakehead University in Ontario, even argue that the U.S. is no longer a rule of law state, but a government that is essentially run by dictator elected every four years. If this is true, then the U.S. is effectively a rogue nation.

Here are five suggestions that could restore the United States to the rule of law:

Revoke the 9/11 Military Authorization

Perpetual war is a systemic threat to democratic government. War increases the powers of the presidency and acts as an excuse to increase presidential powers. Money disappears through appropriations for military expenditure, or just through corruption. War destroys civil society by producing a culture that glorifies the military. War and democracy cannot coexist. As James Madison, a chief author of the U.S. Constitution observed:

> "Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people . . . No nation could preserve its freedom in the midst of continual warfare."

The 9/11 Authorization to Use Military Force (AUMF), passed immediately after the 9/11 attacks, has morphed into a blank check for unending war, worldwide. As of May 2016, the AUMF was cited at least 37 times to support or sustain military action in at least 13 different countries, by both President George W. Bush and President Barack Obama.

And President Donald Trump has indicated his broad support for maintaining the 9/11 AUMF.

Enough is enough. The AUMF, enacted to fight al-Qaeda, should be terminated, immediately. Al Qaida has been crippled or has emerged as a de facto ally of the U.S. in Syria. As new, legitimate threats emerge, Congress can pass new authorizations.

Join the International Criminal Court

We live in a world where there is an independent, international, permanent tribunal whose primary purpose is to prosecute war crimes and crimes against humanity. The U.S. was initially committed to the International Criminal Court (ICC). President Bill Clinton signed the Rome Statute, but President George W. Bush infamously “unsigned” the treaty, and the Senate was never asked to ratify it.

The ICC is 16-years old. American support for the ICC could be significant, if it did not try to politicize it, and could strengthen the international rule of law in ways that could herald a new era of international accountability for torturers, war criminals, and illegal aggressors.

Investigate U.S. Officials who Break International Law

But it would be meaningless if the rule of law stops at the door step of the powerful. Since 9/11, U.S. leaders have committed acts that should be prosecuted in U.S. courts as they violate U.S. law: torture, unlawful surveillance, wars of aggression, crimes against humanity and war crimes. It would be a painful social process. But Americans have no choice but to expel the venom that infect its politics, society and culture.

The American judicial system, including its prosecutorial agencies, attorneys, social activists and even brave members of the political class, are the anti-bodies we need to restore democratic governance. The impunity of high ranking officials must end, whatever their rank and title, if we wish to live in a truly free and democratic society.

Create a Truly Independent Judiciary

It is troubling that the outcome of a major case before the U.S. Supreme Court can usually be determined just by looking at the court’s composition. Independent, impartial review has been jettisoned in favor of nakedly political judicial appointees.

Justices across the political system should find no controversy in protecting and defending civil rights, providing access to justice to vulnerable groups, and acting as a mechanism of last resort for fair and impartial decision making.

Judges and justices themselves must have the integrity and vision to understand that an independent judiciary is the last defense of a dying democracy. They must reject attempts by either the president or Congress to politicize the judiciary.

End the Influence of Money in Politics

Most pundits glorify elections as the end-all and be-all of democracy. But take a look at any dictatorship in the world today, and there was almost certainly an election that was rigged to manufacture the intended outcome.

Elections are essential, but not the only condition of democracy, especially when voting has become little more than a hollow stage-play where nearly all electoral choices have been arranged by plutocratic supporters.

In the U.S., money has infected the electoral process to such a degree that outcomes are effectively tied to the degree of wealth that supports any given candidate. Candidates and elected officials take positions that please their wealthy donors, and not ones that reflect the true will of those who elected them to serve, as this Princeton University study showed.

For elections to be meaningful, they must express the will of an informed citizenry. Public funding of elections and limits on campaign finance expenditure are critical to restore legitimacy to the electoral process. Elections must free, fair, and open to every citizen.

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Gorsuch's Soft Style and Hard Line

After blocking President Obama's Supreme Court nominee for the past year, the Republicans got President Trump to put up a soft-spoken but hard-line right-winger in Judge Neil Gorsuch, as Marjorie Cohn described for Truthdig.

