

7 Questions Trans People Have About Brett Kavanaugh

Trump's nominee for the Supreme Court has a questionable record on healthcare, employment rights, and more.

By Harper Jean Tobin

We already know a lot about Brett Kavanaugh: he is a reliable arch-conservative to the right of Justices Scalia and Gorsuch, and President Trump promises he would “automatically” overturn *Roe v. Wade* and Obamacare. He has controversial views of Presidential power, and a long, consistent record of ruling for corporations and against employees and consumers.

Yet as far as anyone can tell, in his long career he has never ruled on or written about legal issues related to LGBTQ people. With Brett Kavanaugh, no news is not good news for LGBTQ people. What we already know of his record makes clear he would be dangerous for LGBTQ Americans. And there is a great deal we still don't know—including about his tenure as a staffer in the George W. Bush White House.

These are the questions LGBTQ people—and their Senators—should be asking about Kavanaugh before letting him anywhere near the Supreme Court.

1: Will Brett Kavanaugh make being transgender a “pre-existing condition” again?

The Affordable Care Act is one of the most monumental advances for LGBTQ people in the last decade. Its protections for pre-existing conditions meant transgender Americans no longer faced being completely denied health insurance.

President Trump has already promised his Supreme Court pick, i.e. Kavanaugh, will vote to overturn the Affordable Care Act. Kavanaugh's record shows he is ready to fulfill that promise, and Trump is already trying to tee up a chance for him to do it. Just last month, the Trump administration asked a court to strike down the law's protections for pre-existing conditions.

Before the Affordable Care Act, simply being transgender was considered a pre-existing condition, making it all but impossible to get health insurance. The ACA's nondiscrimination provision (known as the Health Care Rights Law) also protects trans people from other forms of health care discrimination. If he were to vote to overturn

health care protections, Kavanaugh could very well turn back the clock, taking away health care from millions of Americans, including many transgender people.

2: Would Kavanaugh rubber-stamp the President's anti-transgender attacks?

Out of all the nominees on President Trump's pre-vetted shortlist, Kavanaugh has the most controversial views of executive power. You've probably heard about his writing that presidents shouldn't be subject to lawsuits, prosecutions, or investigations—but that's not all.

As a federal judge, he favored a sweeping view of Presidential powers on everything from Guantanamo detentions and warrantless surveillance to the President's control of federal agencies Kavanaugh has consistently sided with presidents invoking national security concerns over the protection of constitutional rights such as *habeas corpus* and the Fourth Amendment.

In fact, he even argued President should feel free to ignore federal laws he believes are unconstitutional until ordered to do otherwise by a court. To be sure, these are extreme views of the power of the President to violate norms and laws.

The implications of these opinions could be monumental for the transgender people attacked by President Trump's policies. The President's ban on transgender troops, for example, is currently facing challenges in four federal courts—any one of which could be picked up by the Supreme Court with a newly-minted Justice Kavanaugh.

President Trump is already asking the courts to rubber-stamp his baseless transgender ban in the name of "national security"—it looks like his nominee just might do the job.

3: Does Kavanaugh believe employers have a license to discriminate against LGBTQ people?

One of the most watched Supreme Court cases of the last year was that of Masterpiece Cakeshop, in which a Colorado bakery believed it had a right to refusal to sell a wedding cake to a gay couple. While the high court largely punted on that question, many other businesses serving the public are now seeking the right to refuse to serve LGBTQ customers—and even fire LGBTQ workers.

As a powerful appeals judge, Kavanaugh is already on record saying that employees' rights can be curbed in the name of their employers' religious beliefs. In *Priests for Life v. HHS*, Kavanaugh wrote that not only should employers be able to refuse contraceptive coverage to their workers—he believed that even having to fill out a form asking for an exemption from the coverage was too great a burden on employers.

His strong endorsement of these arguments means Kavanaugh is likely to side with any employer or business using a similar framing to justify their own discrimination against a transgender employee or denying service to a same-sex couple. It's a question Senators should make a priority when questioning Kavanaugh later this year.

