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Judge Kavanaugh and Justice Kennedy do not have conflicts of interest

BY REBECCA ROIPE AND BRUCE A. GREEN, OPINION CONTRIBUTORS — 07/13/18 05:00 PM EDT
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Liberals are understandably upset that President Trump nominated Brett Kavanaugh to fill Anthony Kennedy's seat on the U.S. Supreme Court. Still pining for Merrick Garland, whose nomination was denied by the Republican-dominated Congress in 2016, politicians and pundits are searching for reasons to disqualify Judge Kavanaugh from the post. Whatever the merit of other objections to the nomination, the [argument that Judge Kavanaugh has a conflict of interest](#) because he was nominated by a President who is under criminal investigation cannot hold water.

This is not the only recent effort to use judicial ethics as a cudgel against conservative Justices. Others have [taken to Twitter to suggest that Justice Kennedy himself had a conflict](#) when he heard the travel ban case because he was, at the time, having conversations with President Trump regarding his replacement if he were to retire. The argument goes like this: Justice Kennedy was receiving something of value, namely, control over his legacy, from the President. This fact means Justice Kennedy could not be impartial in deciding a challenge to the President's executive order.

Some in the media [have also suggested that President Trump's business relationship with Justice Kennedy's son's employer](#) created a conflict-of-interest. President Trump said, "Say hello to your son. Special guy" to Justice Kennedy after a speech to Congress in 2017, setting off speculation about conflicts.

None of these claims of judicial impropriety has merit – they are just empty rhetoric with a potentially grave consequence.

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Judges do not recuse themselves simply because their decisions could somehow be influenced by their relationships. The relevant rule states that judges must recuse themselves if “their impartiality can reasonably be questioned.” For example, judges may not sit if they have a personal bias against a litigant or a financial interest in the outcome of the case.

Supreme Court Justices in particular are reluctant to take themselves off cases without good reason, because there are no other Justices in the wings who can substitute for them in the case. For example, in 2015, Justice Breyer declined to recuse himself in a case involving a pharmaceutical company in which his wife owned stock. Earlier, Justice Scalia declined a recusal motion in a lawsuit by the Sierra Club against then-Vice President Dick Cheney in his official capacity, even though the Justice had gone duck hunting with Cheney and ridden in his private jet.

The precedent belies the suggestion that Justice Kennedy or Judge Kavanaugh cannot be impartial in cases involving the President or his Administration because of these jurists' relationship to, or gratitude to, President Trump. Surely, all Justices are grateful to the Presidents who appointed them, but none has ever seen this as a ground for recusal. And many Justices have had much closer relationships with the sitting President. Justice Robert Jackson, for instance, was a friend and confidant of President Roosevelt, and Justice Abe Fortas had close personal ties with President Johnson.

The arguments about Judge Kavanaugh and Justice Kennedy betray a much too profound distrust of judging -- a belief that the judiciary is no more than another political branch whose members seek to promote their own partisan political preferences and self-interest. On this account, judges either can't filter out impermissible considerations or don't bother trying.

It is extremely important – now more than ever – that we not give in to cynicism. Amidst this administration's attack on the rule of law, the judiciary should be celebrated as a real check on the political branches. Imperfect as they may be, most judges do try to filter out impermissible considerations and they should be respected for that.

This is not to say that politics is irrelevant to judicial decision making. But judging involves more than just political ideology. Judges adhere to processes for thinking through problems that impose a real constraint on them. These processes include ruling out illegitimate considerations such as who nominated you for your job and who might replace you when you retire.

The realization that judging is not apolitical is an important correction to a once credulous attitude. The legitimacy of the judiciary, however, requires that we retain just a little faith that by using the tools of their trade, judges at least try to do their job. And this little bit of faith ought to reassure us that Justice Kennedy did not uphold President Trump's travel ban because he was indebted to him for ensuring his legacy. And we should trust that Judge Kavanaugh, if he is confirmed, will not be biased in cases against President Trump simply because President Trump nominated him for his job.

Judge Kavanaugh is a problematic choice, with a record that indicates a willingness to abandon wise and important precedent. Democrats should use this paper trail to challenge his nomination but they should not be distracted by conflicts of interest, which provide little basis for opposition.

Rebecca Roiphe is a professor of law at New York Law School where she chairs the Institute for Professional Ethics and is co-directs the Center for Criminal Justice. Bruce A. Green is the Louis Stein Chair at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics.