By Marjorie Cohn

When Donald Trump's chief of staff Reince Priebus addressed the Conservative Political Action Committee in February, he identified two priorities of the administration: the confirmation of Neil Gorsuch to the Supreme Court, and

deregulation.

It turns out that elevating Gorsuch to the Supreme Court and achieving deregulation are inextricably linked. During Gorsuch's confirmation hearing, Democratic members of the Senate Judiciary Committee challenged him on his pro-business positions.

Minnesota Sen. Al Franken pressed him on a case – that of the now-infamous "frozen trucker" – in which the judge reached what Franken characterized as an "absurd" result. Alphonse Maddin was driving a truck for TransAm Trucking Inc. in 2009 when the brakes froze on the trailer he was hauling. The heater inside the truck wasn't working, and the temperature outside was minus 27 below zero.

Maddin contacted his employer, who arranged for a repair unit to come to Maddin's location. While waiting for help to arrive, Maddin nodded off.

"I awoke three hours later to discover that I could not feel my feet, my skin was burning and cracking, my speech was slurred, and I was having trouble breathing," he said at a recent event in Washington, D.C. When Maddin stepped out of the truck, he said he "was on the verge of passing out. I feared that if I fell, I would not have the strength to stand up and would die." Maddin was exhibiting symptoms of hypothermia. He called his employer again to report that he was leaving to seek shelter. His supervisor ordered him "to either drag the trailer [with no brakes] or stay put."

"In my opinion, clearly, their cargo was more important than my life," Maddin said.

Faced with defying his employer's order to remain with his disabled trailer or freezing to death, Maddin chose to unhitch the trailer and drive his truck to safety. TransAm fired Maddin for disobeying orders, and he filed a complaint with the Occupational Safety and Health Administration, an agency of the Department of Labor. The operative statute in this case forbids employers from firing an employee who "refuses to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public."

The Labor Department found that TransAm had violated the law, concluding that the word "operate" includes not only driving, but also "other uses of a vehicle when it is within the control of the employee." Maddin had refused to operate his vehicle in the manner his employer had ordered – with the trailer hitched to the truck.

Of the seven judges who ultimately ruled on the case, Gorsuch was the only one who voted to uphold Maddin's firing. He decided that Maddin did "operate" his vehicle, which took him outside the statutory language that protects an employee

who refuses to operate his vehicle.

What source did Gorsuch consult to construe the word “operate?” He turned to the Oxford English Dictionary, refusing to defer to the Department of Labor’s broader interpretation of the statute. Gorsuch characterized “health and safety” concerns as “ephemeral and generic,” writing, “After all, what under the sun, at least at some level of generality, *doesn’t* relate to ‘health and safety’?”

A Smooth Persona

In his dissent, Gorsuch, who displayed a smooth, compassionate persona while testifying at his hearing, described the conditions Maddin faced as merely “cold weather.” He wrote that for Maddin to sit and wait for help to arrive was an “unpleasant option.”

Maddin’s lawyer, Robert Fedder, told Democracy Now!’s Amy Goodman that during oral argument before the appellate panel, “Judge Gorsuch was incredibly hostile.” Fedder noted, “I’ve litigated many cases in appellate courts … [Gorsuch] may have been the most hostile judge I’ve ever appeared before.”

Maddin, who is African-American, later said, “The first thing I noticed was that in his opening reference [in his dissent, Gorsuch] simply called me a trucker and didn’t use my name.” Maddin told The Guardian, “In my heart of hearts, I felt like he willfully tried to negate the human element of my case.”

At Gorsuch’s confirmation hearing, Illinois Sen. Dick Durbin discussed Maddin’s case with Gorsuch, saying that the temperature was minus 14 that night, “but not as cold as your dissent.”

In Gorsuch’s dissenting opinion, he refused to defer to the Department of Labor’s interpretation of the statutory language regarding refusal to operate. Gorsuch was, in effect, refusing to apply the well-established “Chevron deference.”

This doctrine requires that when a law is ambiguous, courts must defer to an agency’s reasonable construction of the statute. Even the late Supreme Court Justice Antonin Scalia, to whom Gorsuch is often compared, thought that agencies were in the best position to construe regulations that inform their work.

If Gorsuch had his druthers, he would do away with Chevron deference. In fact, he stated as much in his lengthy concurrence in Gutierrez-Brizuela v. Lynch, in which he wrote, “Maybe the time has come to face the behemoth.”

