



August 29, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

Dear Senators McConnell and Schumer, and all Members of the United States Senate:

The Center for Democracy & Technology (CDT) writes to express grave concerns about the nomination of Judge Brett Kavanaugh to the United States Supreme Court. For almost twenty-five years, CDT has worked to ensure that the fundamental rights and civil liberties guaranteed to individuals in their daily lives are protected in the digital age. We find that Judge Kavanaugh's judicial opinions do not reflect these values. His opinions are openly dismissive of the right of everyday Americans to safeguard their privacy against unwarranted government surveillance; value the free speech rights of corporations over those of individuals; and demonstrate a fundamental hostility toward the role of regulatory agencies in protecting consumers.

Beyond his opinions on the DC Circuit, we are troubled by the refusal to release Judge Kavanaugh's records from his time in the White House, including those written as White House staff secretary. These documents are needed to fully understand Judge Kavanaugh's views of executive power and civil liberties. Prior to confirmation, Justice Elena Kagan fully complied with the Senate's request for her records while in the Clinton White House and in the Justice Department; Judge Kavanaugh should meet the same standard.

If confirmed, Judge Kavanaugh will be tasked with ensuring that the law keeps pace with technology. In order to provide true advice and consent, the Senate must understand how a judicial nominee will interpret constitutional issues in light of rapid societal and technological change. We urge you to ask Judge Kavanaugh the following questions at his confirmation hearings:

JUDICIAL PHILOSOPHY

The advances in technology over the past few decades have deeply impacted our country: There have been seismic shifts in how we work and live, and how we interact with our government and fellow Americans. It is critical that courts are equipped to interpret the law in a manner that reflects the realities of the digital age.

- Do you think the Framers of the Constitution would have drafted the Bill of Rights differently if they lived in the digital age?

- Are you committed to interpreting the Constitution as it was understood when it was written, or do you believe that its meaning evolves over time through Supreme Court interpretations?

SURVEILLANCE

*Technology is playing an ever-increasing role in our lives and cases involving civil liberties online will come before the Supreme Court with greater frequency. If Judge Kavanaugh is confirmed, he will cement a majority view that the government should be allowed to make broad requests, without a warrant, to access data collected by private companies. Judge Kavanaugh ruled in *Klayman v. Obama* that government mass surveillance of American's digital communications records does not require a warrant and is not a violation of anyone's privacy rights.*

- How should the Constitution view mass data collection by the government? For example, would it be constitutional to copy or view all internet activity routed through a service provider?
- How should the Constitution address those who are impacted by, but not targeted by, surveillance?
- Does the Constitution allow for differentiating between U.S. citizens and non-citizens when engaging in mass surveillance?
 - If so, how do you surveil non-citizens on the internet without impacting citizens?
- In *Carpenter v. U.S.*, the Supreme Court declined to extend the third-party doctrine to seven days or more of stored cell site location information. As a result, the Court ruled that a warrant was required to access this data. Do you agree with the majority's reasoning in the *Carpenter* case?
 - Are there other collections of communications data, exclusive of content, to which the third-party doctrine should not extend?
- You joined in Judge Sentelle's dissent from the DC Circuit *en banc* decision to decline to rehear *U.S. v. Jones*, the case in which the Supreme Court eventually held that attaching a GPS device to a vehicle and tracking its location requires a warrant. In light of the Court's decision in *Carpenter*, do you agree that there comes a tipping point when collection of data about a person becomes so pervasive that a warrant is required, even if collection of one bit of the same data would not?
- In *U.S. v. Jones*, Justice Sotomayor wrote that the third-party doctrine is "ill-suited to the digital age" because it is an era "in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Do you agree with this sentiment?
- In *Riley v. California*, the Court rejected the notion that the "search incident to arrest" doctrine permitted a law enforcement officer to search the contents of a cellular telephone seized without a warrant at the time of an arrest. The *Riley* Court held that when it comes to these searches, "digital is different" because the volume and the sensitivity of the data that can be held in a digital device. Since then, other courts have extended the reasoning of *Riley* to searches of cell phones found in vehicles, and to searches of cell phones held by probationers. Was *Riley* correctly decided?

- Should *Riley's* reasoning—that digital is different—be extended to other contexts in which exceptions to the warrant requirement would otherwise apply?
- Describe the scope of the government's authority to conduct searches of Americans and foreigners as they enter the United States.
 - Would it be constitutional for border agents without a warrant and without reasonable suspicion to thoroughly search the contents of the cellular telephones and laptops of Americans as they enter the United States?
 - Could they order reentering citizens to enter a password to facilitate such a search?
 - Could they order them to unlock their device using biometrics such as fingerprints or a facial scan?
 - Could they download the contents of the devices for later review?

FREE EXPRESSION

With the ubiquitous nature of the internet, more voices than ever are able to participate in our democracy. People use the internet to read and exchange information, associate with others, create and produce content, and protest and advocate. As a result, our First Amendment traditions are being tested in new forums.

- In *Al Bahlul v. United States*, you ruled that noncitizens abroad do not enjoy First Amendment rights; would you extend that rule to lawful permanent residents or green card holders in the United States?
 - Do visitors to the U.S. and undocumented immigrants in the U.S. enjoy First Amendment rights while in the U.S.?
- Do you think social media platforms and other content hosts should have the freedom to moderate content as they choose and decide what they wish to host, or should they be required to host all lawful speech, regardless of subject matter or ideology?
- In your dissent from the majority in *U.S. Telecom v. FCC* you prioritize the free speech rights of corporations over those of internet users on the grounds that internet service providers (“ISPs”) should be free to block or otherwise deter access to content based on the ISPs’ editorial discretion. By what metric do you evaluate the speech rights of human beings relative to those of corporations?
 - How do you explain this to the tens of millions of people who do not have a choice among providers?
 - Would you recuse yourself from sitting on this case or related matters if confirmed to the Supreme Court?
- You have said that “the internet’s technological architecture may mean that internet service providers can provide unlimited content; it does not mean that they must.” Do you believe that ISPs should be arbiters of the content or sources of information people in the United States can access via the internet?
 - What should a person do if an ISP does not allow him or her to either access or upload lawful content to the internet?

