

**From:** "Kavanaugh, Brett M."  
**To:** "Ashley Kavanaugh" [b(6)] "Gottesman, Blake"  
**Subject:** Could have been worse ...  
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The Next Generation

Emma Schwartz

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Most nights a line snakes out the door at Lauriol Plaza, the trendy Mexican restaurant on 18th Street in Dupont Circle that draws a cross section of the Washington cognoscenti, many of whom come as much to make the scene as to sample the cuisine.

On one such evening about two years ago, James Brochin, a New York lawyer, was waiting to be seated with a few buddies from Yale Law School, including Brett Kavanaugh, staff secretary for President George W. Bush.

Nearby, Jeff Berman, then counsel to Sen. Charles Schumer (D-N.Y.) on the Senate Judiciary Committee, caught Kavanaugh's eye and walked over. Kavanaugh was in the midst of a bitter confirmation battle over his nomination to the U.S. Court of Appeals for the D.C. Circuit, but the staffer still wanted to trade a few friendly words before heading out the door.

"I was struck at the time by the irony that this guy's boss was spending a great deal of energy trying to shoot Brett down, yet he was still good friends with this staffer," recalls Brochin, a partner at [Paul, Weiss, Rifkind, Wharton & Garrison](#).

It might seem unusual, but the story is emblematic of the complex politics and loyalties often just behind the scenes of the judicial nomination process. It also illustrates the challenge Democrats have facing off against this 41-year-old Maryland native, whose stalled nomination is expected to come before the Senate Judiciary Committee again as early as next month.

Kavanaugh's conservative credentials are etched indelibly into his résumé. In fact, he's something of the Zelig of young Republican lawyers. A protégé of independent counsel Kenneth Starr, he was a key figure in the Whitewater investigation. In the recount fight after the 2000 election, he served as a foot soldier in the legal army that descended on Florida and gave Bush his presidency. As a lawyer for Bush in the White House counsel's office, he shepherded most of the administration's contentious federal court nominees, including Miguel Estrada and Priscilla Owen.

But whether his right-wing bona fides will incite enough Democratic opposition to keep him off the bench remains an open question.

## **THE LONG AND WINDING ROAD**

Kavanaugh was first nominated to the D.C. Circuit in July 2003, but faced sharp opposition at his hearing the following April, where Senate Democrats lambasted him for his youth, lack of judicial experience, and partisanship. Although the American Bar Association rated him "well qualified," Schumer bluntly labeled Kavanaugh's nomination "payment for political services rendered."

Attention shifted, however, to the 2004 presidential election, and Kavanaugh's nomination was marooned in committee. He was then left out of the "Gang of 14" deal last summer, which allowed three previously controversial nominees to be voted on in the Senate and that seemed to signal nobody was interested in a brawl over him. Then came more than six months of bruising Supreme Court confirmation fights, during which Kavanaugh remained buried.

But when the Senate moved to hold over all nominees at the end of the last congressional session, Kavanaugh was again left out because of Democratic opposition. So the White House renominated him in January, sending the message that it won't allow Kavanaugh to be forgotten.

Now he's back at the front of the confirmation line. And while Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, has made Kavanaugh a priority this session, his path looks just as rocky as it did two years ago. Just last Friday, Senate Democrats renewed their call for another hearing on Kavanaugh. The D.C. Circuit — often called the second-most-important court in the country because of its jurisdiction over federal government agencies — has been fertile ground for past confirmation fights. Exhibit A: the controversy over Miguel Estrada, so nasty that it led him to withdraw in September 2003.

Senate Democrats are girding for a similar knock-down, drag-out fight over Kavanaugh, which looms as the latest test of their clout on future federal court confirmations.

"If the Democrats weren't able to stop [Samuel] Alito," says Sheldon Goldman, a political science professor at the University of Massachusetts at Amherst, "the question that is being asked now is, How can they stop anyone who is as professionally qualified as Brett Kavanaugh?"

## **MAKING A MODEL CONSERVATIVE**

Politics have always threaded through Kavanaugh's life. Raised in Bethesda, Md., he was the only child in a tight-knit family of lawyers. His mother, Martha, was a prosecutor in the state attorney's



office and later worked as a criminal defense lawyer. She was nominated to the Montgomery County Circuit Court in 1995, where she served until retiring, nearly five years ago.

Kavanaugh's father, Edward, was a prominent figure inside the Beltway. As head of the [Cosmetic, Toiletry and Fragrance Association](#) for 22 years, he was friends with congressional heavyweights including the late Speaker of the House Thomas "Tip" O'Neill (D-Mass.) and Sen. Orrin Hatch (R-Utah). (Indeed, Hatch gave him a special welcome at his son's nomination hearing.)

