Brett Kavanaugh as Supreme Court Justice: What's the Damage?

He could be disastrous for people with HIV, but he's not the worst-case scenario.

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The sudden, though not altogether surprising retirement of Supreme Court Justice Anthony Kennedy has created a great deal of fear and anxiety among HIV advocates and our allies regarding the composition of the Supreme Court. Based on the short list of 25 potential nominees put forth by the Federalist Society and used by President Trump in his deliberations, HIV advocates knew that whoever was chosen as the Court's newest prospective member would almost certainly be less likely to rule in ways that were as beneficial to people living with and affected by HIV as Justice Kennedy, who has occupied the role of the Supreme Court's moderate swing vote in recent years and wrote majority/plurality opinions in Obergefell vs. Hodges and Casey vs. Planned Parenthood, which made same-sex marriage the law of the land and helped reaffirm a woman's right to choose.

After President Trump's primetime, televised selection of DC Circuit Court Judge Brett Kavanaugh as nominee to succeed Justice Kennedy on the high court, the primary question on the minds of most HIV advocates was, how will this guy impact people living with HIV? The short and honest answer to that question is that we don't know how Kavanaugh's appointment to the Supreme Court would impact people living with HIV. The longer and more speculative answer is that, based on 12 years' worth of his opinions on the DC Circuit Court and his personal statements, it is exceedingly unlikely that his decisions on the bench would be beneficial to people living with HIV.

Using a metric that converts judges' rulings into a score along an ideological spectrum, Kavanaugh would be more conservative than President Trump's first appointee, Neil Gorsuch, and would rival Justice Clarence Thomas as the most conservative judge on the Court. With that being said, Kavanaugh was not the most conservative judge being seriously considered by President Trump in recent weeks and a number of conservative pundits and policymakers have expressed concerns that he might be too moderate for their tastes. In their minds, Trump should have chosen someone who was more stridently anti-abortion and overtly religious, like Amy Coney Barrett, a United States Circuit Court Judge in the 7th Circuit Court of Appeals who emerged as the darling of the far right and social conservatives during the nomination process.

Based on his past decisions, it's clear that Kavanaugh is not a fan of the Affordable Care Act, but it also uncertain to what degree he would be comfortable ruling to overturn the law. In 2011,

Kavanaugh wrote the dissenting opinion in a case before the DC Circuit Court on the constitutionality of the ACA's individual mandate, not because he thought the individual mandate was unconstitutional, but because he thought the court lacked the jurisdiction to consider the question. In fact, Kavanaugh wrote in his dissent that he believed a "minor tweak to the current statutory language" by Congress could enable the individual mandate to fit "comfortably within Congress's Taxing Clause power." A year later, Chief Justice John Roberts would use similar reasoning—namely viewing the individual mandate as a taxation issue—to uphold the majority of the ACA. With that being said, Kavanaugh also wrote in the same opinion that he was worried that the ACA could, "usher in a significant expansion of congressional authority with no obvious principled limit," going so far as to speculate about the government using their authority to imprison individuals who fail to purchase health insurance.

Kavanaugh's stated fears about the expansive reach of the ACA has led Congressional Democrats to openly worry about how he would rule should a case concerning the constitutionality of the health care law like Texas vs. Azar come before the Supreme Court. In remarks earlier this week, Senator Chris Coons (D-DE) remarked that "The fact that Judge Kavanaugh went out of his way to talk about his fears about how broad the ACA may be...tells you that if you have pre-existing conditions, you are in the crossfire right now."

While Kavanaugh's appointment to the Supreme Court might not spell the end of the ACA—after all, Kennedy was one of the 4 justices to dissent in the case that upheld the ACA's constitutionality—it could certainly lead to the chipping away at protections for millions of Americans who benefit from it, particularly where Medicaid expansion is concerned. It is not a stretch to think that a Supreme Court Justice Kavanaugh would vote in favor of the Department of Health and Human Services and uphold the legality of their onerous and discriminatory Medicaid work requirements or to green light the Trump administration's incredibly damaging association health plans that would drive up premiums for people living with HIV.

The bottom line is that a Supreme Court Justice Brett Kavanaugh would put a laundry list of rights and laws that are vital to people living with and impacted by HIV on the chopping block. It is unclear, based on his past decisions, if Kavanaugh would overturn Roe vs. Wade or, but reproductive rights advocates speculate that, at the very least, he would rule in ways that would make it increasingly more difficult for women to access abortion. And, while he has received a somewhat tepid reception from many of the far religious right over his track record on issues related to "religious liberty" his 2015 dissent against the ACA's contraceptive mandate for religious employers is troublesome to say the least. Hopefully, Kavanaugh's confirmation hearings will shed a little more light on his judicial intentions.

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