



National Task Force to End Sexual & Domestic Violence

September 4, 2018

Dear Senator:

The National Task Force to End Sexual and Domestic Violence (NTF), comprising national, state, tribal, territorial, and local leadership organizations representing thousands of advocates and others working to end domestic violence and sexual assault, writes to express our deep concern about the nomination of Brett Kavanaugh to fill the vacancy on the US Supreme Court. In addition to concerns noted in a prior letter about the lack of documents shared from Kavanaugh's time in the White House, we are particularly troubled by the impact of this nomination on the safety, health, rights, and well-being of domestic violence and sexual assault survivors as it relates to firearms, reproductive rights, health care, and privacy, as well as larger issues of judicial independence.

Domestic Abusers' Access to Firearms

In America, abused women are five times more likely to be killed if their abuser has access to a firearm, and domestic violence assaults involving a gun are 12 times more likely to end in death than assaults with other weapons or physical harm.¹ In a 2004 survey of female domestic violence shelter residents in California, more than a third reported having been threatened or harmed with a firearm.² In nearly two thirds of cases in which a gun was present in a household shared by a domestic abuser and victim, the abuser had used the firearm against the victim, usually threatening to shoot or kill her.³

Judge Kavanaugh's record of ruling against gun violence protection measures is a direct threat to survivors of domestic violence. After the Supreme Court decided 5-4 in the 2008 case *District of Columbia v. Heller* that the Second Amendment protects an individual's right to bear arms, Washington, DC passed laws that prohibited assault weapons and high-capacity magazines, and that required certain firearms to be registered. The same plaintiff, Richard Heller, argued again that the new gun laws violated the Second Amendment. In the 2011 case *Heller v. District of Columbia*, a panel of three Republican-appointed judges ruled 2-1 that DC's ban on assault weapons and high-capacity magazines was constitutional. In Judge Kavanaugh's dissent, he held that the ban on assault weapons was

¹Giffords Law Center. "Domestic Violence & Firearms." 2017. <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>

²Susan B. Sorenson et al., *Weapons in the Lives of Battered Women*, 94 Am. J. Pub. Health 1412, 1413 (2004).

³Giffords Law Center. "Domestic Violence & Firearms." 2017. <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>

unconstitutional. He wrote: “In *Heller*, the Supreme Court held that handguns — the vast majority of which today are semi-automatic — are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles.”⁴

It is troubling that Judge Kavanaugh sees no difference between assault weapons and handguns. As a candidate, President Trump stated: “I’m very proud to have the endorsement of the NRA and it was the earliest endorsement they’ve ever given to anybody who ran for president.... We are going to appoint justices that will feel very strongly about the Second Amendment.” Judge Kavanaugh clearly passes this litmus test. This is deeply alarming given the well-documented intersection of domestic violence and firearms.

Reproductive Rights

We believe that every person has the right to control what happens to their body, free from coercion or fear. This freedom should not be limited to the ability to accept or reject sexual experiences, rather, true bodily autonomy requires that an individual can make informed decisions about involvement in any experience: sexual, medical, or otherwise⁵.

The right to access abortion safely and legally in this country will likely disappear if Judge Kavanaugh is confirmed. President Trump has been explicit that he would only nominate someone who would “automatically overturn” *Roe v. Wade*. Judge Kavanaugh was on the list of candidates who met that criteria, compiled by the uber-conservative Federalist Society and Heritage Foundation. In the well-known “Jane Doe” case, Kavanaugh tried to block a young immigrant woman’s access to abortion care, claiming that the court was creating “a new right” for immigrants in custody “to obtain immediate abortion on demand.” Over Kavanaugh’s dissent, the DC Circuit rightly allowed the young woman to seek the medical care she needed. While abortion rights are not a focus of all of our organizations, the right to bodily autonomy and personal decision making is. These concepts are at the heart of our movement to end domestic and sexual violence.

Affordable Care Act

As a DC Circuit Court Judge, Kavanaugh dissented from the opinion upholding the constitutionality of the Affordable Care Act (ACA). And, just weeks before being added to President Trump’s aforementioned short list of potential candidates, Kavanaugh criticized Chief Justice Roberts for the reasoning he used in *NFIB v. Sebelius* to uphold the ACA’s individual mandate. If Kavanaugh were confirmed, millions of Americans — including survivors of domestic and sexual violence — would likely lose their health care. The ACA not only expanded health insurance coverage to millions of individuals who were previously uninsured, it changed the landscape for women’s health insurance coverage and access. Thanks to the ACA, domestic and sexual violence survivors cannot be charged more for, or be

⁴ United States Court of Appeals for the District of Columbia. “District of Columbia v. Heller.” 2011. Page 47. [https://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/\\$file/10-7036-1333156.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/DECA496973477C748525791F004D84F9/$file/10-7036-1333156.pdf)

⁵ [California Coalition Against Sexual Assault](#) (CALCASA), May 2, 2017.

turned away from, health coverage.