Bright, hard-working, and unflappable, Kavanaugh attended all-boys Catholic schools, first at Mater Dei and then at Georgetown Preparatory High School, where he excelled both in class and in sports, playing on the basketball and football teams. Friends also recall him being infused with a sense of religious faith that remains important to him today.

From an early age, Kavanaugh seems to have been drawn to the law. Growing up, he sat in on some of his mother's cases and spent a few summers interning on the Hill. But unlike many children of well-connected Washingtonians, Kavanaugh didn't come off to others as arrogant or transparently ambitious. "Brett's a chess player," says Steve Ochs, Kavanaugh's high school history teacher. "He always sees moves ahead without having guile."

That sense of reserve carried over to Yale University, where friends recall him as more of a sports guy than a campus partisan involved in student politics. Kavanaugh's more liberal friends certainly knew he was conservative but say he based friendships on shared interests, rather than shared politics.

Kavanaugh went directly to Yale Law School, graduating in 1990. While there he wrote an article in the *Yale Law Journal* analyzing the 1986 Supreme Court case [Batson v. Kentucky](#), which restricted the use of peremptory challenges to strike jurors on the basis of race. Kavanaugh argued that the decision still left the exact enforcement procedures to the lower courts, but advocated a defendant's right to be present during any hearing on the proper use of peremptory challenges.

After law school, Kavanaugh spent two years clerking in federal appeals courts, first for Judge Walter Stapleton on the U.S. Court of Appeals for the 3rd Circuit and then for Judge Alex Kozinski on the U.S. Court of Appeals for the 9th Circuit (an icon for many legal conservatives, but something of an iconoclast himself).

Kozinski's clerkships are notoriously demanding, a kind of boot camp for young lawyers with Federalist Society credentials. A perfectionist and an outspoken conservative on a liberal court, Kozinski routinely cycles through dozens of drafts on opinions. To meet the workload, Kavanaugh and his fellow clerks worked in shifts. Mark Perry, now co-chair of [Gibson, Dunn & Crutcher's](#) D.C. office, recalls that when he clerked alongside Kavanaugh, he took the early shift, which started at 6 a.m., while Kavanaugh had the "late" one, which began at 8 a.m. — and ran until 9 or 10 at night, six days a week.

In Kozinski, Kavanaugh found a mentor and an intellectual sparring partner. "He's not one to sort of jump to conclusions. He weighs and he considers and goes back and forth," Kozinski recalls of their legal debates. "I think we sort of reinforce each other." Kozinski likens Kavanaugh's legal philosophy to that of Chief Justice John Roberts Jr. and Alito. "The question is what he would do in close cases,"



he says. “I think in close cases he would offer the conservative-libertarian result.”

From Kozinski’s chambers, Kavanaugh moved to a yearlong fellowship in the solicitor general’s office under Starr. There he worked alongside conservative luminaries such as Roberts and Maureen Mahoney and had a chance to argue his first appeals court case. In 1993, Kavanaugh moved up the clerkship ladder again, this time into the chambers of Justice Anthony Kennedy on the Supreme Court.

## PLUNGING INTO WHITEWATER

As Kavanaugh’s Kennedy clerkship was ending in the summer of 1994, Starr was tapped to replace Robert Fiske as independent counsel in the Whitewater investigation. One of his first moves was to bring Kavanaugh on board.

It was a watershed moment for the 29-year-old lawyer, one that would earn him both acclaim and lasting enemies. One of his initial duties was to lead the probe into the apparent suicide of White House counsel Vincent Foster, a close personal friend of President Bill Clinton and first lady Hillary and a former colleague of Hillary’s at the Rose Law Firm in Arkansas — which Kavanaugh also investigated. Though Starr closed these investigations without prosecuting, Kavanaugh did not make any friends in the Clinton White House. Now-Sen. Clinton (D-N.Y.) in particular took bitter exception to Kavanaugh’s investigatory tactics, which she viewed as a partisan witch hunt meant to destroy her and her husband.

In 1997, Kavanaugh briefly retreated into private practice, joining [Kirkland & Ellis](#), Starr’s old firm. But after less than a year, Starr asked him to return to the independent counsel’s office to argue a case stemming from the Foster investigation that had been granted certiorari by the Supreme Court.

The case, *Swidler & Berlin v. United States*, led to an important decision on the scope of attorney-client privilege — but not one in Kavanaugh’s favor. The issue was whether attorney James Hamilton was required to turn over notes to Starr on a conversation he had with his now-deceased client, Foster. Kavanaugh argued that lower court precedent, particularly in criminal cases, suggested that the attorney-client privilege did not survive the death of the client. Many attorneys found the position controversial because it encroached on a well-established privilege.

Hamilton, who argued the case himself, says despite the loss, Kavanaugh was impressive. “Brett is obviously a very talented lawyer. Although he lost the Swidler case — to the benefit of both clients and the profession — he did well with a most difficult position.”