- Do you believe that telephone companies should be able to restrict who their customers may call, or what a customer may say during their telephone calls?
- In *U.S. Telecom v. FCC*, you compare ISPs to bookstores, newspapers, and cable providers. Do you see the internet as a one-way, one-sided market in which ISPs offer content of their choosing to subscribers?
 - If not, can you explain why your comparison is appropriate?
- Tens of millions of Americans live in areas served by only one internet service provider. Do you believe that ISPs should be able to limit access or expression for their subscribers, thereby creating inequalities based on where a person lives?

Consumer Privacy

*As our lives move increasingly online, we are connecting more devices to the internet, ranging from our fitness trackers to our refrigerators. The Supreme Court held in *Spokeo v. Robbins* that a statutory violation of a privacy right does not per se meet Article III standing requirements and that a plaintiff must demonstrate a concrete harm. Lower courts are interpreting this requirement in different ways, and what type of "harm" will be recognized by the federal courts will have huge impacts on the privacy and security rights of people who use digital and online services.*

- Do you believe *Spokeo v. Robbins* was correctly decided?
 - With ever increasing use and misuse of personal information, as well as breaches of data, do you believe that reputational and dignitary injuries could be recognizable intangible harms?
 - If not, why not?
- How do you understand Congress's intentions to identify a privacy harm as sufficient to warrant standing?
- Should the government be required to obtain a warrant to obtain information from an "Internet of Things" device storing the information in the cloud?
 - Does the type of information stored matter, such as health or genetic data?
 - Does the location where the information was gathered or stored play a role, such as an internet-connected device in the home versus a shared vehicle used in the street?

AGENCY AUTHORITY

*With the explosion of new technologies -- ranging from connected cars and drones to internet-connected pacemakers and baby monitors -- Americans will rely on federal agencies like the FTC, FCC, NTIA, FDA and FAA to regulate devices and protect consumers. In administrative law, Judge Kavanaugh argues that federal judges should displace specialized agencies in setting regulatory policy, which helped form the basis for his dissent in the DC Circuit's ruling on the 2015 Open Internet Order governing net neutrality. In *Chevron v. NRDC (1984)*, the Supreme Court found that unless Congress has legislated otherwise, the courts should defer to an agency's decision as long as it is reasonable -- even if the judges would have interpreted the statute differently. Whenever a statute is ambiguous, the agency enjoys wide discretion. Judge Kavanaugh rejects this approach; instead, he*

wrote in *Harvard Law Review*, “courts should seek the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons.”

- The Administration commended your jurisprudence noting that “Judge Kavanaugh has overruled federal agency action 75 times.” Do you think *Chevron* was wrongly decided?
 - If *Chevron* was wrongly decided, what standard of review should be used by the courts when reviewing agency decisions?

EXECUTIVE POWER

Judge Kavanaugh’s decisions show broad deference towards a strong executive, especially in matters of national security. They also incline toward the “unitary executive” view of presidential power, which holds that Congress cannot set up federal agencies that are not under the direction and control of the president. For example, in a law-review article he published in 2009, entitled “Separation of Powers During the Forty-Fourth Presidency and Beyond,” Judge Kavanaugh begins by recommending that while the president is in office, he should not be subject to civil lawsuits or to criminal investigation or prosecution. Allowing a President to take actions using information gathered electronically that is not subject to judicial oversight as a result of national security concerns can result in law that severely curtails civil liberties.

- In *Korematsu v. U.S.*, the Supreme Court found it was constitutional to order the internment of Japanese Americans during World War II, irrespective of citizenship. Recently, the Supreme Court stated the *Korematsu* decision was wrongly-decided. Do you agree?
 - If so, what practices are prohibited now that *Korematsu* has been overturned?
- In *Boumediene v. Bush*, the Supreme Court held that prisoners imprisoned by the United States as “enemy combatants” at Guantanamo Bay detention camps in Cuba had a right to the writ of habeas corpus under the United States Constitution, and that the Military Commissions Act of 2006 was an unconstitutional suspension of that right. Do you believe *Boumediene* was correctly decided?
- Can you name other historical examples where you believe presidents acted unconstitutionally in the name of national security?
 - Should the courts have rejected presidential assertions of national security in those cases, and on what basis?
- To what extent can Congress impose limitations on electronic surveillance targeting foreigners abroad for national security and foreign intelligence purposes?
 - Is Section 702 of the Foreign Intelligence Surveillance Act, which imposes controls on the President’s authority to order the surveillance of foreigners who are outside the United States, constitutional?
- President Trump has nominated you to a lifetime position. If presented with a case involving President Trump’s personal interests, will you consider recusing yourself from the case?
 - If you would consider recusal, what standard would you use in making that determination?

- As a matter of law, do you believe a president has the Article II authority to shut down a special counsel investigation into himself, or pardon anyone, including himself, for any reason?

We appreciate your efforts to learn more about Judge Kavanaugh's judicial philosophy as it relates to the digital age. Please let us know if we can provide any information that might be of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lisa A. Hayes".

Lisa A. Hayes
VP, Strategy & General Counsel
Center for Democracy & Technology