Prior to the ACA, insurance companies denied coverage to women based upon “pre-existing conditions,” such as receiving medical treatment for domestic or sexual violence. In fact, seven states allowed health plans to deny coverage based on a history of domestic violence — and only 22 states had limited protections against plans using domestic violence as a pre-existing condition.⁶

Privacy and Technology:

Judge Kavanaugh has made disturbing comments about expectations of privacy on smartphones in criminal law cases. He has expressed the opinion that phone companies operate as “third parties” that destroy any expectation of privilege or privacy — an opinion that is in opposition to existing Supreme Court holdings on the issue. This would be a terrifying outcome if this position became the standard in the law for survivors of domestic and sexual violence. Survivors use their smartphones to search for and access confidential help in fleeing abuse. Abusers routinely try to obtain this information by seeking discovery regarding their confidential communications with victim advocacy organizations. If Judge Kavanaugh's position is adopted, survivors will have no ability to seek help confidentially.

Judicial Deference to Federal Agencies

In a February 2017 speech at Notre Dame Law School, Kavanaugh made it a point to criticize a legal precedent that supports judicial deference to agency actions (known as the *Chevron* doctrine), stating that it “encourages agency aggressiveness on a large scale” and arguing that “Courts [should] no longer defer to agency interpretations of statutes.” Such disregard for scientific integrity, subject matter experts, and the critical role of government protections is concerning. For more than three decades, since 1984, the Supreme Court has required judges to defer to administrative agencies’ interpretations of federal law in most cases where the law is “ambiguous” and the agency’s position is “reasonable.” Conservative Justice Antonin Scalia defended the *Chevron* doctrine as an important rule-of-law principle.

Federal agencies issue regulations addressing a wide array of issues, including firearm protections by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Overturning the *Chevron* precedent would return that ultimate decision-making authority to judges rather than the subject-matter experts, inviting a challenge to every regulation and rule in the federal government. Kavanaugh’s confirmation would invite attacks on the regulations that govern protection orders and misdemeanor crimes of domestic violence prohibitors, and other protections and programs directly impacting domestic and sexual violence.

Knowledge of Ongoing Sexual Assault by a Federal Judge

Judge Kavanaugh clerked for Judge Alex Kozinski of the Ninth Circuit and has reportedly remained close to his former boss, who left the Ninth Circuit in late 2017 after over a dozen allegations of sexual harassment by his former clerks. Long before the Washington Post exposed the allegations against him

⁶ <https://www.futureswithoutviolence.org/3-things-at-stake-aca/>, January 10, 2017.

in 2017⁷, Kozinski’s sexualized and abusive behavior was an open secret in the legal profession.⁸ Kavanaugh and Kozinski reportedly worked together for years as “screeners” for Justice Kennedy, essentially hiring the Justice’s clerks for him. This process led to many applicants who had previously clerked for Kozinski obtaining clerkships with Justice Kennedy. As a result, Kavanaugh helped maintain the prestige of a Kozinski clerkship, which no doubt had the effect of encouraging many young attorneys to continue to seek Kozinski clerkships despite the widespread rumors of abusive behavior.

The White House has asserted that Judge Kavanaugh “had never heard any allegations of sexual misconduct or sexual harassment” by Kozinski prior to the story becoming public last year, but some in the legal community have asserted that this strains credulity. Judge Kavanaugh must speak fully to the question of what he knew about Kozinski’s abusive behavior, when he learned of it, and what actions he took in response. Too much is at stake for women for the Senate to move forward on his nomination without a thorough vetting of these questions.

Belief that the President is Above the Law

The overreach of the Trump Administration — as well as President Trump’s unabashed disrespect for independent judges — underscores why we need a Supreme Court that will serve as a check on politicians in all branches of government. Judge Kavanaugh’s writings demonstrate that he would be anything but an independent check on the executive branch. He wrote that a sitting president should never be able to be criminally indicted, and that the president “should have absolute discretion” to decide whether and when he can be investigated, as well as decide who can conduct that investigation. As if that weren’t enough, he thinks any special prosecutor should be removable at will by the president. The president isn’t above the law — but Judge Kavanaugh thinks he is.

The nomination of Judge Brett Kavanaugh to the US Supreme Court threatens women’s reproductive rights and access to healthcare for all Americans. The Supreme Court is the ultimate arbiter of our most cherished rights, and it is no place for someone so far outside of the mainstream who will roll back the clock on hard-won freedoms and rubber stamp the Trump Administration’s dangerous agenda. In addition to our specific concerns as advocates for the safety, health, rights and well-being of survivors of domestic and sexual violence and their families, we join many others in raising broader concerns about Judge Kavanaugh’s extreme views on issues of key importance to all Americans.

For questions or more information, please contact:

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⁷ [Prominent appeals court Judge Alex Kozinski accused of sexual misconduct](#). (Washington Post) December 8, 2017.

⁸ [More Women Speak Out About Judge Kozinski’s Behavior; Say It Was An ‘Open Secret’](#) (Above the Law) December 11, 2017