According to Bob Woodward’s book [Shadow: Five Presidents and the Legacy of Watergate](#), Kavanaugh was also something of a moderating force in the office. He was among those who encouraged Starr to seek direct testimony from White House intern Monica Lewinsky and Clinton about their affair, rather than simply write the report based on secondhand accounts. He questioned whether Starr needed to hand over the narrative section of the final report to Congress. And though he helped assemble the 11 possible legal violations laid out in the report, he was opposed to Congress’ decision to release the report to the public.

Even after he left Starr’s office, Kavanaugh continued to express concerns over the power afforded the



independent counsel, going so far as to write an article for the *Georgetown Law Journal* arguing that Congress should change the statute to limit the politicization of the independent counsel position.

Yet Kavanaugh's tenure with Starr continues to enrage Democrats, who note that he has defended the former independent counsel's work in newspaper editorials. In one such piece for *The Washington Post*, Kavanaugh said that subsequent congressional action, such as the vote by the House of Representatives to impeach Clinton, fully vindicated Starr's investigation.

## **THE PRESIDENT'S LAW FIRM**

In 1999, Kavanaugh returned to Kirkland, where he mostly handled appellate cases for corporate clients such as Verizon Communications Inc., America Online Inc., and General Motors Corp.

Even in private practice, Kavanaugh managed to get involved in charged cases. For instance, he and a colleague joined the last-ditch appeal of Elian Gonzalez's deportation back to Cuba after a panel on the U.S. Court of Appeals for the 11th Circuit ruled that it did not have jurisdiction to overturn the Department of Justice's decision. The Supreme Court denied cert.

Kavanaugh also filed an amicus brief in the 1999 case [\*Santa Fe School District v. Jane Doe\*](#), in which he represented two Republican congressmen who were supporting a school district's policy that allowed student-initiated prayer at football games. The Supreme Court ruled that the policy violated the Constitution's establishment clause.

But Kavanaugh's true return to politics came in 2000, when he joined the Bush recount team in Florida, overseeing Volusia County. After the election he was offered a spot in the White House counsel's office, then headed by Alberto Gonzales, where he joined an A list of top conservative lawyers, including Rachel Brand, now assistant attorney general for the Office of Legal Counsel; Stuart Bowen, now special inspector general for Iraq reconstruction; and Courtney Elwood, the current deputy chief of staff for Gonzales.

That office, however, has come under scrutiny recently for its role in drafting memos justifying the use of torture in questioning terrorism suspects and validating the National Security Agency's domestic eavesdropping program. Although he worked in the office at the time, Kavanaugh hasn't been directly tied to those controversial policies.

He was, however, at the forefront of other divisive issues, most notably serving as a chief architect of the administration's judicial selection process. He helped vet candidates and worked as a liaison between the White House and Capitol Hill, coordinating hearings with Republican staffers.

Along with judicial nominations, Kavanaugh pushed tort reform legislation on issues including asbestos, class actions, and terrorism risk insurance. He was also the main author of a controversial executive memo that allows presidents and their families to limit the release of presidential documents.

Once again in a place known for grueling hours, Kavanaugh stood out. He became a fast favorite of Gonzales, who put him forward as a candidate for a seat on the U.S. Court of Appeals for the 4th Circuit. Maryland senators objected because they wanted a nominee who had practiced in their home

state.

Meanwhile, Kavanaugh replaced Harriet Miers as staff secretary, a little-known but powerful post in the Executive Office of the President. It's more a political than a policy job, but lawyers often hold it because it requires reviewing every piece of paper before it lands on the president's desk. Kavanaugh's position has brought him close to Bush, with whom he has traveled around the globe. The president even made a special appearance at Kavanaugh's 2004 wedding to Bush's personal secretary, Ashley Estes, held at Georgetown's Christ Episcopal Church.

The close association with the president has only fanned Democratic furor over Kavanaugh's nomination. Democrats especially want to question him on whether he had a role in approving the NSA wiretapping program. "He doesn't have the legal philosophy that ought to be had for that position," says Elliot Minberg, legal director of the liberal [People For the American Way](#). "Most of his career has been spent as a far-right advocate." Maybe so, but Democrats have few options to derail Kavanaugh, without resorting to a filibuster.

In the meantime, in his West Wing office, Kavanaugh remains busy serving the president he helped put in the White House. In that office three large photographs adorn the front wall.

In the first, the president appears at his Oval Office desk with Kavanaugh and now-Chief Justice Roberts. To the right is a picture of Bush greeting the late Pope John Paul II at the Vatican. The third shot shows the president, behind a wooden podium, introducing his first crop of judicial nominees from the spring of 2001, a group that included Roberts, Estrada, and Owen.

It's a display befitting of a presidential aide, no doubt. But nervous Democrats might wonder how they would look in a judge's chambers.

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