

AMAR: Third thoughts on Kavanaugh

[Akhil Amar](#)

In a Yale Daily News op-ed published on Sept. 24, I offered “Second Thoughts” on the Supreme Court nomination of Justice Brett Kavanaugh ’87 LAW ’90 and mapped a procedural path forward through the dense thicket of accusations and denials. I proposed: (1) a speedy public hearing followed by (2) additional investigation, with (3) a firm end date to the investigation — I floated Oct. 5 — and (4) scope restrictions on the investigation to prevent “still more extensions [and] ever wider investigations.”

On Sept. 24, no one else — so far as I know — was publicly proposing this precise procedural framework, but, as events actually unfolded in the following weeks, something remarkably similar to my proposed framework was in fact cobbled together and implemented, though critics have argued that the scope of the FBI’s post-hearing investigation was unduly narrow. Kavanaugh’s confirmation on Oct. 6 raises countless questions — the episode will spawn shelves of future books and articles. Today, I will address just one narrow issue of special local significance: Yale’s, and my own, complicated relationship to power.

Yale prides itself on its tradition of preparing future leaders. In his Yale College opening address on Aug. 25 — well before the Kavanaugh nomination boiled over and roiled the campus — President Peter Salovey proclaimed that “Our alumni are perhaps the greatest illustration of Yale’s tradition of service. Five Yale graduates have served as U.S. presidents, four as secretaries of state and eighteen as justices on the U.S. Supreme Court, representing viewpoints across the political spectrum. Yale alumni have served as heads of state of several foreign countries, including Italy, Mexico, Malawi and South Korea.”

In recent speeches at Yale reunions and Bulldog Days, I have publicized

similar statistics. Four of America's last five presidents, plus six of the last eight presidential runners-up, attended Harvard or Yale or both; the last presidential election without a Harvard or Yale grad in the final round was 1984 (1968, if one includes vice presidential candidates); and every justice on the current Court studied at either Harvard Law School or Yale Law School.

But in the wake of Kavanaugh's nomination, critics have complained about the dark side of Yale's and Yalies' ambitions. Some complaints have aimed directly at me, after I published a July 9 op-ed in The New York Times touting Kavanaugh and simultaneously contributed to an official Yale Law School press release that seemed to celebrate his nomination. Wasn't all this simply elitist cronyism, sycophantic ass-kissing and, or self-serving back-scratching? Does Yale, and do I, care only about access to power? Will Yale, will I, amorally celebrate any powerful alum, whether virtuous or vicious? In return for Yale's, and my, support, are alums such as Kavanaugh expected to hire Yale's, and my, favorite students as apprentices and law clerks, in a self-perpetuating intergenerational system of unjust privilege and hierarchy?

I do not presume to speak for Yale, but I can speak for myself. My endorsement of Kavanaugh is not rooted in cronyism. It is not some Skull and Bones thing. I barely knew Kavanaugh as a student 30 years ago — I think he shopped my class for one day, then bailed. In the three decades since then, I have spent less than three hours with him in face-to-face conversation. We have never had a beer together. A couple of the other names on President Donald Trump's public list of potential nominees are closer to me, personally, but I consider Kavanaugh's output as a judge for the last dozen years—his opinions and articles—to be more legally impressive. That is what I said both in my Times op-ed and in my official Senate testimony on Sept. 7. (I also said his votes and opinions are apt to be better for liberals like me than the votes and opinions of others on Trump's short list.)

Not every notable Yale alum deserves to be celebrated by alma mater. I myself have no problem criticizing specific graduates, however prominent or powerful. For example: If there is anyone out in Kansas who reads this, please vote against would-be governor Kris Kobach LAW '95 next month!

Moreover, precisely because Yalies are, as Salovey noted, arrayed across the political spectrum, it is logically impossible to back them all at all times: In publicly testifying in support of Kavanaugh on Sept. 7, I thus found myself contesting no fewer than five of my Yale pals, two of whom are also my former students: Sens. Richard Blumenthal LAW '73, Sheldon Whitehouse '78, Amy Klobuchar '82, Chris Coons LAW '92 and Cory Booker LAW '97.

What about the concern that I'm expecting some reciprocal back-scratching in exchange for my endorsement? Am I hoping to get fat fees for bringing winning cases to the Court, now that my guy is on the bench? Hardly. Precisely in order to preserve my reputation as an honest broker, I do not litigate or represent clients. Am I angling to secure Kavanaugh clerkships for future protégés? Historically, my best students have landed top clerkships regardless of my personal ties or lack thereof to individual jurists. I have never met or even spoken by phone to Chief Justice John Roberts, but, in recent years, he has probably hired more of my best students than has Justice Stephen Breyer, my dear friend of three decades.

In case you, gentle reader, are not convinced by my self-serving professions, here is my public pledge, a prophylactic recusal rule of sorts, aimed to avoid any public perception of elite cronyism or back-scratching: For the next three years, I will not write any letter of recommendation to Kavanaugh. (There is a loose analogy here to the Supreme Court's own Rule 7, which requires that a former law clerk recuse herself from practicing before the Court for two years post-clerkship.)

Here is a related suggestion directed personally and publicly to Kavanaugh: For each of the next few years, I urge you to hire at least one law clerk recommended to you by a law professor who publicly opposed your

nomination. There are literally thousands of anti-Kavanaugh law professors to choose from, alas. Prove them wrong by being the same kind of open-minded jurist on the Supreme Court that you have been on the D.C. Circuit. Continue to hire clerks from across the spectrum. But please don't be afraid to continue to hire Yale students, even though — at least for the next few years — they won't be my personal recommendees and some may in fact be protégés of your critics on the Yale Law faculty. Yale truly does produce many of the world's best lawyers and leaders, and you, the Court and the country deserve nothing but the best.

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