Gorsuch would substitute his own interpretation for that of an agency. But agencies are in the best position to make these determinations about matters

within their purview.

Dangers of Second Guessing

In opposing Gorsuch's nomination to the high court, the nonprofit organization Alliance for Justice wrote of the dangers of second-guessing agency experts: "It is difficult to overstate the damage [Gorsuch's] position would cause. Judge Gorsuch would tie the hands of precisely those entities that Congress has recognized have the depth and experience to enforce critical laws, safeguard essential protections, and ensure the safety of the American people."

Courts that have given deference to agency interpretations ensured essential protections, including:

–Deferring to the National Labor Relations Board's reasonable determination that live-haul workers are employees entitled to protections of the National Labor Relations Act;

–Deferring to the Environmental Protection Agency's rule requiring states to reduce emissions from power plants that travel across state lines and harm downwind states;

–Deferring to the Department of Labor's interpretation of portions of the Black Lung Benefits Act that make it easier for coal miners afflicted with black lung disease to receive compensation; and

–Deferring to the EPA's revision of regulations under the Toxic Substances Control Act that provide more protection from exposure to lead paint.

But Gorsuch's desire to neuter agency determinations dovetails nicely with Trump's chief strategist Steve Bannon's goal of "deconstruction of the administrative state." The Trump administration has issued several orders that mandate deregulation:

On Jan. 20, Priebus directed agency heads to refrain from sending new regulations to the Office of the Federal Register until there are administration officials in place to approve them.

On Jan. 24, Trump signed a memo directing his Secretary of Commerce to review the ways in which federal regulations affect U.S. manufacturers in order to reduce as many of them as possible.

On Jan. 30, Trump issued an executive order requiring the mechanistic elimination of two regulations for every new one, and capping spending on new regulations during 2017 at zero.

On Feb. 3, Trump signed an executive order rolling back Dodd-Frank regulations on Wall Street. This will increase the risk of another dangerous recession.

During the confirmation hearing, Franken confronted Gorsuch with the confluence of his confirmation to the Supreme Court and the deconstruction of the administrative state (deregulation), saying,

“[F]or those who subscribe to President Trump’s extreme view, [the Chevron doctrine] is the only thing standing between them and what the President’s chief strategist Steve Bannon called the ‘deconstruction of the administrative state,’ which is shorthand for gutting any environmental or consumer protection measure that gets in the way of corporate profit margins.

“Speaking before a gathering of conservative activists last month, Mr. Bannon explained that the President’s appointees were selected to bring about that deconstruction, and I suspect that your nomination, given your views, is part of that strategy.”

Big Business Interests

Deregulation serves the interests of big business, a key conservative goal. When questioned at his hearing about what ideology he would bring to the court, Gorsuch made the disingenuous claim, “There’s no such thing as a Republican judge or a Democratic judge. We just have judges in this country.”

If that were true, why are the Heritage Foundation and the Federalist Society so keen on Gorsuch? He was on a list prepared by the two right-wing groups from which Trump dutifully selected his Supreme Court nominee.

“The president outsourced your selection to far right, big money interest groups, and they have an agenda. They’re confident you share their agenda. That’s why they called you ‘a nominee who understands things like we do,’ ” Sen. Patrick Leahy, D-Vermont, told Gorsuch at his hearing.

Why has $10 million in “dark money” been spent by anonymous conservative donors to buy Gorsuch a seat on the high court, as Sen. Sheldon Whitehouse, D-Rhode Island, charged at the hearing? And why, as Whitehouse added, was $7 million expended on the unprecedented, but successful, campaign to deny Barack Obama’s nominee Merrick Garland a hearing?

Gorsuch is a staunch, longtime conservative judge who, in spite of his refusal to tip his hand about his ideology, has taken positions that confirm his right-wing bona fides. When Sen. Chuck Schumer, D-New York, announced he would vote against Gorsuch’s nomination, he stated that Gorsuch had ruled repeatedly for employers and against workers.

Gorsuch “almost instinctively favors the powerful over the weak,” Schumer said, adding, “We do not want judges with ice water in their veins,” an apt analogy in light of Gorsuch’s dissent in the TransAm case.

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