4: What was Kavanaugh's role in the Bush administration's attacks on LGBTQ people?

Kavanaugh is a veteran of the George W. Bush White House, having served in numerous legal and policy roles from 2001 to 2006. This was also the period when the administration made some of its biggest attacks on the rights of LGBTQ people.

As many advocates will remember, the Bush administration began to sow confusion about the rights of LGBTQ federal employees, with the Office of the Special Counsel removing materials from its website referring to the rights of employees experiencing discrimination. This was also the period the Supreme Court issued its historic ruling in *Lawrence v. Texas*, overturning anti-sodomy laws nationwide that criminalized same-sex relationships.

Kavanaugh was likewise present during the epic battles over same-sex marriage centering on both the 2004 election, the President's responses to state marriage equality rulings, and the Bush-endorsed "Federal Marriage Amendment" that could have put a marriage ban in the Constitution .

It's likely Kavanaugh, as a White House lawyer and later Assistant to President Bush, participated in developing some of these policies and statements or devising legal justifications for them. Did Kavanaugh, for example, [oversee Bush's 2004 statement](#) taking a strong stance against the rights of same-sex couples and even calling into question their ability to parent?

If so, Kavanaugh may have already compromised himself on many of the issues the Supreme Court could face today.

5: Why does the Family Research Council want Kavanaugh on the bench so badly?

One of the most active lobbying firms who fought against same-sex marriage then—and who are promoting lies and scare tactics about transgender people today—is the hyper-conservative Family Research Council.

Like other anti-transgender lobbyists, FRC greeted Kavanaugh's nomination with applause and cheers, saying "hopefully we can get the [Supreme] Court back in alignment with the Constitution," and "We look forward to having a justice with his philosophical approach on the Court."

In their reaction to the news, they particularly praised his belief employers should be granted a license to discriminate based on their religious beliefs.

We already know Kavanaugh was a favorite of the FRC—they lobbied hard to move him from the Bush White House to a powerful appeals court. And he made it through the vetting of other anti-LGBTQ groups to get on Trump’s shortlist. They clearly see in him a reliable vote against equality

Any LGBTQ American looking to the courts to protect their freedom should severely doubt they’ll hear a fair trial from such a close friend of the Family Research Council. Senators should press Kavanaugh on these endorsements and whether he agrees with the views of these organizations, which say being trans is a “delusion” and promote quack “conversion therapy.”

6: Did Kavanaugh know about - and turn a blind eye to - a judge’s sexual abuse?

Last year, federal appeals Judge Alex Kozinski resigned amid an investigation of a decades-long pattern of sexually harassment of female peers and subordinates. Kavanaugh clerked for Kozinski, and remained friends with him for years. Colleagues say Kozinski’s behavior was widely known, and that Kavanaugh likely witnessed it himself.

One in seven transgender workers reports facing on the job harassment in the last year. Transgender people can’t afford a justice who would turn a blind eye to sexual harassment—none of us can. Senators should demand to know what Kavanaugh knew, heard, and saw, and what he did (or didn’t do) about it.

7: Will Kavanaugh give real answers about his beliefs on court precedents that protect personal freedoms?

Many—though not all—recent Supreme Court nominees have flatly refused to answer core questions about protecting the personal freedoms Americans depending on. Last year, Justice Gorsuch gave meaningless answers about respect for precedents—and once on the Court, showed no hesitation in reversing them.

With a President who has specifically promised his pick will overturn *Roe v. Wade* “automatically” and gut health care protections, the game has changed. Senators must not accept meaningless answers from Kavanaugh, like saying that past decisions are “precedents of the Court.”. Senators should not settle for anything less than Kavanaugh saying whether he agrees with precedents establishing Americans’ liberty to make personal decisions about their bodies, their families, and their medical care, and whether he will protect those freedoms.

While the 2 million transgender people in the U.S. have come a long way in seeking an equal part in American society, the Supreme Court has immense power to destroy much of it. Whether Kavanaugh will do so is a topline concern for transgender people, our advocates, and our lawmakers.